



IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



PHASE 3 REPORT **Colombia**

This Phase 3 Report on Colombia by the OECD Working Group on Bribery evaluates and makes recommendations on Colombia's implementation 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 12 December 2019.

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

Executive Summary	5
1. Introduction	7
1.1. The on-site visit	7
1.2. Summary of the monitoring steps leading to Phase 3	7
1.3. Outline of the report	8
1.4. Economic background	8
1.5. Colombia’s foreign bribery risks and approach to corruption	10
1.6. Cases involving the bribery of foreign public officials since Phase 2	10
2. Implementation and application by Colombia of the Convention and the 2009 Recommendations	13
2.1. The foreign bribery offence	13
(a) Would the offer that does not reach the public official constitute a bribe?	13
(b) Defences and exemptions	13
2.2. Responsibility of legal persons	14
(a) Legislation on liability of legal persons	14
(b) Institutional framework: the role of the Superintendency of Corporations in proceedings against legal persons.....	16
2.3. Sanctions	21
(a) Legislative provisions applicable to natural and legal persons	21
(b) Sanctions in practice	22
2.4. Confiscation of the bribe and the proceeds of bribery	23
2.5. Investigation and prosecution of the foreign bribery offence	24
(a) Institutional framework, resources, training and coordination	24
(b) Detection of foreign bribery cases by the PGO	27
(c) Opening and terminating foreign bribery cases	28
(d) Independence of criminal law enforcement authorities – Article 5 of the Convention	30
(e) A potential challenge to foreign bribery enforcement: investigative time limits.....	33
2.6. Money laundering	34
(a) Money laundering predicated on foreign bribery	35
(b) Detection of foreign bribery through the AML reporting framework	36
(c) Statistical information	39
2.7. Accounting requirements, external audit, and company compliance and ethics programmes ...	40
(a) The false accounting offence	40
(b) Detection of foreign bribery through external audit	42
(c) Anti-corruption internal controls, ethics and compliance	44
2.8. Tax measures for combating bribery	47
(a) Non-tax deductibility of bribes	47
(b) Detection and reporting of foreign bribery by tax officials	48
2.9. International cooperation	50
(a) Mutual legal assistance	51
(b) Extradition	53
2.10. Public awareness and the reporting of foreign bribery	54
(a) Awareness of the Convention and the offence of foreign bribery	54
(b) Reporting suspected acts of foreign bribery	56
(c) Whistleblowing and whistleblower protection	57

2.11. Public advantages	58
(a) Public procurement	58
(b) Export credits.....	59
(c) Official Development Assistance	61
3. Recommendations and issues for follow-up	63
3.1. Recommendations of the Working Group	63
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery	63
Recommendations for ensuring effective prevention, detection and reporting of foreign bribery	64
3.2. Follow-up by the Working Group.....	66
ANNEX 1 – List of Participants in the Phase 3 On-Site Visit to Colombia	68
ANNEX 2 – Phase 2 recommendations to Colombia (2015) and assessment of implementation by the WGB (2018)	69
ANNEX 3 – Abbreviations and Acronyms.....	74

Executive Summary

The Phase 3 report on Colombia by the OECD Working Group on Bribery evaluates and makes recommendations on Colombia's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific issues arising from changes in Colombia's legislative and institutional framework, as well as progress made since Colombia's Phase 2 evaluation in 2015. The report also focuses on key cross-country issues, particularly enforcement.

Overall, the Working Group welcomes the proactive steps taken by the Colombian authorities, in particular, the Superintendency of Corporations, to enforce the foreign bribery offence. Since the entry into force of corporate liability legislation in 2016, and despite limitations to its investigative capacities (relating for instance to mutual legal assistance (MLA) and access to financial intelligence held by certain government agencies), the Superintendency has already imposed sanctions against one company for foreign bribery, indicted two companies, and opened a significant number of preliminary investigations. Nevertheless, concerns remain about the confiscation of the proceeds of foreign bribery from legal persons in practice. To date, no natural person has been prosecuted or convicted for foreign bribery; three investigations are ongoing. The Working Group has high expectations that the good knowledge of foreign bribery and willingness to build relevant expertise demonstrated by the Prosecutor General's Office (PGO) team will soon translate into effective criminal enforcement of the foreign bribery offence. To enhance enforcement, the Working Group also considers that more effective and proactive cooperation between the Superintendency of Corporations and the PGO could be beneficial, and welcomes initial steps taken to address this. Further steps could also be taken to strengthen the independence of law enforcement to preserve them from political influence.

The report identifies other areas for improvement. In particular, the Working Group regrets the continued absence of whistleblower protection legislation in Colombia and notes that the situation for whistleblowers is perceived as hostile. This, along with the lack of visibility and accessibility of public channels for reporting foreign bribery, constitute significant obstacles to the detection of foreign bribery. The Working Group is also concerned with the decreased engagement of a certain number of key government agencies since Phase 2, resulting in limited commitment in terms of training, awareness-raising, and detection and reporting of foreign bribery. The Working Group nevertheless notes recent efforts to address some of these concerns and will follow up attentively on their implementation in practice. Gaps identified in Phase 2 in anti-money laundering obligations for the private sector also remain largely unaddressed, limiting Colombia's anti-money laundering regime's capacity to detect foreign bribery. Concerns also remain about the insufficient sanctions available in Colombia's false accounting framework, especially for legal persons.

The report also notes positive developments. In particular, Colombia's Superintendency of Corporations has been actively promoting the adoption and implementation of anti-corruption compliance programmes, and raising awareness of the foreign bribery offence, although such efforts should be more appropriately shared with other key government agencies, including the Secretariat of Transparency and Ministry of Foreign Affairs. With respect to international cooperation, Colombia has a sound framework for providing and seeking MLA and extradition, including in relation to foreign bribery. Colombia's financial intelligence unit has also taken recent steps to improve assessment of foreign bribery-related money laundering risks and handling of corruption-related suspicions. The Working Group also welcomes the introduction of a requirement for auditors (*revisores fiscales*) to report suspicions of a range of offences, including foreign bribery, and encourages Colombia to provide adequate protections and guidance in this respect. Finally, the setting up of a tax crime unit within the