



# **PHASE 1 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN COLOMBIA**

**December 2012**

This Phase 1 Report on Colombia by the OECD Working Group on Bribery evaluates and makes recommendations on Colombia's implementation and application of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 14 December 2012.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

## TABLE OF CONTENTS

A.	IMPLEMENTATION OF THE ANTI-BRIBERY CONVENTION .....	5
	Formal issues .....	5
	The Convention and the Colombian legal system .....	5
1.	Article 1: The Offence of Bribery of Foreign Public Officials.....	5
1.1	The elements of the offence.....	6
1.2	Complicity .....	9
1.3	Attempt and conspiracy .....	10
2.	Article 2: Responsibility of Legal Persons .....	11
2.1	Legal entities subject to liability.....	12
2.2	Standard of liability .....	13
2.3	Proceedings against legal persons .....	15
3.	Article 3: Sanctions.....	16
3.1	Principal penalties for bribery of a domestic and foreign public official .....	16
3.2	Penalties and mutual legal assistance .....	17
3.3	Penalties and extradition.....	17
3.4	Seizure and confiscation.....	17
3.5	Additional civil and administrative sanctions.....	19
4.	Article 4: Jurisdiction .....	20
4.1	Territorial jurisdiction.....	20
4.2	Nationality jurisdiction .....	21
4.3	Consultation procedures .....	21
4.4	Review of basis of jurisdiction .....	21
5.	Article 5: Enforcement .....	22
5.1	Rules and principles regarding investigations and prosecutions .....	22
5.2	Considerations such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved.....	25
6.	Article 6: Statute of Limitations .....	25
7.	Article 7: Money Laundering .....	26
7.1	The money laundering offence .....	26
7.2	Money laundering reporting .....	26
8.	Article 8: Accounting .....	27
8.1	Accounting and auditing requirements / Companies subject to requirements.....	27
8.2	Penalties.....	28
9.	Article 9: Mutual Legal Assistance .....	29
9.1	Laws, treaties and arrangements enabling mutual legal assistance .....	29
9.2	Dual criminality and MLA in cases of liability of legal persons .....	30
9.3	Bank secrecy.....	31
10.	Article 10: Extradition .....	31
10.1	Extradition for bribery of a foreign public official .....	31
10.2	Legal basis for extradition .....	31
10.3	Extradition of nationals .....	32
10.4	Dual Criminality .....	32

11. Article 11: Responsible Authorities .....	33
B. IMPLEMENTATION OF THE 2009 ANTI-BRIBERY RECOMMENDATION .....	33
1. Tax Deductibility .....	33
EVALUATION OF COLOMBIA.....	35

## A. IMPLEMENTATION OF THE ANTI-BRIBERY CONVENTION

### Formal issues

1. On 24 January 2011, the Government of Colombia formally applied to the OECD Secretary-General to become a full participant in the OECD Working Group on Bribery in International Business Transactions (Working Group) and to accede to the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Convention). The OECD Executive Council invited Colombia to join the Working Group in November 2011 and Colombia participated in the December 2011 plenary of the Working Group as its fortieth member. Colombia deposited its Instrument of Accession to the Convention with the OECD on 19 November 2012.

2. The present report has been prepared for the purpose of the Phase 1 review of Colombia in accordance with the procedure agreed by the OECD Members of the Working Group on Bribery [DAF/INV/BR(2008)9/REV1].

### The Convention and the Colombian legal system

3. Colombia ratified the Inter-American Convention against Corruption, through Law 412 of 1997, upheld by Constitutional Court Decision C-397/98. Colombia's Penal Code (Law 599 of 2000) criminalises passive and active bribery of domestic and foreign public officials, following recommendations made under the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). The foreign bribery offence is contained in article 433 of the Penal Code (PC), as amended by the new Anti-Corruption Statute (Law 1474 of 2011). With the aim of bringing its legislative framework into compliance with the Convention, on 12 July 2011 the Colombian Congress enacted the Anti-Corruption Statute which purported to introduce, *inter alia*, liability of legal persons (see Section 2 below).

4. According to the Colombian legal system, treaties must be approved by Congress by way of legislation. Once adopted, such legislation is signed by the President of the Republic, who then submits it to the Constitutional Court for judicial review.<sup>1</sup> The Bill ratifying the Convention was adopted by Congress on 19 June 2012, signed by the President and published in the Official Gazette on 2 August 2012. The Constitutional Court issued its decision upholding the law on 14 November 2012.

#### 1. Article 1: The Offence of Bribery of Foreign Public Officials

5. Article 433 PC, as amended by article 30 of Law 1474 of 2011, criminalises the bribery of foreign public officials:

#### ARTICLE 433: TRANSNATIONAL BRIBERY<sup>2</sup>

Whoever gives or offers a foreign public official, for his own benefit or that of a third party, directly or indirectly, any money, object of financial value or any other good in exchange for committing, omitting, or delaying any action related to a financial or commercial transaction, shall incur in imprisonment for a period of nine (9) to fifteen (15) years

<sup>1</sup> Articles 224 and 241 of the Colombian Constitution.

<sup>2</sup> Translation of this and all other legal provisions provided by Colombia in its responses to the Phase 1 Questionnaire.

and a fine of one hundred (100) to two hundred (200) current minimum legal monthly wages.

PARAGRAPH: For the purposes of this article, a foreign public official is any person with a legislative, administrative or judicial position in a foreign country, whether elected or appointed, as well as anyone who exercises public functions for a foreign country, whether it be in a public entity or in a company that provides a public service. Any officer or agent of an International Public Organisation is also considered a foreign public official.

6. Article 324 of the Criminal Procedure Code (CPC) provides for several exceptions to the obligation to prosecute, most of which could apply to foreign bribery prosecutions. A bribery-specific exception is contained in article 324(18): “when the author or participant in the cases of bribery files the formal complaint that originates the criminal investigation, accompanied with useful evidence for the trial, and serves as a witness for the Prosecution, on the condition that he voluntarily and integrally repairs the harm done.” Colombia points out that this article applies only to cases of domestic bribery contained in Chapter III, Title XV of the Penal Code, entitled ‘*Cohecho*’. Colombia asserts that this exception only applies to domestic bribery, although it does not specifically refer to the article 405 to 407 domestic bribery offences, rather it refers to ‘bribery’ (*cohecho*) in general. While Colombia’s foreign bribery offence is entitled ‘*soborno transnacional*’ and belongs in a different category of crimes in the Penal Code, it is worth noting that the Spanish translation of the Anti-Bribery Convention uses the word ‘*cohecho*’ to describe bribery of foreign public officials and that hence there may be room for confusion over the terminology.<sup>3</sup> This issue is discussed under Section 5.1.2 below on prosecutorial principles, as an exception to the obligation to prosecute and Section 5.2 on Article 5 considerations.

### **1.1 The elements of the offence**

#### **1.1.1 any person**

7. The translation of article 433 PC provided by Colombia refers to ‘whoever gives or offers’, whereas Colombia in its responses refers to ‘Anyone who gives or offers.’ Colombian authorities explain that the perpetrator of this offence can be inferred to be ‘any individual, without any special qualification.’ Nevertheless, the article 433 PC transnational bribery offence does not directly apply to legal persons. Liability of legal persons is discussed below in Section 2.

#### **1.1.2 intentionally**

8. The foreign bribery offence contained in article 433 PC does not include any reference to the need to establish intent (*mens rea*) on the part of the offender. Article 21 PC provides that illegal conduct must amount to wilful misconduct, negligence or ‘exceeded intention’ (*preterintención*). The Colombian authorities assert that wilful misconduct is the relevant *mens rea* for the transnational bribery offence, as the offender must ‘have knowledge of and must bring about a behaviour which violates the legal system.’ Article 22 PC defines wilful misconduct as occurring when the offender is aware of the actions leading to the offence and intends their culmination or when the offender foresees the likely commission of the offence and leaves its non-occurrence to chance (i.e. wilful blindness). Decision C-064/03 of the Constitutional Court found that ‘(...) in wilful offences the perpetrator directs his behaviour unequivocally at damaging the interests protected by the legal system.’ Colombia also referred to article 25 PC which sets out liability for acts and omissions, even in cases of negligent behaviour by ‘guarantors’ (*posicion de garante*); however this provision has never been applied in a foreign bribery case. The practical application of the relevant *mens rea* for natural and legal persons should be followed-up in Phase 2.

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<sup>3</sup> For Spanish translation, see: [www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/47079135.pdf](http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/47079135.pdf).

### 1.1.3 *to offer, promise or give*

9. Article 433 PC criminalises both the offering and giving of a bribe. Colombia states that an offer in itself would be sufficient to complete the offence without any need to rely upon article 27 PC, which covers attempt (see Section 1.3.1 below on attempt). In addition, Colombia asserts that an offer would also be considered a promise, in the context of the wording of Article 1.1 of the Convention. This position is supported by the Supreme Court of Colombia which found, in relation to the article 407 PC domestic bribery offence, that the offering or giving of a bribe is committed when an offer or a gift is received, regardless of whether or not the offer is accepted or rejected.<sup>4</sup> Colombia referred to this jurisprudence when confirming that an offer or gift of a bribe would constitute a transnational bribery offence under article 433 PC even if the instrument of the bribe itself did not reach the foreign public official in question. On this point, Colombia also refers to legal doctrine noting that ‘the actual delivery, receipt of payment [of the bribe] is not necessary’.<sup>5</sup> However, an offer of a bribe that does not reach the public official will not constitute an offence. This issue is discussed further in section 1.3.1 on attempt.

### 1.1.4 *any undue pecuniary or other advantage*

10. The article 433 PC transnational bribery offence defines a bribe as ‘any money, object of financial value or any other good.’ The Colombian authorities refer to a decision of the Supreme Court which found that ‘simple economic gains, real estate, automotive vehicles and even sexual favours’ could fall within this definition, in relation to the article 397 PC embezzlement offence. Colombia also refers to the views of Colombian legal academics that the scope of ‘any other goods’ could include ‘any material, moral, economic or non-economic gain, such as for example, honorific distinctions, or even the situation in which the Official or Agent induces the private party to procure employment for a relative, or be introduced to someone or to obtain any other undue favour.’<sup>6</sup>

11. Colombia has chosen not to introduce an exception of small facilitation payments. However, Colombia considers it unlikely that very small facilitation payments would be prosecuted. Phase 2 should examine the prosecution of small facilitation payments in practice.

### 1.1.5 *whether directly or through intermediaries*

12. Article 433 PC covers the offer or gift of a bribe ‘directly or indirectly’. The Colombian authorities confirm that a direct offer of a bribe, and an offer through an intermediary, would constitute the offence of bribery of foreign public officials. Colombia clarified that it is not necessary to prove intent (or wilful misconduct) on the part of the third party or intermediary when determining the liability of the person who originally offered the bribe for the acts of those intermediaries in relation to the offence of bribery. Such intent will only need to be proved if the intermediary him or herself is prosecuted. In the event that a legal person is the intermediary (or instrument, according to Colombian legal principles) in a corrupt transaction, it will not be necessary to prove intent to hold the briber liable.

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<sup>4</sup> Supreme Court of Justice, Criminal Chamber, Case no. 17674 of November 26, 2003.

<sup>5</sup> PABÓN PARRA, Pedro Alfonso. “Manual de Derecho Penal, Parte Especial”, Tomo II. Editorial Doctrina y Ley Ltda. Octava Edición. Bogotá: 2011. Pge 1015.

<sup>6</sup> GÓMEZ MÉNDEZ, Alfonso, Special Criminal Law (*Derecho Penal Especial*), Universidad Externo de Colombia, 1985; MOLINA ARRUBLA, Carlos Mario, Crimes against the Public Administration (*Delitos contra la Administración Pública*), Ed. Diké, 1995. In Colombia, a civil law country, case law, general legal principles, customs and legal doctrine are all secondary sources of law and although they can influence legislative and judicial activities, do not bind judges when they interpret legislation (LASTRA, José Manuel, ‘Fundamentos de derecho’. Ed. Porrúa, México 2005, p. 45).

### 1.1.6 to a foreign public official

13. The additional paragraph of article 433 PC was incorporated by Law 1474 of 2011 and defines ‘foreign public official’ as ‘any person with a legislative, administrative or judicial position in a foreign country, whether elected or appointed, as well as anyone who exercises public functions for a foreign country, whether it be in a public entity or in a company that provides a public service. Any officer or agent of an International Public Organisation is also considered a foreign public official.’ This definition is *prima facie*, very broad and covers the categories of foreign public officials required under Article 1.4(a) of the Convention.

14. Colombia confirmed that there is no legislative definition of ‘foreign country’ and instead Colombia considers that a foreign country would be defined as anywhere outside the Colombian territory, as defined in Article 101 of the Colombian Constitution. In the absence of a specific definition, the foreign bribery offence may not cover public officials from organised foreign areas or entities, such as an autonomous territory or separate customs territory.<sup>7</sup> This issue should be followed up in Phase 2.

15. Article 1.4(a) of the Convention defines persons exercising a public function for a public entity or public enterprise as foreign public officials. Colombia provided a non-exhaustive list of provisions defining Colombian public entities, including articles 70 (Public Establishments), 83 (Social State-Owned Enterprises), 84 (Official Public Utilities Enterprises) and 85 (Industrial and Commercial State-Owned Enterprises) of Law 489 of 1998. Not included in this list are companies defined in article 97 that are incorporated with State and private-party contributions (when the State, local or decentralised authorities’ interests are less than 90% of the company’s corporate capital) and carry out industrial or commercial activities under private law. Article 70 provides that ‘public establishments are agencies, primarily in charge of exercising administrative functions and providing public services under the rules of public law’, which is consistent with the definition in Commentary 13 to the Convention, stating that a ‘public agency’ is an entity constituted under public law to carry out specific tasks in the public interest. Article 85 defines industrial and commercial State-owned enterprises (SOEs) as: ‘(S)tate entities established or authorised by law, involved in industrial or commercial activities and economic management under the rules of private law, except as established in the law, with the following characteristics: a) Legal status; b) Administrative and financial autonomy; c) Independent capital constituted wholly by common public property or funds, the products thereof, or fees for the functions exercised or services provided, and contributions from special destinations in the cases allowed by the Constitution. The capital of industrial and commercial State-owned enterprises can be represented in equal shares or shares of nominal value.’ The entities defined in articles 83 and 84 are state-owned enterprises created exclusively to provide health services and public utilities, respectively.

16. These relatively narrow categories of defined areas of State participation in companies might not cover the full scope of the definition set out in Commentary 14 to the Convention, which defines a ‘public enterprise’ as ‘any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.’ Colombia argued that the reference to ‘public entity’ could be more broadly interpreted than the categories of SOE defined in domestic law, and that this would be subject to clarification in caselaw.

### 1.1.7 for that official or for a third party

17. Article 433 PC refers explicitly to third party beneficiaries: ‘for the benefit of the official or that of a third party.’ Colombia also cites jurisprudence in relation to appropriation and embezzlement for a

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<sup>7</sup> See Commentary 18 to the Convention.

third party, which has taken into account benefits offered to third parties, even when they have not been identified.<sup>8</sup>

*1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties*

18. Colombia criminalises bribes paid ‘in exchange for committing, omitting or delaying any action...’. This goes beyond the requirement in Article 1.1 of the Convention that the official act or refrain from acting, to include mere delays (see Section 1.1.10 below).

19. In terms of the Article 1.4(c) requirement that ‘in relation to the performance of official duties’ include any use of the public official’s position, whether or not within the official’s authorised competence, article 433 does not expressly require that the act, omission or delay be in relation to the official duties of the foreign public official. It instead requires that the act, omission or delay be ‘related to a financial or commercial transaction’. This issue should be followed up in Phase 2.

*1.1.9 in order to obtain or retain business or other improper advantage*

20. Article 433 PC does not require that the offender acts in order to obtain or retain business or other improper advantage. As mentioned above, the applicable mental element is ‘wilful misconduct’, contained in articles 21 and 22 PC.

*1.1.10 in the conduct of international business*

21. As mentioned above in Section 1.1.8, article 433 PC criminalises the giving of a bribe to a foreign public official in relation to ‘a financial or commercial transaction’. This scope is different to that of Article 1.1 of the Convention, which specifies that the conduct must take place ‘in the conduct of international business.’ This could provide a loophole for bribes paid in return for official acts that do not necessarily relate to a financial or commercial transaction, such as bribes paid in order to reduce tax rates, to release goods from customs or to overlook safety or regulatory standards. It is possible that bribes paid in the conduct of international business might fall outside of the scope of financial or commercial transactions, and therefore not fall within the conduct criminalised in article 433 PC.

**1.2 Complicity**

22. Article 1.2 of the Convention requires Parties to establish as a criminal offence ‘complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official.’ Article 30 of Colombia’s Penal Code relates to accessorial liability:

**Article 30: Participants**

Participants are the decider and the accomplice. Whoever determines another to commit illegal behaviour will incur in the penalty established for the offence. Whoever contributes to the commission of the unlawful conduct or provides subsequent assistance by prior agreement or concurrent to it, shall incur in the penalty established for the corresponding violation decreased by one-sixth to one-half. For a person involved not having the special qualities required in the criminal definition participating in its realisation, the penalty shall be reduced by one-quarter.

<sup>8</sup> Decision No. 32081 of 2009, Reporting Judge Alfredo Gómez Quintero; Decision no. 25504, Reporting Judge Javier Zapata Ortiz.

23. Colombia cites a 9 March 2006 decision of the Supreme Court, which clarifies the difference between co-perpetrators and participation: ‘Only the person who controls the action can be considered the perpetrator. The accomplice is the person who merely supports or aids in a way that is not significant in the making of a crime; in other words, the person participates without controlling the action.’<sup>9</sup>

24. Article 30 PC covers incitement and to some extent aiding and abetting, but it might not encompass the full range of acts set out in Article 1.2 of the Convention. This is not problematic since Commentary 11 only requires that ‘if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party’s legal system, then the Party would not be required to make it punishable with respect to the bribery of a foreign public official.’

### **1.3 Attempt and conspiracy**

#### **1.3.1 Attempt**

25. Article 1.2 of the Convention requires Parties to criminalise attempt and conspiracy to bribe a foreign public official to the same extent as they criminalise attempt and conspiracy to bribe a domestic public official.

26. Given that an offer or attempt to bribe either a domestic or foreign public official is considered an instantaneous offence, provided that the offer was received, the article 27 PC attempt provision does not apply. The Criminal Chamber of the Supreme Court confirmed this view in its decision of 26 November 2003,<sup>10</sup> which found (in relation to bribery of domestic public officials): ‘Regarding its content, bribery is considered an ‘offence of mere behaviour and instantaneous consummation’. This means that the offence occurs simply by the performance of the actions that constitute either of its alternative forms (giving or offering), no matter if the result is obtained (...).’ Therefore, where there is an attempt to offer a bribe to a domestic or foreign public official and the offer is not received for reasons beyond the control of the briber, this would not constitute an offence in Colombia.

#### **1.3.2 Conspiracy**

27. The Colombian Penal Code contains several conspiracy and association offences which apply equally to bribery of domestic or foreign public officials. Article 340 (Conspiracy) applies to all Penal Code offences even if the conspirators do not act upon their agreement. This provision would therefore apply in foreign bribery cases.

#### **Article 340: Conspiracy**

*When several persons conspire to commit crimes, each of them shall be punished for that act alone, with imprisonment of forty-eight (48) to one hundred and eight (108) months...<sup>11</sup>*

28. Article 434 contains a conspiracy offence which is specific to corruption offences, the offence of ‘Association for the Commission of a Crime against Public Administration,’ a category of crimes which includes the article 433 transnational bribery offence. Under article 434, ‘a public servant who is associated

<sup>9</sup> Judgment of Judge Sigifredo Espinosa Pérez.

<sup>10</sup> Above, note 1.

<sup>11</sup> Under article 340, increased sanctions are envisaged for certain serious criminal offences, not including domestic or foreign bribery.

with another, or with a private individual, to commit an offence against the public administration, will incur by that act alone a prison sentence of 16 to 54 months.’ Colombia states that this would also apply to bribery of foreign public servants, such that if two individuals (i.e. two public servants or a public servant and a private individual) are involved in bribery of a foreign public official, this would also constitute the offence of association for the commission of a crime against the public administration under article 434. The application of this article to active foreign bribery cases appears limited in practice, given that it only applies when a Colombian public official is associated with a private individual or a company engaging in foreign bribery.

29. An additional form of liability is contained in article 29 PC, which defines the perpetrators and co-perpetrators of a criminal offence and thereby establishes that the sanction for the relevant offence will apply equally to the actual perpetrators and to the co-perpetrators, where they act on the basis of a common agreement. Colombia stated that this article does not apply in cases where a group of co-perpetrators form a common agreement but do not act on it.

#### **Article 29: Perpetrators**

A perpetrator is whoever carries out the criminal offence by himself or by using another as an instrument. Co-perpetrators are those who, upon common agreement, act within the division of the criminal work on the basis of the importance of their contribution. A perpetrator is also a member of an authorised or ‘de facto’ body of a legal person, of a collective body without that attribute, or who holds the representation of a natural person, and carries out the criminal offence, even though the offence has been not committed directly by him, but through the person or collective body represented. The perpetrator in his various forms will incur in the penalty established for the criminal offence.

30. Each form of liability set out in articles 29, 340 and 434 could potentially apply to cases of foreign bribery and each has a different set of accompanying sanctions. This is an issue that should be followed up as practice develops.

## **2. Article 2: Responsibility of Legal Persons**

31. Article 2 of the Convention requires each Party to “take such measures as may be necessary [...] to establish liability of legal persons for the bribery of a foreign public official.”

32. Article 34 of Law 1474 of 2011 provides for measures against legal persons in Colombia, including for acts of foreign bribery. Contrary to other provisions in Law 1474 of 2011, article 34 has not been incorporated into the Penal Code, but is a standalone provision. It encompasses administrative liability within criminal proceedings against natural persons (paragraph 1), civil liability for damages (paragraph 2), and administrative liability in independent proceedings by the Superintendence of Corporations (paragraph 3). Even though, under paragraph 1, an administrative sanction may be imposed against a legal person in the context of criminal proceedings against a natural person, the Colombian legal system does not provide for criminal proceedings (prosecution) against legal persons (see also Section 2.3 below on proceedings against legal persons). Sanctions provided in the CPC are either administrative or civil sanctions.

#### **Article 34 of Law 1474 of 2011 – Measures against legal persons**

Regardless of individual criminal liability that might arise, the measures referred to in Article 91 of Law 906 of 2004 shall apply to legal persons who have sought to benefit from the commission of crimes against public administration, or any criminal offence related with public property, made by its legal representative or managers, directly or indirectly.

In crimes against public administration or affecting public property, possibly affected State entities may require as

third-party civil liable the legal persons who have participated in their commission.

In accordance with the provisions of Article 86 of Act 222 of 1995, the Superintendence of Corporations may impose fines ranging from five hundred (500) to two thousand (2000) current monthly minimum wages, when with the consent of his legal representative or any of their managers or with their tolerance, the corporation has participated in the commission of an offence against the public administration or against public property

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#### **Article 91 of Law 906 of 2004 (CPC) – Suspension and cancellation of the legal status**

At any moment before the Indictment, on petition of the office of the prosecutor, the judge with functions of guarantee control can order the competent authorities to proceed with the cancellation of the legal status or the temporary closure of the shops or establishments of legal or natural persons, subject to prior fulfilment of the requirements established by the law, whenever there are well founded motives to infer that they have been totally or partially used in criminal activities.

The above cited measures will be made final in the conviction sentence whenever there is proof beyond a reasonable doubt of the circumstances that created them.

### **2.1 Legal entities subject to liability**

33. Article 34 refers broadly to liability of ‘legal persons.’ Neither Law 1474 nor the CPC define the term ‘legal person’. Article 633 of the Civil Code defines a legal person as “a fictitious person capable of exercising civil rights and obligations and, of being represented in court and outside of it. Legal persons are of two kinds: corporations and non-profit entities.” Sanctions under paragraphs 1 and 2 of article 34 are applicable to all legal persons, whether corporations or non-profit entities.

34. On the other hand, article 34(3) provides for fines against ‘a corporation’ (*sociedad*) rather than ‘legal persons’ in general, in contrast to the first two paragraphs. Colombia explains that this is because the Superintendence of Corporations, the agency in charge of the surveillance of *corporations*, has the sole mandate to impose fines under article 34(3). Colombia clarified that, under Book 2 of the Colombian Commercial Code (CoC), ‘corporations’ would cover for-profit business organisations, including partnerships. Trusts would not be considered corporations, or even legal persons. Bribery of foreign public officials by non-profit entities would therefore not be punishable by financial sanctions, thus falling short of Convention standards on this point, which does not limit liability of legal persons only to ‘for profit’ entities.

35. As concerns the applicability of corporate liability to state-owned and state-controlled companies, Colombia points to article 85 of Law 489 of 1998 on the Organisational Structure and Operation of State Entities, which provides that state-owned enterprises involved in industrial or commercial and economic management are governed by the rules of private law (see above, Section 1.1.6). Colombia asserts that this liability of state-owned and state-controlled enterprises has been enforced on several occasions by Colombian courts, including at the Supreme Court and Constitutional Court level, although not specifically in corruption cases.<sup>12</sup> This issue will need to be further followed-up in the course of future monitoring by the Working Group.

36. At a very late stage of the evaluation process, Colombia cited Decree 1529 of 1990 which regulates non-profit entities, although not specifically for (foreign) bribery offences. The lead examiners did not have the chance to analyse this Decree. According to Colombia, under article 7 of this Decree, governors of local state entities may pronounce the suspension or dissolution of non-profit entities, notably where their activities are contrary to the law. The Decree does not appear to provide for the imposition of

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<sup>12</sup> See Supreme Court of Justice Decision of 28 February 2006, and Constitutional Court Decision T-390/12 of 28 May 2012.

pecuniary sanctions, contrary to the requirement in Article 3.2 of the Convention that legal persons be subject to monetary sanctions for foreign bribery.

37. The types of legal entities covered under article 34 should be further followed-up in Phase 2.

## 2.2 *Standard of liability*

38. The standards of liability for legal persons differ slightly under paragraph 1 and paragraph 3 of article 34. Paragraph 1 provides for the possibility to suspend or dissolve the legal status of a legal person which sought to benefit from the commission of an offence. Under paragraph 3, a corporation may receive a fine if it has participated in the commission of an offence against the public administration (i.e. including for a foreign bribery offence). Damages may also be paid to affected State entities under paragraph 2, a situation less likely to occur in practice in foreign bribery cases.

39. Under both paragraphs 1 and 3, the liability of the legal person depends on an act by a legal representative or manager of the legal person. The terms “legal representative” or “manager” are not defined in Law 1474 of 2011. A definition is however contained under article 22 CoC, which provides that “Administrators are the legal representative, the liquidator, the factor, members of the boards of directors and whoever exercises those functions according to the by-laws.”

### 2.2.1 *Standard of liability under article 34, paragraph 1 – Cancellation or dissolution of the legal status of the legal person*

40. In order for a legal person to be liable under paragraph 1 of article 34, the offence against the public administration must be committed by the legal representative or manager, either “directly or indirectly”. Colombia asserts that a legal person could be liable for transnational bribery committed by lower level employees and officers, not only if a senior officer either directly or indirectly requested the lower level employee to pay a bribe to a foreign public official, but also if foreign bribery was committed because of inadequate supervision by the company’s legal representatives or managers. Assuming this reasoning will be applicable in foreign bribery cases, this sanction would, in any case, only be imposed against legal persons in the context of criminal proceedings against natural persons. Therefore, imposition of the paragraph 1 sanction against the legal person would require the prosecution and conviction of a natural person, contrary to the requirements under the 2009 Anti-Bribery Recommendation. Whether this is an obstacle to the effective enforcement of the foreign bribery offence against legal persons will be further assessed in Phase 2.

41. Paragraph 1 of article 34 provides that the legal status of a legal person may be suspended or cancelled, as provided under article 91 CPC (Law 906 of 2004). This cancellation or suspension may be pronounced by the supervisory judge (*juez de control de garantías*) as a temporary measure at any moment before the indictment stage, if there are well founded motives to believe that the criteria set out in article 91 CPC are met. The sanction only becomes final once the natural person has been convicted, and it has been established beyond a reasonable doubt that (1) the legal person has been totally or partially dedicated to criminal activities; (2) that the legal person sought to benefit from the commission of a crime against the public administration; and (3) that the crime was committed directly or indirectly by its legal representatives and managers (on this last factor, see discussion above).

42. For the article 91 sanctions to be applied, the legal person must have sought to benefit from the commission of the crime (as set out in the first paragraph of article 34). As ‘benefit’ is undefined, it is unclear what the prosecution will need to establish in order for these sanctions to be applied in foreign bribery cases, a situation that will only be clarified by case law. The word ‘sought’ suggests that the benefit might not need to be realised; it is unclear whether, for example, a case in which a bribe is paid to obtain a

loss-making contract would satisfy this requirement (such as where the company is seeking to enter a major new market). Colombia considers that such a situation would be covered, as the bribes would have been paid with the view of obtaining a future, indirect benefit, separate from the loss-making contract itself. This should be followed up as case law develops.

43. Furthermore, article 91 CPC requires the legal person to “have been totally or partially used in criminal activities.” This raises a question as to whether application of this provision might be limited to cases where the legal person has been created largely or solely for the purpose of committing criminal activities: for instance, in a foreign bribery context, a company may be created for the essential or sole purpose of channelling bribe payments to foreign public officials. Colombia explains that, under the Colombian legal system, it would not be possible to create a company with the sole purpose of carrying out criminal activities, including transnational bribery; therefore, it would be sufficient to show that a legal person was either totally or partially *used* to commit a crime to apply article 91 sanctions. It remains to be seen in practice how this provision may be applied in practice in a bribery case concerning a “legitimate” corporation (i.e. not also a criminal organisation).

#### 2.2.2 *Standard of liability under article 34, paragraph 3 – Imposition of fines against corporations*

44. The Superintendence of Corporations has responsibility for proceedings concerning the liability of corporations under paragraph 3 of article 34. These proceedings are independent from any proceedings against natural persons. To trigger the liability of legal persons under this provision, the offence against the public administration must have been committed by or “with the consent of his legal representative or any of their managers or with their tolerance”. Colombia explains that, since this is not a criminal liability offence, the notion of consent can be inferred from the notion of “obligation” provided for in article 1502 of the Civil Code as a “voluntary agreement”. Colombia asserts that the concepts of “consent” or “tolerance” would include negligence and wilful blindness. In support of this assertion, Colombia points in particular to article 23 of Law 222 of 1995, which provides, *inter alia*, that “managers must act in good faith, with loyalty and the diligence required from a good businessman” and “should [...] ensure strict compliance with legal or statutory provisions.” Colombia explains that there are numerous court decisions which interpret this to include situations where the manager was ‘negligent’ or ‘wilfully blind’, although not specifically in cases of transnational bribery in international business transactions. However, this jurisprudence was mentioned at a very late stage of the evaluation, and the lead examiners did not have the time to analyse it. Even though the text of article 34 does not refer to negligence as such, or cross-reference to article 23 of Law 222, Colombia is confident that the jurisprudence on negligence would apply in foreign bribery cases. It nevertheless remains to be seen to what extent the culpability of the natural person will have to be proven to establish the liability of the legal person in foreign bribery cases. Whether this paragraph 3 provision would be sufficient to hold a legal person liable for transnational bribery committed by lower level employees will need to be further assessed as case law develops, and in the course of future monitoring.<sup>13</sup>

<sup>13</sup>

Section B of Annex I to the 2009 Anti-Bribery Recommendation provides that:

“Member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

- a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or
- b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:
  - A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
  - A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and

### 2.2.3 Standard of liability under article 34, paragraph 2 – Civil liability vis-à-vis affected State entities

45. Finally, in addition to liability under paragraphs 1 and 3, paragraph 2 provides that legal persons participating in the commission of crimes against the public administration or other criminal offences related to public property may be called to trial as civilly liable third parties by ‘possibly affected State entities.’ This refers back to a scheme of civil responsibility where transnational bribery has generated damages. It requires, *inter alia*, that damages be suffered by a victim, and that a causal element be established between the offence and the damage suffered. This type of liability does not address the standards under Article 2 of the Anti-Bribery Convention, which require that liability of legal persons be established for acts of foreign bribery, regardless of whether damages have been suffered and whether a complaint is lodged. Nevertheless, in the context of bribery in an international business transaction, the Colombian authorities indicate that foreign States could be considered ‘affected State entities’ under article 34. As for other victims, such as competing companies or consumer organisations which may have suffered damages as a result of the bribery; since they are not ‘State entities,’ they would not be considered victims under this provision.<sup>14</sup>

### 2.3 Proceedings against legal persons

46. Annex I of the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Recommendation) provides that ‘member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.’

47. In terms of process, Colombia explains that there are no criminal proceedings (prosecutions) against legal persons under the Colombian legal system: investigation of legal entities is purely administrative, and independent from the criminal liability of natural persons. However, pursuant to article 34, paragraph 1 of Law 1474 of 2011, article 91 of the CPC sanctions would be applied in the context of a prosecution against a natural person. Enforcement of the criminal sanction under this provision (i.e. suspension or dissolution of the legal person under article 91 of the Criminal Procedure Code) is decided by the supervisory judge. This sanction may be imposed even after the imposition of an administrative fine under article 34, paragraph 3.

48. As already outlined, Colombia points out that the most relevant autonomous process in foreign bribery cases would be the one foreseen under article 34, paragraph 3, which is purely administrative in nature. Investigation of suspicious activities by corporations and enforcement of administrative fines under this provision are carried out by the Superintendence of Corporations, without the requirement of a prior prosecution or conviction of a natural person. The Colombian authorities assert that the Superintendence of Corporations is adequately resourced, has access to the necessary expertise and is able to employ the full range of investigative powers, including specialist investigative techniques, in order to effectively combat foreign bribery.

49. Nevertheless, to establish the liability of the legal person, it must be established that the offence was committed by (paragraph 1) or with the consent or tolerance of (paragraph 3) a legal representative or

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– *A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.”*

<sup>14</sup> Article 107 CPC does however cover other victims other than State entities, and may therefore apply in such situations.

manager. Therefore, paragraph 1 clearly requires the prosecution of a natural person to be able to impose article 91 PC sanctions on the related legal person. Under paragraph 3, although prosecution of a natural person is not formally required, it may be very difficult to establish that the bribery occurred with the consent or tolerance of the legal representative or manager without the said legal representative or manager being prosecuted or even convicted. In the current context of increasingly complex corporate structures, often characterised by decentralised decision-making, it may prove difficult to identify an individual decision-maker within a management chain comprising several levels. This could potentially result in certain difficulties with respect to prosecution, including evidentiary issues, and may be ultimately problematic in effectively applying liability of legal persons for acts of foreign bribery in certain cases. The requirement of identification and/or conviction of a related natural person would merit follow-up in the context of future monitoring. Furthermore, future monitoring should seek to clarify other procedural issues such as expectations in terms of burden of proof, and the possibilities of appealing decisions by the Superintendence of Corporations.

### **3. Article 3: Sanctions**

50. The Convention requires Parties to institute ‘effective, proportionate and dissuasive criminal penalties’ comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to ‘effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions.’ The Convention also mandates that for a natural person, criminal penalties include the ‘deprivation of liberty’ sufficient to enable mutual legal assistance (MLA) and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation, or that monetary sanctions of ‘comparable effect’ are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

#### **3.1 *Principal penalties for bribery of a domestic and foreign public official***

##### **3.1.1 *Penalties for natural persons***

51. The article 433 PC foreign bribery offence provides for sanctions of 9 to 15 years’ imprisonment and a fine of 100 to 200 minimum legal monthly wages for natural persons. For the year 2012, the minimum legal monthly wage (or SMMLV for the Spanish initials) was set at 566 700 Colombian pesos (COP) (USD 315 or EUR 260).<sup>15</sup> Consequently, financial sanctions for natural persons for 2012 for a foreign bribery offence range between COP 56 670 000 and COP 113 340 000 (or between approximately USD 31 500 and 63 000, or EUR 26 000 and 52 000). While the available prison sentences are significant, it is questionable whether the financial sanctions are sufficiently effective, proportionate and dissuasive. Colombia is of the view that, since imprisonment sanctions are very high, and may be imposed in conjunction with pecuniary penalties, the Convention criteria are met.

52. The sanctions for foreign bribery are higher than the ones foreseen for active bribery of a domestic public official. Domestic bribery sanctions range between 4 to 9 years’ imprisonment, and 66.66 to 150 minimum legal monthly wages. Natural persons convicted of active domestic bribery also incur a deprivation of political rights and are banned from exercising public functions for a period of 80 to 144 months. In addition, article 8.1(j) of Law 80 of 1993, as modified by article 1 of Law 1474 of 2011, concerning debarment from public procurement would also be applicable (see Section 3.5 below for further details).

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<sup>15</sup> As of 1 August 2012, 1000 Colombian Pesos (COP) = 0.56 USD = 0.46 EUR.

### *3.1.2 Penalties for legal persons*

53. Penalties for legal persons convicted of foreign bribery are provided for in article 34 of Law 1474 of 2011, and may be imposed cumulatively.

54. Paragraph 1 of article 34 provides for the imposition of an administrative penalty, as referred to under article 91 CPC, in the form of suspension or dissolution of the legal person. The application in foreign bribery cases of this sanction appears improbable, or, at the very least, very limited. Indeed, the dissolution of the company provided under article 91, might, depending on the case, be considered inappropriate and disproportionate to the act committed. Whether and how this sanction is applied in practice will need to be followed-up in Phase 2.

55. The administrative sanction under paragraph 3 of article 34 would therefore appear the most relevant in the context of bribery of a foreign public official in an international business transaction. Under this provision, the Superintendence of Corporations may impose fines ranging from 500 to 2000 minimum monthly wages, i.e. between COP 283 350 000 and COP 1 133 400 000 (or between approximately USD 157 500 and 630 000, or EUR 130 000 and 520 000). It is questionable whether such sanctions would be effective, proportionate and dissuasive for a legal person, especially where that legal person is a large multinational corporation. As a point of comparison, sanctions in Colombia for money laundering for natural persons may reach as high as 50 000 times the minimum monthly wage (i.e. up to USD 15.750 million or EUR 13 million). The application of sanctions in practice should also be followed-up in Phase 2.

### *3.2 Penalties and mutual legal assistance*

56. Mutual legal assistance in Colombian law does not depend on the type or degree of penalty. Rather, it depends on specific requirements being met under Book V of the Criminal Procedure Code, in particular articles 484 and 489 (see Section 9 below on MLA, including in relation to asset seizure, forfeiture and confiscation).

### *3.3 Penalties and extradition*

57. As provided under Article 35 of the Colombian Constitution, as well as article 18 PC and article 490 CPC, extradition may be conceded or offered on the basis of international treaties to which Colombia is a Party, including the Anti-Bribery Convention, and, in their absence, on the basis of the law. Article 493 of the Criminal Procedure Code defines an extraditable offence as any offence punishable with a sentence of imprisonment for a period not less than four years, and where at least an indictment or its equivalent has been issued. Given that the foreign bribery offence carries a minimum term of nine years imprisonment under Colombian law, extradition for foreign bribery would be possible under this provision (see also Section 10 below on extradition). Article 504 CPC provides for the deferral of an extradition request if the requested individual is subject to proceedings in Colombia. In cases where the accused has been convicted in Colombia, the surrender will not take place until the end of the period of imprisonment in Colombia.

### *3.4 Seizure and confiscation*

#### *3.4.1 Seizure*

58. Article 83 CPC provides for the possibility of pre-trial seizure of goods susceptible of criminal confiscation under article 82, ‘when there are well founded motives to infer that the goods and resources at issue are a direct or indirect product of a wilful offence; that their value is equivalent to that of such product; that they have been used or are destined to be used as a means or instrument of a wilful offence; or that they constitute the material object of the offence...’ This type of pre-trial seizure is only applicable

to natural persons, as only natural persons may be held criminally liable (see below on confiscation provisions under article 82).

59. The *extinción de dominio* provisions available under Law 793 of 2002 may also act as a form of pre-trial seizure, and would be applicable to bribes and the proceeds of foreign bribery in the hands of both natural and legal persons.

### 3.4.2 Confiscation

60. Article 34 of the Colombian Constitution prohibits deportation, life imprisonment or deprivation of property (“*confiscación*”). Nevertheless, confiscation, as understood under the Anti-Bribery Convention, is provided for in Colombian law under a different terminology. The bribe and proceeds of bribery may be seized and confiscated under two different procedures: (1) “*comiso*” (confiscation), provided for under article 82 CPC, and (2) *extinción de dominio* (extinction of the right of property), as defined by Law 793 of 2002.

61. Confiscation under article 82 of the Criminal Procedure Code is based on a criminal conviction, and is therefore only applicable to natural persons, since legal persons cannot be held criminally liable.

#### **Article 82 of the Criminal Procedure Code – Application**

Confiscation (*comiso*) shall fall on the goods and resources of the person criminally liable which proceed directly or indirectly from the offence or on those used or destined to be used for wilful offences as a means or instrument for their execution, without impairing the rights of passive subjects or third parties of good faith.

When the goods or resources that proceed directly or indirectly from the offence are mingled or hidden with goods of licit origin, confiscation shall take place up to the estimated value of the illegal product unless, unless said conduct constitutes another offence. In this case, the confiscation shall encompass all of the goods involved in the offence.

Without impairing the rights of the victims or third parties of good faith, confiscation shall apply to the goods of the person criminally liable up to a value that corresponds or is equivalent to the direct or indirect proceeds arising from the offence whenever these are impossible to locate, identify or materially affect, or if their confiscation cannot be done in the terms provided above.

Once the goods have been confiscated, they shall pass to the Prosecutor General’s Office through the Special Fund for the Administration of Goods, unless the law orders their destruction or a different destination.

PARAGRAPH. For the effects of confiscation, it shall be understood that “goods” whose economic value can be estimated or those subject to right of property, regardless of their material or immaterial, movable or immovable, tangible or intangible nature, including the documents or deeds that prove the right of domain over them.”

62. In the context of a foreign bribery offence, article 82 would allow for confiscation of the bribe if it is still in the hands of the perpetrator or another participant, provided that person is convicted. Article 82 would also allow for confiscation of the proceeds resulting from the foreign bribery offence, or their financial equivalent, provided they are in the hands of the natural person convicted of foreign bribery. Where foreign bribery occurs in the context of an international business transaction, it is usually a company which receives the proceeds of the bribery. Since legal persons cannot be held criminally liable in Colombian law, article 82 confiscation would rarely be applicable to confiscate the proceeds of foreign bribery in an international business transaction.

63. The Colombian legal system provides, however, for a separate system of non-conviction based forfeiture under Law 793 of 2002: *extinción de dominio*, or extinction of the right of property. Its object is

the assets themselves, and not their owner. Article 2 of Law 793 of 2002, as modified by article 72 of Law 1453 of 2011, lays down the circumstances where *extinción de dominio* may occur.

#### Article 2 of Law 793 of 2002 – Extinción de dominio – Causes

The right of property shall be declared extinct by court order, when any of the following cases occur:

1. When there is unjustified increase in assets at any time, without explanation of their legal origin.
2. When the good or goods in question proceed directly or indirectly from an unlawful activity.
3. When the goods in question have been used as a means or instrument to commit illegal activities or are intended to be used for such activities or correspond to the object of the crime.
4. When the assets or resources in question proceed from the sale or barter of other goods which proceed directly or indirectly from illegal activities, or which have been destined for illegal activities or are proceeds, effect, instrument or object of the offence.
5. When the goods in question have lawful origin but have been mixed, integrated or confused with resources of illicit origin, excepting Decentralized Securities Deposits, provided that the holders of such securities adequately met standards on the prevention of money laundering and terrorist financing.

[...]

PARAGRAPH 2nd. The illegal activities to which this article refers are:

[...]

3. Those involving the serious deterioration of social morality. For purposes of this provision, activities that are understood to cause deterioration of social morality are those against the public health, economic and social order, natural resources and the environment, public safety, the public administration, the constitutional and legal regimes, kidnapping, kidnapping for ransom, extortion, procurement, human trafficking and migrant smuggling". [*emphasis added*]

64. This provision could be most usefully relied on in foreign bribery cases to seize the proceeds of an act of bribery of a foreign public official in an international business transaction, whether the proceeds are in the hands of a natural or a legal person, and regardless whether there has been a criminal conviction. As provided under article 7 of Law 793 of 2002, to establish that goods are proceeds of an illegal activity, the civil standard of proof on the balance of probabilities will apply (as opposed to the proof beyond reasonable doubt standard applicable in criminal law). How these provisions are applied in practice will need to be further assessed in the context of future monitoring.

65. Under article 5 of Law 793, the procedure may be initiated *ex officio* by the prosecutor<sup>16</sup> when it appears likely that the grounds set forth in article 2 are met. Colombia explains that this *extinción de dominio* procedure is also initiated systematically when the goods or resources in question are the subject of criminal proceedings but no final decision has been made as to their status, illicit or otherwise. It is therefore likely that, if a criminal investigation into a foreign bribery offence is opened, pre-trial seizure of the bribe and proceeds of bribery would be initiated on the basis of the *extinción de dominio* provisions, since this is an autonomous action by the public prosecution, separate to the criminal proceedings for the foreign bribery offence itself.

66. As concerns international cooperation, Colombia explains that it would also be able to rely on the provisions pertaining to the *extinción de dominio* to provide MLA in respect of measures to confiscate proceeds of bribery in the hands of both natural and legal persons.

### 3.5 Additional civil and administrative sanctions

67. Under article 8.1(j) of Law 80 of 1993, as modified by article 1 of Law 1474 of 2011, individuals declared guilty of crimes against the public administration that are punishable by imprisonment, including

<sup>16</sup> Or by any person by prior request.

foreign bribery, are banned for 20 years from bidding in public procurement procedures and from entering into public contracts. This prohibition is extended to corporations in which such persons are partners, their parent companies and subsidiaries, except for limited liability corporations. Convicted individuals are entered in a register of convicted persons, which may be consulted by the public procurement authorities.

68. As of the time of this report, Colombian legislation does not provide for debarment sanctions directly against legal persons. As noted immediately above, an indirect form of debarment exists under article 8.1(j). Colombia indicates in its Phase 1 responses that the National Agency for Public Contracts and Procurement is working on an amendment to article 8.1(j) to explicitly extend this prohibition to legal persons sanctioned for foreign bribery, which would be in force by June 2013.

69. Civil penalties are envisaged under article 34, paragraph 2 but are premised on the existence of damages and a victim. Even if such damage could be demonstrated, it may be difficult to quantify. The use of this provision in foreign bribery cases appears unlikely (see above discussion under Section 2.2.).

#### **4. Article 4: Jurisdiction**

##### **4.1 Territorial jurisdiction**

70. Article 4.1 of the Convention requires each Party to ‘take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.’ Commentary 25 to the Convention clarifies that ‘an extensive physical connection to the bribery act is not required.’

71. Article 14 PC lays down the rule for exercise of territorial jurisdiction:

#### **Article 14 of the Penal Code – Territoriality**

Colombian Penal Law shall be applied to any person who infringes a Law in national territory, except as provided in International Law.

The criminal offence is deemed to be made:

1. In the place where the action, in whole or in part, has been developed.
2. In the place where there was an action of omission.
3. In the place where the final result occurred or should have occurred.”

72. Article 15 PC further extends the principle of territorial jurisdiction to offences committed aboard ships or aircrafts belonging to or operated by the State.

73. In cases of transnational bribery, Colombia indicates that, to establish Colombian territorial jurisdiction, where the offer, promise or giving of the bribe occurred abroad, a territorial link to Colombia would need to be shown, i.e. that at least part of the action or omission occurred in Colombia, or produced its “final result” in Colombia. Colombia provided varying interpretations of the definition of ‘final results’. On the one hand, Colombia indicated that the “final result” refers to the prejudice caused by the criminal act. Therefore, according to Colombian authorities, if only the benefits of the transnational bribery returned to a Colombian company, this would not be sufficient to show that “the final result occurred” in Colombia and thus establish a territorial link. In further discussions, Colombia explained that it would be sufficient to show ‘any link’ to Colombian territory.

74. Given the absence of provisions on territorial and nationality jurisdiction in the Colombian legislation on corporate liability (Law 1474), it is unclear how jurisdiction will be exercised in practice over legal persons in foreign bribery cases. Colombia asserts that the jurisdictional provisions in Law 222

of 1995 would apply to sanctions in article 34 paragraph 3 of Law 1474. The application in practice of territorial jurisdiction will need to be followed-up in Phase 2.

#### **4.2 Nationality jurisdiction**

75. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, ‘take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official.’

76. Under Colombian law, the exercise of extraterritorial jurisdiction over Colombian nationals is an exception to the principle of territorial jurisdiction. Article 16, paragraph 1 of the Penal Code provides for the possibility for Colombia to exercise nationality jurisdiction over Colombian nationals abroad who have allegedly committed foreign bribery offences, which fall into the category of crimes against the public administration.

#### **Article 16, paragraph 1 of the Penal Code – Extraterritoriality**

Colombian criminal law shall be applied:

To the person who commits a crime abroad against the existence and security of the State, against the constitutional regime, against the economic and social order other than the conduct defined in article 323 of this Code, against the public administration, or whom falsifies national currency or incurs in the crime of financing terrorism and the management of resources related to terrorist activities, even when they have been acquitted or convicted abroad with a lesser sentence than that under Colombian law. *[emphasis added]*

77. Given that article 16 is part of the Penal Code, and that only administrative proceedings are envisaged against legal persons, nationality jurisdiction under this provision cannot be exercised against Colombian legal persons for acts of transnational bribery committed abroad.

#### **4.3 Consultation procedures**

78. Article 4.3 of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

79. Colombia does not currently have specific procedures in place to consult with other Parties to the Convention in cases where Colombia and another Party may have concurrent jurisdiction over a foreign bribery offence. Requests to transfer a case from Colombia to another country would therefore be handled under the general MLA procedures, by the Central Authority (see Section 9 below on MLA).

80. Furthermore, it is worth noting that article 16(1) PC explicitly provides for the discretion for Colombia to exercise its jurisdiction in foreign bribery cases, even when the person who committed the offence has already been acquitted or convicted abroad.<sup>17</sup>

#### **4.4 Review of basis of jurisdiction**

81. The Colombian State has not reviewed whether its current basis for jurisdiction is effective in the fight against foreign bribery. It should be pointed out that Colombia has yet to investigate and prosecute a foreign bribery case.

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<sup>17</sup> Article 16.1 of the Penal Code does, however, provide that any imprisonment sanction already pronounced will be considered as a completed part of the sentence.

## 5. Article 5: Enforcement

82. Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party.” It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

### 5.1 Rules and principles regarding investigations and prosecutions

83. In Colombia, the Code of Criminal Procedure (Law 906 of 2004; CPC) governs investigations and prosecutions. Article 45 CPC grants the Prosecutor-General and his or her delegates the competence to investigate and prosecute Penal Code offences.

#### 5.1.1 Investigation

84. Article 200 CPC sets out the relevant investigative authorities in Colombia. The Prosecutor-General’s Office (*Fiscalía General de la Nación*; PGO) is responsible for coordinating the investigation of Penal Code offences, including through direction, legal control, technical and scientific verification and supervision of activities carried out by authorities exercising judicial police functions. Under article 250(3) of the Colombian Constitution, the PGO is mandated to direct and coordinate the National Police in its exercise of permanent judicial police functions. The National Police’s Criminal Investigations Office (DIJIN) is responsible for exercising these functions in foreign bribery cases. The DIJIN is organised into eight areas and several groups according to the categorisation of crimes in the Penal Code, such as narcotics, traffic and transportation of drugs and anti-extortion and abductions. There is a specific group within the DIJIN which is responsible for investigating crimes against the public administration (which includes foreign bribery) and internal affairs and investigations. This group has 66 investigators and the financial resources made available to it correspond with its caseload. The DIJIN collects, manages and evaluates evidence; exchanges information with other government agencies in the context of investigations; undertakes risk profiling; maintains a national 24-hour toll-free Anti-Corruption Hotline and an online tool to facilitate confidential reporting. These reporting mechanisms are open to reports of possible foreign bribery, although they have not received any foreign bribery allegations to date. In addition to its role in obtaining material and/or physical evidence, the DIJIN is also mandated to seize and confiscate assets; carry out extradition requests and arrest suspects. The DIJIN has an INTERPOL National Central Bureau to cooperate with foreign law enforcement authorities in transnational crime investigations and can provide MLA to other countries carrying out foreign bribery investigations.

85. Article 202 CPC designates government agencies other than the National Police that are mandated to perform permanent judicial police functions, in accordance with their specific duties as supervisory bodies provided for in the Constitution.<sup>18</sup> Colombia confirmed that none of these bodies would be mandated to investigate suspected instances of foreign bribery as long as no Colombian public officials are involved. The PGO also has the power to temporarily mandate other public entities to carry out judicial police functions under article 203 CPC although no such authorisation has been issued to date in connection with foreign bribery investigations. Public servants who exercise judicial police functions must undertake preliminary investigations when they receive reports and complaints of possible Penal Code offences, and are required to immediately inform the PGO of the initiation of a preliminary investigation (article 205 PC).

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<sup>18</sup> Namely the Inspector General’s Office (*Procuraduría General de la Nación*; IGO); PGO; Comptroller General; transit authorities; public bodies exercising oversight and control functions; officials of the National Prisons Institute as set out in the Prisons and Penitentiary Code; mayors and police inspectors.

86. Officials carrying out judicial police functions during the investigation stage of a criminal case act under the control of a Prosecutor from the PGO. Articles 213 to 245 CPC set out the investigative techniques that do not require prior judicial authorisation, which include wire-tapping (articles 235 and 236); undercover agents (article 242); undercover anti-corruption operations (article 242-A), which allows for the use of undercover agents and analysis and infiltration of a criminal organisation to verify the possible existence of crimes against the public administration in Colombian public entities and would therefore have limited, if any, application in foreign bribery cases; controlled deliveries in cases involving arms trafficking, explosives, ammunition, counterfeit, drugs of dependency or continuing criminal activity (article 243); selective database searches (article 244); and DNA analysis (article 245).

### 5.1.2 Prosecution

#### Prosecution Authorities

87. The mandate of the PGO is set out in the Colombian Constitution. The PGO is part of the Judicial Branch (article 116) and is the government agency in charge of criminal proceedings in relation to facts that may constitute a crime ‘that are brought to its attention through routine channels, formal accusations, special petitions and legal notifications, on the condition that there are sufficient reasons and factual circumstances that indicate the possible existence of the offence’ (article 250). Article 66 CPC requires the PGO to commence criminal proceedings *ex officio*, or when suspected offences are brought to its attention through reports (*denuncia*), special requests (*petición especial*), complaints (*querrela*) or by any other means. Each special branch (*seccional*) of the PGO has an economic crime unit. It is unclear how these units work together and what resources are available to them.

88. The PGO of Colombia has a National Anti-Corruption Unit, which specialises in the investigation and prosecution of offences against the public administration, including transnational bribery. This Unit has jurisdiction only in those cases specifically assigned by the Prosecutor-General. It is unclear on what basis cases are assigned to the Unit. There are several other sub-units within the various branches of the PGO that also participate in corruption cases. These groups have their own prosecutors specialised in the investigation of crimes against the public administration. The interaction between these sub-units and the Anti-Corruption Unit in foreign bribery cases remains unclear, and will need to be further addressed in Phase 2.

89. In accordance with article 249 of the Constitution, the Prosecutor-General is elected for a four-year term by the Supreme Court from a list of three candidates chosen by the President. The PGO enjoys administrative and financial autonomy. Article 235 of the Constitution grants the Supreme Court discretion to determine its own rules of procedure. Under the current rules of procedure determined by the Supreme Court, a quorum of 16 out of the possible 23 votes that is, two thirds of the votes, is necessary to elect the Prosecutor-General. In March 2012, the Prosecutor-General stepped down after the Council of State (Colombia’s highest administrative court) determined that the appointment of the Prosecutor-General in January 2011 was unconstitutional. This was based on the fact that at the time of the election of the Prosecutor-General, the Supreme Court had 18 judges and 5 vacant seats, and she was elected by 14 of the 18 judges. The Council determined that this departure from the internal procedure of the Supreme Court was unconstitutional. There has been some criticism of the circumstances surrounding the recent resignation of the Prosecutor-General, made against the background of numerous corruption prosecutions and convictions under the former Prosecutor-General, often involving members of the former administration.<sup>19</sup> Colombia explained that these prosecutions are ongoing, regardless of the change in

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<sup>19</sup> See: Colombia Chief Prosecutor Resigns, BBC News: <http://www.bbc.co.uk/news/world-latin-america-17240645>; Colombia Reports: [colombiareports.com/opinion/131-gustavo-silva-cano/22604-the-decision-to-sack-viviane-morales-is-unconstitutional.html](http://colombiareports.com/opinion/131-gustavo-silva-cano/22604-the-decision-to-sack-viviane-morales-is-unconstitutional.html).

Prosecutor-General. Colombia also pointed to the legislative basis for the independence of the Council of State and the PGO from the Executive, both in terms of resources and function. Future monitoring should follow up on guarantees for the independence of the Prosecutor-General and the PGO.

### Prosecution principles

90. Article 322 CPC sets out the legality principle, which requires the PGO to prosecute offences except when the opportunity principle applies. Prosecutors are unable to suspend, discontinue or abandon criminal proceedings (*persecución*) except in cases falling under the opportunity principle set out in article 324 CPC.

91. Article 324 CPC sets out the circumstances in which the opportunity principle is invoked, and provides, in paragraph 2, for its application by the Prosecutor-General or his or her delegate in relation to crimes with a maximum penalty of over 6 years' imprisonment (which includes the article 433 PC foreign bribery offence, which has a maximum penalty of 15 years' imprisonment). Colombia states that any such decision must be subject to judicial review, in accordance with Article 250 of the Constitution. The opportunity principle may be applied in cases where, *inter alia*, the victim has been compensated; the defendant is extradited to another country; the defendant collaborates before the judgment hearing to prevent the continuation of the crime or agrees to serve as a prosecution witness against other defendants (provided he or she has the opportunity to testify); the defendant has suffered serious physical or moral harm; or when the criminal procedure implies risk or serious threat to the Foreign Security of the State. Law 1474 of 2011 inserted in Article 324 CPC a bribery-specific exception to the obligation to prosecute:

#### **Article 324(18) CPC – Exception to the legality principle in bribery cases**

The opportunity principle is applicable in the following cases: ...When the author or participant in the cases of bribery files the formal complaint that originates the criminal investigation, accompanied with useful evidence for the trial, and serves as a witness for the Prosecution, on the condition that he or she voluntarily and integrally amends the harm done ... The effects of the opportunity principle will be revoked if the person that it benefits fails to comply with his or her obligations in the Judgment Hearing ...

92. As discussed earlier (see Section 1 on the foreign bribery offence), Colombia points out that this article applies only to cases of domestic bribery contained in Chapter III, Title XV of the Penal Code, entitled '*Cohecho*'. However the article does not specifically refer to the article 405 to 407 domestic bribery offences, it instead only refers to 'bribery' (*cohecho*) in general. This exception is understandable in a domestic bribery context, where the primary objective may be to curb domestic corruption and punish first and foremost public officials receiving or soliciting bribes. However if this provision were to be used by a defendant in a foreign bribery case, it is unclear how the damage caused could be adequately quantified and remedied, in satisfaction of this provision. In terms of procedure, the role that would be played by the Judicial Police and/or PGO in determining whether the various elements are satisfied is also unclear, as is the role of the courts, if any, in a decision as to whether this defence should succeed. Colombia clarified, however, that even if this exception was applied in a foreign bribery case and the accused was not prosecuted for criminal policy reasons, confiscation would still be available with respect to the bribe and its proceeds. The application of this provision in practice should be followed up in Phase 2.

93. Once the relevant information has been collected during the investigation, the Prosecutor presents all actions undertaken by the authority exercising the judicial police function that affect the fundamental rights of citizens, such as search and seizure, personal inspection and registration, to the supervisory judge, who will also decide whether to order pre-trial detention at the request of the Prosecutor. Once the investigation is complete, the Prosecutor will accuse the defendant before a trial judge, in accordance with the required form and content of the indictment as set out in articles 286 to 289 CPC, who will call an oral

and public trial during which the Prosecutor must prove, beyond reasonable doubt, that the crime was committed.

94. Criminal procedures can be closed under any of the seven grounds listed in article 332 CPC, which are: the impossibility of initiating or continuing the prosecution; existence of a ground to exclude criminal liability under the Penal Code; inexistence or irregularity of the act being investigated; lack of involvement of the accused; impossibility of disproving the presumption of innocence; or expiry of the statute of limitations set out in article 294 CPC.

## ***5.2 Considerations such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved***

95. As noted above, the PGO may only suspend, interrupt or decline to prosecute in accordance with the opportunity principle, set out in article 324 CPC, and subject to a decision by a supervisory judge. The exception in article 324(8) CPC is for cases in which the prosecution involves serious risk or threat to the external security of the State. The exact scope of this exception is not defined in the CPC. Colombia refers to jurisprudence of the Constitutional Court citing article 189(6) of the Constitution, which mandates the President of the Republic to exercise powers to ensure the ‘external security of the Republic’, to infer that this is defined as (i) the independence and honour of the nation, (ii) the inviolability of its territory, and (ii) a situation of foreign war. It is unclear how this interpretation might be applied to the article 324(8) CPC provision for suspending, interrupting or declining prosecutions that involve serious risk or threat to the external security of the State. In any case, Colombia states that in cases that might involve ‘the external security of the State’, the Executive may suggest when such proceedings might constitute a threat but that the final decision is left to the prosecutor to decide, subject to control by the supervisory judge. The potential influence of the Executive in these cases, coupled with the absence of a defined set of criteria on which such a determination is based should be addressed in more depth in Phase 2.

## **6. Article 6: Statute of Limitations**

96. Article 6 of the Convention requires that any statute of limitations with respect to bribery of a foreign public official provide for ‘an adequate period of time for the investigation and prosecution’ of this offence.

97. Article 83 PC provides for a limitation period equal to the maximum imprisonment penalty for the relevant crime. In any case, the statute of limitations may not be any lower than 5 years or higher than 20 years. Furthermore, the statute of limitations increases by half for offences initiated or committed abroad, without exceeding a maximum of 20 years. Thus, for the foreign bribery offence, the statute of limitations would run 15 years if committed in Colombia, and 20 years if committed abroad (since one and a half times 15 years would equal 22 years, which is higher than the maximum 20 year statute of limitations allowed). Article 83 PC is silent as to the time at which the limitation period commences. Colombia has stated, with reference to case law, that the foreign bribery offence is completed with the offer of the bribe, regardless of the outcome, and that it is therefore an instantaneous rather than a continuous offence. This has been confirmed in decisions by the Colombian Supreme Court of Justice.<sup>20</sup> Given the lengthy basic limitation period, this is unlikely to create problems even if the corrupt transactions continue over a long period, but the application of the limitation period in practice should be followed up in Phase 2.

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<sup>20</sup> See Ruling no. 17674 of November 2003, in which the Chamber established that the bribery offence is one of immediate consummation.

## **7. Article 7: Money Laundering**

### **7.1 *The money laundering offence***

98. Article 7 of the Convention provides that, if a Party has made bribery of its own public officials a predicate offence for the purpose of its money laundering legislation, it shall do so on the same terms for the bribery of foreign public officials, without regard to the place where the bribery occurred.

99. Article 323 PC<sup>21</sup> establishes the money laundering offence. Under this provision, a person is guilty of money laundering if he/she ‘acquires, safeguards, invests, transports, processes, stores, keeps, has custody or administers property that originates directly or indirectly from [certain illegal] activities [...], or related to the proceeds from crime under conspiracy to commit crime, or gives the assets coming from such activities the appearance of legality or legalises, conceals or disguises the true nature, source, location, destination, movement or right over such property, or performs any other act to conceal or disguise their illicit origin ...’

100. Offences against the public administration, which include foreign bribery, are predicate offences to money laundering. Article 323(3) explicitly provides that money laundering is still punishable in Colombia if the predicate offence has been committed partially or wholly abroad.

101. The money laundering offence carries a prison sentence of 10 to 30 years, and fines of 650 to 50 000 minimum monthly wages, i.e. between COP 368.355 million and COP 28.335 billion (or between approximately USD 204 750 and 15.750 million, or EUR 169 000 and 13 million).

102. It appears that these provisions would not apply to legal persons. However, in its 2008 GAFISUD Mutual Evaluation Report (MER), Colombia cited the provisions for suspension or cancellation of the legal person in article 91 CPC as relevant in money laundering cases (see Section 3.1.2 above on sanctions for legal persons). It is unclear whether other government agencies can impose administrative sanctions on legal persons for money laundering offences, although there are sanctions available for failure to report (see below). How money laundering is enforced in practice, including in respect of legal persons, will be further followed-up in Phase 2.

### **7.2 *Money laundering reporting***

103. The UIAF (*Unidad Administrativa Especial de Información Análisis Financiero*) is a public entity created by Act 526 of 1999 and regulated by Decree 1497 of 2002. The UIAF is the central authority for combating money laundering and terrorist financing and is authorised to request information from any public or private entity (other than confidential information at the Prosecutor General’s Office). In terms of information sharing, Act 526 of 1999 allows the Director General of the UIAF to cooperate with FIUs from other countries.

104. Entities required to report suspicious transactions to the UIAF include casinos and gaming establishments, notaries, foreign exchange dealers, new or second-hand motor dealers, stock brokers, port companies, forwarders, customs users, dealers in precious metals and stones, credit unions, postal finance services and other financial institutions supervised by the Financial Superintendent. The UIAF has defined suspicious transaction as ‘any transaction made by a natural or legal persons, which by their [sic: its] number, quantity or characteristics is not part of the normal business practices of an industry or sector and could not be reasonably justified.’

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<sup>21</sup> Article 323 of Law 599 of 1999, amended by article 42 of Law 1453 of 2011.

105. In Colombia, the financial institutions that fail to comply with the provisions pertaining to money laundering reporting may be subject to administrative sanctions by their supervisory authorities (Financial Superintendence of Colombia), consisting of monetary penalties in accordance with the Organic Statute of the Financial System (article 211 of Decree - Law 663 of 1993). They may also be subject to criminal penalties that can reach the suspension and cancellation of legal personality (article 91 of Law 906 of 2004 Criminal Procedure Code) or termination of ownership of property (Act 793 of 2002).

## **8. Article 8: Accounting**

### **8.1 Accounting and auditing requirements / Companies subject to requirements**

106. Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, each Party prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for effective, proportionate and dissuasive penalties in relation to such omissions and falsifications.

#### **8.1.1 Books and records / Accounting standards**

107. Colombian accounting standards are set out primarily in Law 43 of 1990, Presidential Decree 2649 of 1993, Law 1314 of 2009, and the Commercial Code. Article 19(3) CoC requires companies and individuals to keep regular accounts of their business operations. According to Colombia, article 19(3) CoC requires ‘any natural or legal person’ to keep accounts of its business and is therefore applicable to all Colombian companies. Under article 50 CoC, accounts must be kept exclusively in Spanish according to the double-entry system in registered books, so as to provide a clear, complete and accurate account of the business affairs. Books must be kept for at least 10 years from the date of closure or last entry (article 60) and can only be examined by their owners or authorised persons (article 61) unless ordered by members of the executive or judicial branches for the purposes of, *inter alia*, criminal inquiries (article 63). Presidential Decree 2649 of 1993 lists, in articles 19 to 33, the basic financial statements that companies are required to maintain and disclose. These include the balance sheet, income statement and consolidated financial statements. Article 57 CoC prohibits inaccurate, false or incomplete accounting. The Superintendence of Corporations is mandated to supervise the financial statements of companies that fall within their portfolio. The Superintendence of Corporations supervises all commercial corporations belonging to the real sector of the Colombian economy so as to comply with corporate and accounting laws and regulations. Under Decree 2649 of 1993, it is also authorised to disclose mandatory elements of financial statements as set out in accounting law. It is unknown what these elements are and if the Superintendence is mandated to disclose these to law enforcement authorities. The process for regulating the financial statements of companies that fall outside the Superintendence of Corporations’ portfolio, and private entrepreneurs, is unclear.

108. Colombia further cites a number of related legislative provisions: article 289 PC, which provides that forgery and later use of a private document shall be considered a criminal offence punishable by one to six years’ imprisonment; article 773 of the Colombian Tax Code (Decree 624 of 1989; TC), which requires traders to accurately show the daily movements of sales and purchases and, consistent with requirements set out in regulations, to exercise effective control and reflect the financial and economic situation of the company; and article 34 of Law 222 of 1995, which requires the disclosure of certified financial statements to the Superintendence of Corporations.

### 8.1.2 External auditing requirements

109. Article 203 CoC requires joint stock companies, subsidiaries of foreign companies, ‘companies in which, by law or articles of association, management is not in the hands of all the shareholders, when so required by any number of shareholders excluded from the management that account for at least 20% of the equity,’ to have an internal, or statutory, auditor (*revisor fiscal*). The statutory auditor is equivalent to the external auditor under the International Financial Reporting Standards but has additional duties defined in article 207 CoC and Law 222 of 1995. In addition, article 13 of Law 43 of 1990 provides that it is mandatory for all commercial companies, regardless of their nature, to have a statutory auditor when their gross assets as of December 31 of the previous year are more than or equal to five thousand times the minimum monthly wage (COP 2833.5m; USD 1.6m; EUR 1.3m), or their gross income for the same period was more than or equal to three thousand times the minimum monthly wage (COP 1700.1m; USD 945 000; EUR 78 000). Article 215 states that the auditor must be a public accountant with permanent work outside the company administration. Colombian companies that do not have a legal obligation to appoint an external auditor may nevertheless choose to do so. Issues relating to auditing of companies will be the subject of future monitoring in Phase 2.

### 8.1.3 Reporting of offences

110. Under Colombian legislation, there is no specific legal obligation for statutory auditors to report a suspected act of bribery of a foreign public official to management or corporate monitoring bodies. However, as concerns internal auditors, Colombia cites instead, article 208 CoC which sets out the requirements for the internal auditor’s report on the financial statements of a company: these include whether the accounts are maintained in accordance with legal regulations, and reservations or exceptions about the faithfulness of the financial statements. Colombia also refers to article 7 of Law 1474 of 2011, which deals with statutory auditors’ obligations to report to law enforcement authorities outside the company. This article amends Law 43 of 1990, which governs the auditing profession, to add the failure to inform the relevant tax or disciplinary authority of alleged acts of corruption (*corrupción*) within 6 months to the article 26 grounds for cancellation of the registration of an auditor. It is unclear whether bribery of foreign public officials is included in the definition of ‘corruption’ for the purposes of this article, given that *soborno* is the terminology used under the article 433 foreign bribery offence. Colombia asserts that foreign bribery would be included in the definition of an act of corruption. Reporting requirements for auditors for acts of foreign bribery should be followed up in Phase 2.

111. In terms of other sources of detection in the context of audit of companies, under article 83 of Law 222 of 1995 the Superintendence of Corporations can request legal, accounting, economic and management information from any commercial company that is not under the surveillance of the Financial Superintendence. This information can be used for the administrative investigation of companies in the event of non-compliance.

## 8.2 Penalties

112. The sanctions for violating the article 57 CoC false accounting provision are a fine of up to COP 9 250 (USD 5 000) to be imposed by the Chamber of Commerce or the Superintendence of Corporations. In cases where the perpetrator cannot be identified, the ‘owner of the books’, the accountant and auditor will be held jointly liable. This administrative liability is imposed without prejudice to criminal liability under the Penal Code. Consequently, in addition to any administrative sanction imposed under the CoC, a person may also be held criminally liable, for example under the article 289 PC offence of falsifying private documents, punishable by 16 to 108 months’ imprisonment.

113. In addition, articles 654, 657 and 658-1 TC contain penalties for falsifying accounts in tax declarations, which include sanctions of 0.5% of the higher of the net worth or net income for the previous financial year; closure of premises; or a fine equivalent to twenty per cent of the penalty imposed on the taxpayer, not exceeding 4,100 Tax Value Units (UVT), which may not be paid by his or her employer.

114. In addition, article 43 of Law 222 of 1995 provides for criminal liability, which is the subject of Constitutional Court jurisprudence,<sup>22</sup> accompanied by sanctions of one to six years' imprisonment, for those who knowingly provide authorities with information contrary to reality, or issue certifications or attestations of the same nature, or who order, tolerate, incorporate or conceal forgeries in financial statements or notes.

## **9. Article 9: Mutual Legal Assistance**

115. Article 9.1 of the Convention requires Parties to cooperate with each other to the fullest extent possible in providing 'prompt and effective legal assistance' with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, within the scope of the Convention.

### **9.1 *Laws, treaties and arrangements enabling mutual legal assistance***

116. Colombia provides international cooperation under the 1991 Colombian Constitution; bilateral and multilateral conventions; accepted principles of international law; the CPC and related provisions; and memoranda of understanding and agreements. Colombia is a party to the Inter-American Convention against Corruption, the Inter-American Convention on Mutual Assistance in Criminal Matters, the UN Convention against Corruption and the UN Convention against Transnational Organised Crime. Therefore the international cooperation provisions in these treaties are available for Colombia to use in relation to requesting and providing MLA in cases of domestic and foreign bribery. Colombia has also concluded bilateral MLA treaties with Argentina (2001), Brazil (2001), China (2004), Cuba (2001), Ecuador (2001), France (2000), Mexico (2001), Panama (1999), Paraguay (1999), Peru (1999), Spain (2000), UK (1999), Uruguay (2001), and Venezuela (2001). In the absence of a treaty, relevant provisions of the PC and CPC will apply.

#### **9.1.1 *Criminal matters***

117. Colombia's framework for international cooperation is set out in Book V of the CPC. Article 484 CPC sets out the general principle that investigative and judicial authorities will provide international cooperation, through the Ministry of Foreign Affairs, in accordance with the Constitution, international instruments and laws. Colombia stated that this general principle applies in the absence of a treaty but that the central authority responsible for international cooperation will depend on the international instrument forming the basis of the request. In most cases, the Ministry of Justice or the PGO is designated as the relevant central authority. International cooperation includes assistance in investigations or trials of a criminal nature (including civil actions that are carried out in the context of a criminal process), such as transfer of evidence, witnesses or experts, as well as in actions relating to the extinction of the right of property (see above, Confiscation). Article 485 lists the elements to be included in requests for MLA. Colombia states that the general rule of communication through the diplomatic channel does not apply in relation to international cooperation in criminal investigations. To expedite investigations, direct communication is allowed with foreign law enforcement authorities through the PGO's Office of International Affairs, bypassing the Ministry of Foreign Affairs. Article 486 CPC allows for the transfer of witnesses and experts abroad, and also allows foreign law enforcement authorities into Colombia to

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<sup>22</sup> Constitutional Court, Judgment C-434 of 12 September 1996, reporting Judge José Gregorio Hernández, JYD 12/96, p. 1510.

conduct investigations with the direction and coordination of a delegate from the IGO and the PGO. Article 487 relates specifically to transnational crime, and permits the PGO to take part in international commissions to collaborate in transnational crime investigations, and to conclude agreements with foreign counterparts to strengthen international cooperation and exchange of technology, experience, and capacity. Colombia states that cooperation may consist of exchange of information, documents, judgments, location of persons and goods, recording of statements and testimony, transfer of defendants, witnesses or experts, seizure of assets, as well as assistance allowed under the law of the requested country. The PGO maintains an International Cooperation Handbook in Criminal Matters, based on article 484 CPC.

118. Article 489 CPC provides that MLA can be provided ‘unless it is contrary to the values and principles established in the Colombian Constitution’. Colombia states that for the purposes of article 489 CPC, constitutional values are those set out in the preamble to the Constitution (life, work, justice, equality, peace and freedom) and constitutional principles are those contained in specific articles (sovereignty and human dignity). Colombia also stated that MLA requests that would breach any of these values or principles would be denied. Whether this may provide exceptions to the Article 9 requirement to provide MLA should be followed up in Phase 2.

119. In relation to requests by Colombia for MLA, Colombia states that prosecutors and judges may request to be transferred abroad to carry out investigations once other means, such as videoconference, are exhausted. They may also inquire directly to Colombian consular offices abroad to obtain evidence and carry out proceedings when they involve a Colombian citizen and in accordance with the mandate of the consular office abroad under Article 5(j) of the 1963 Vienna Convention on Consular Relations.<sup>23</sup>

#### 9.1.2 *Non-criminal matters*

120. Article 696 of the Colombian Code of Civil Procedure requires judges to fulfil requests for MLA in civil matters from foreign judiciaries or courts of arbitration, provided they do not oppose Colombian legislation or other national public policy provisions. Article 697 provides that the requests are to be reviewed by Circuit Judges unless otherwise specified in the relevant international treaty. The request must be fulfilled if it is authenticated and in Spanish. If the application meets the requirements, it will then be forwarded to the IGO which will have three days to take appropriate action. The response is to be submitted to the requesting country through the diplomatic channel, i.e. the Ministry of Foreign Affairs.

### 9.2 *Dual criminality and MLA in cases of liability of legal persons*

121. Article 489 CPC establishes that MLA can be provided, even if the conduct in question does not constitute a criminal offence under Colombian law. Colombia therefore does not require dual criminality to provide MLA. In response to the question whether this provision would extend to liability for legal persons, Colombia stated that the only grounds for refusing MLA are the constitutional values and principles set out in article 489 CPC. As these values and principles do not refer to legal persons, Colombia asserts that MLA could be provided in corporate liability cases. The Working Group should follow up in Phase 2 whether Colombia provides MLA in practice, in the context of criminal proceedings against legal persons.

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<sup>23</sup> 1963 Vienna Convention on Consular Relations, Article 5(j): ‘Consular functions consist in ... transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State.’

### 9.3 *Bank secrecy*

122. Colombia states that bank secrecy is not a cause for refusing to respond to an MLA request. Bank secrecy itself is defined in Section 4 of Chapter 9, Title I of the Basic Legal Circular (*Circular Básica Jurídica*) of the Financial Superintence as ‘the obligation that officials of financial and insurance institutions have to maintain discretion and reserve of information concerning their clients or concerning those related to the company that know of its situation because of their profession or post.’ Article 15(4) of the Constitution provides access to ‘accounting records and other private documents’ for inspection, surveillance or intervention for tax or legal purposes. Colombia cites jurisprudence that supports the application of this Constitutional basis for lifting data privacy and bank secrecy requirements to requests made by *foreign* judges or prosecutors for information held by Colombian banks, namely in cases involving drug trafficking, money laundering and corruption.<sup>24</sup>

123. Related legal provisions include: article 105 of Law 663 of 1993 (Organic Statute of the Financial System), which provides for the lifting of bank secrecy at the request of Colombia’s Financial Intelligence Unit (UIAF) or the PGO; article 200 CPC which requires official and private organisations to cooperate with authorities exercising judicial police functions; and articles 61 and 63 CoC which establish exceptions to bank secrecy for those with the function of overseeing or auditing books and records of commercial companies, and following orders from officials from the judicial or executive branches in the context of criminal proceedings and in accordance with the CPC.

## 10. **Article 10: Extradition**

### 10.1 *Extradition for bribery of a foreign public official*

124. Colombia is a party to relevant international treaties containing obligations to extradite or prosecute for corruption and transnational crime (see Section 9 above on MLA) and is a party to the Bolivarian Agreement on Extradition (1911), and the Multilateral Treaty on Extradition of the Montevideo Convention (1933). Colombia has concluded bilateral extradition treaties with Belgium (1914, additional convention ratified in 1958), Brazil (1940), Chile (1928), Costa Rica (1931), Cuba (1936), France (1852), Mexico (1937), Nicaragua (1932), Panama (1928) and Spain (1893, modified in 1999).<sup>25</sup>

### 10.2 *Legal basis for extradition*

125. Extradition can be granted in the absence of a treaty, on the basis of reciprocity, provided the requirements of dual criminality are met and the requesting country has issued an indictment or its equivalent (article 35, Constitution; article 490 CPC). The prerequisites for extradition are the issuing of an indictment or its equivalent by the foreign authorities and a minimum penalty of four years’ imprisonment for the corresponding offence under Colombian law (article 493 CPC). The article 433 transnational bribery offence carries a minimum sentence of nine years; on this basis it is an extraditable offence.

126. Extradition requests must contain a certified, Spanish version of the sentence, indictment or its equivalent; an outline of the events leading to the extradition, including the place and date of their occurrence; data establishing the full identify of the individual subject to the extradition request; and copies of the relevant provisions in the requesting State’s criminal legislation (article 495 CPC). The request must

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<sup>24</sup> Constitutional Court of Colombia, Judgment C-053 of 16 February 1995; C-397 of 1998; C-326 of 2000; and C-288 of 2002.

<sup>25</sup> Note: Colombia’s MESICIC Third Round Evaluation Report lists, in addition to these countries, Argentina, El Salvador and Peru as having concluded bilateral extradition treaties. See: [www.oas.org/juridico/english/mesicic\\_III\\_rep\\_col.pdf](http://www.oas.org/juridico/english/mesicic_III_rep_col.pdf) (p.22).

be transmitted through the diplomatic channel or, exceptionally, through the consular channel or from government to government (article 495 CPC). In order for extradition to be granted, the Criminal Chamber of the Supreme Court (*Sala Penal de la Corte Suprema de Justicia*) must decide in favour of extradition (article 492 CPC), which will then be executed by the Ministry of Justice and Law (articles 491 and 501 CPC). Colombia specifies that a decision of the Supreme Court in favour of extradition remains subject to the discretion of the executive, which can decide to grant or deny the request, 'depending solely on its political convenience.' Extradition is not granted for political crimes (article 490 CPC). Under article 494, extradition can be granted for capital offences only if the sentence is commuted and there are guarantees that the individual will not be subject to torture or cruel, inhuman or degrading treatment, or punishments prohibited in the Constitution (exile, imprisonment or *confiscación* (see Section 3.4.2 on confiscation). Article 504 provides for the deferral of an extradition request if the requested individual is subject to proceedings in Colombia.

127. Under article 505 CPC, in cases where multiple extradition requests are received in relation to the same facts, Colombia will prefer the request of the State where the offence occurred. In cases in which multiple extradition requests are made in relation to different facts, but the same person, the State where the most serious offence is being investigated will be prioritised, taking into account the object of the offence and the potential punishment. If the different offences are equally serious, the first country to present the request will be prioritised.

128. In relation to extradition requests made by Colombia, law enforcement authorities must have evidence of the location of the requested Colombian citizen, an executable arrest warrant and an indictment or conviction for an offence with a minimum prison sentence of at least two years (article 512 CPC). Judges must issue extradition requests with an annexed copy of the ruling and other relevant documents, through the Ministry of Justice and the Ministry of Foreign Affairs (article 514 CPC).

### **10.3 Extradition of nationals**

129. Colombia will extradite its nationals for offences committed abroad only if the relevant offences are also criminalised under Colombian legislation, that is, if dual criminality is deemed to exist. Extradition is not available for acts committed before 17 December 1997, date of enactment of Legislative Act 01/1997 which repealed the Constitutional prohibition on the extradition of Colombian nationals by birth.<sup>26</sup> Article 494 CPC mandates the Colombian government to grant extradition under the conditions it deems appropriate and provided that the extradited person is not convicted for offences different to those contained in the extradition request, or subjected to sanctions beyond those that correspond to the offence in the extradition request.

### **10.4 Dual Criminality**

130. In accordance with article 493 CPC, dual criminality, or double incrimination, is necessary in order for Colombia to fulfil an extradition request. Colombia states that dual criminality is considered to exist if the conduct for which the extradition is sought falls within the definition set out in the article 433 PC transnational bribery offence, or the domestic bribery offences contained in articles 405, 406 and 407.

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<sup>26</sup> Confirmed by jurisprudence of the Chamber of Criminal Appeals of the Supreme Court, Filing No. 14038, 16 April 1998. Article 35 of the Colombian Constitution now authorises the extradition for offenses committed abroad of Colombians by birth.

## **11. Article 11: Responsible Authorities**

131. Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, MLA and extradition.

132. Colombia has designated the Ministry of Justice and Law as its official central authority for making and receiving requests under the OECD Anti-Bribery Convention. In relation to extradition requests, the Ministry of Foreign Affairs assesses whether the request complies with international standards, including whether the requesting country has signed a bilateral extradition agreement with Colombia, and the Ministry of Justice and Law evaluates if the documentation complies with the requirements set out in Colombian legislation. In civil matters, the PGO and the Ministry of Foreign Affairs are the responsible authorities: the PGO, for assessing the validity of the request, and the Ministry of Foreign Affairs for executing it.

## **B. IMPLEMENTATION OF THE 2009 ANTI-BRIBERY RECOMMENDATION**

133. In conformity with previous Phase 1 reviews by the Working Group on Bribery, this Phase 1 Report only addresses Section VIII of the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

### **1. Tax Deductibility**

134. Section VIII of the 2009 Recommendation urges the full and prompt implementation by Member countries of the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which recommends in particular ‘that Member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner.’

135. Colombia’s current tax legislation does not ‘explicitly disallow’ the deduction of bribe payments to foreign public officials. As it stands, the tax legislation therefore does not meet the standards under the 2009 Anti-Bribery and Tax Recommendations.

136. Colombia indicated that, as of the time of this review, draft legislation was being considered with a view to addressing the issues raised below. This draft legislation is not assessed in this evaluation. If passed, this new legislation will be the subject of assessment in Phase 2.

137. Colombia points to a general impossibility to deduct any expenses related to the commitment of illegal acts, resulting from the application of article 3 of the Commercial Code, to explanations on the nature of deductible expenses in article 107 of the Tax Code (TC), and to an Opinion of the National Tax and Customs Administration (DIAN) (Opinion 70322 of 1998). It is worth noting that this Opinion is not available online, which raises, at the very least, questions as to the awareness of taxpayers that bribes to foreign public officials are not deductible. This explanation fails to address the explicit non-tax deductibility of bribe payments. There is also concern that some of the provisions in the Colombian Tax Code may provide potential loopholes for the tax deductibility of bribes, including bribes paid to foreign

agents or intermediaries. This matter should be further considered in the course of Phase 2, in particular the application of articles 107, 121 and 122 TC.

138. Regarding the denial of tax deductibility in practice, tax deductions claimed via tax returns are considered *prima facie* valid, insofar as article 746 TC establishes a legal presumption that all facts stated in tax returns are truthful. Accordingly, the tax administration bears the burden of proof as to the non-deductibility of an expense claimed as deductible by a taxpayer in a tax return. Colombia further explains that the tax administration may, in rebutting the veracity of facts declared in tax returns, rely on evidence of any kind. If the evidence produced demonstrates that the expense is related to the commission of a criminal offence, the administration may reject such expense and provide for an official tax assessment, the rebuttal of which falls on the taxpayer. It is unclear whether, in practice, a court decision or the opening of criminal proceedings – or administrative proceedings in the case of legal persons – would be necessary to show evidence that the expense was related to the commission of a criminal offence. If a court decision or legal proceedings are a prerequisite to refusing deductibility, this standard would fall short of the one under the 2009 Tax Recommendation which requires that “denial of tax deductibility is not contingent on the opening of an investigation by the law enforcement authorities or of court proceedings.”

## EVALUATION OF COLOMBIA

### General Comments

139. The Working Group commends the Colombian authorities for their high level of co-operation and openness during the examination process. The Group appreciates the feedback provided by the authorities during the drafting of the report to ensure a comprehensive and effective basis for the examination.

140. Article 433 of the Colombian Penal Code criminalises the bribery of foreign public officials. The Working Group considers that, other than its framework for liability of legal persons, Colombia's legislation appears generally capable of conforming to the standards of the Convention. However, the Working Group has certain reservations, which are noted below.

### Specific issues

#### 1. *The offence of bribery of foreign public officials*

##### *Definition of foreign public official*

141. The article 433 PC foreign bribery offence defines a 'foreign public official' *inter alia* as any person with a specific position or exercising a specific function in or for a 'foreign country' including in a 'public entity' of that country. The Working Group is concerned that as 'foreign country' is not defined under Colombian legislation, the offence may not cover public officials of organised foreign areas or entities that do not qualify or are not recognised as States, in accordance with the Convention. In addition, the narrow legal definition in Colombia of State participation in companies might not cover the full range of 'public entities' defined in Commentary 14 to the Convention. These issues should therefore be followed up in Phase 2.

##### *In the conduct of international business*

142. Article 433 criminalises the payment of bribes in exchange for 'any action related to a financial or commercial transaction'. The Working Group is concerned at the possibility that some bribes paid 'in the conduct of international business' might fall outside the scope of financial or commercial transactions and therefore suggests following up on this issue in Phase 2.

#### 2. *Responsibility of legal persons*

##### *Liability of non-profit entities*

143. Under the Colombian corporate liability regime, only corporations (i.e. not including non-profit entities) are subject to monetary sanctions for acts of foreign bribery. The Working Group considers that this is a restrictive application of the Convention and recommends that Colombia take appropriate action to ensure that non-profit entities can also be held liable and subject to monetary sanctions for the offence of bribery of foreign public officials.

##### *Liability of the legal person for acts committed by lower level persons*

144. To hold legal person liable under Colombian law, it must be proven that that a legal representative or manager committed, consented or tolerated the commission of the foreign bribery

offence. Colombia asserts that this would include situations where the legal representative or manager fails to prevent a lower level person from bribing a foreign public official, or is negligent or wilfully blind. Since this is key to meeting the standards in the Convention and 2009 Anti-Bribery Recommendation, the Working Group will follow this up in Phase 2 to ensure that legal persons can be held liable for acts of foreign bribery, even where these are committed by lower level persons.

#### *Identification of the natural person to prosecute the legal person*

145. Under Colombian law, the proceedings differ depending on whether dissolution of the legal person or the imposition of monetary sanctions on the legal person is sought. In the former situation, prosecution and conviction of a natural person is necessary to be able to impose the sanction of suspension or dissolution of the legal person. The imposition of monetary sanctions on a legal person does not, under the law, require the investigation and prosecution of a natural person. However, to impose such sanctions, it must be established that the act of bribery was committed with the consent or tolerance of a legal representative or manager. It is unclear to what extent the corrupt act of the natural person will need to be demonstrated in practice in foreign bribery cases. Due to the absence of foreign bribery cases, and the practical difficulties in identifying conduct by one individual in a complex and decentralised corporate structure, the Working Group considers that this issue should be followed-up in Phase 2.

### **3. Sanctions**

#### *Effective, proportionate and dissuasive sanctions for legal persons*

146. Under the Colombian corporate liability regime, corporations are subject to monetary sanctions ranging from COP 283 350 000 and COP 1 133 400 000 (or between approximately USD 157 500 and 630 000, or EUR 130 000 and 520 000). The Working Group therefore recommends that Colombia take the necessary legislative steps to increase the level of financial penalties available against legal persons in foreign bribery cases to ensure that they are effective, proportionate and dissuasive.

### **4. Jurisdiction**

#### *Exercising jurisdiction over legal persons*

147. Provisions on corporate liability in Law 1474 do not address territorial or nationality jurisdiction over foreign bribery acts committed by legal persons. Colombia asserts that the jurisdictional provisions in Law 222 of 1995 would apply. The Working Group questions how Colombia will exercise jurisdiction in practice over legal persons in foreign bribery cases, and is concerned as to how this may affect enforcement. This matter will therefore be followed up to ensure that Colombia can exercise jurisdiction, in accordance with the requirements under the Convention.

### **5. Enforcement**

#### *Rules and principles regarding investigations and prosecutions*

148. The Colombian Constitution mandates the Prosecutor-General's Office to coordinate the investigation of Penal Code offences. The PGO is comprised of an Anti-Corruption Unit and several other sub-units that also participate in corruption cases. The Working Group notes some criticism of the circumstances surrounding the recent resignation of the Prosecutor-General, and will follow up on guarantees for the independence of this position, as well as the role of the various units in the PGO that also participate in corruption cases. Investigations and prosecutions are initiated based on the legality principle although article 324 of the Criminal Procedure Code provides for certain exceptions to this principle, including in bribery (*cohecho*) cases and in cases involving "serious risk or threat to the external

security of the State.” The Group is concerned at the potential for this exception to be applied in cases of bribery of foreign public officials and will monitor its application in practice.

#### **6. *Mutual Legal Assistance***

149. Colombia’s framework for providing mutual legal assistance is contingent upon the request conforming to the values and principles established in the Colombian Constitution (article 489 CPC). The values and principles set out in the Constitution are very general (life, work, justice, equality, peace, freedom, sovereignty and human dignity) and the Working Group will therefore follow up on whether they provide exceptions (a) to the requirement, in Article 9, to provide prompt and effective MLA and (b) to the prohibition of the considerations set out in Article 5 of the Convention. In addition, the Group will follow up on whether Colombia provides MLA in practice, in the context of criminal proceedings against legal persons.

#### **7. *Non-tax deductibility***

150. Colombia’s legislation does not explicitly disallow the deduction of bribe payments to foreign public officials. The Working Group therefore recommends that Colombia explicitly disallow, by law or any other binding means, the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner.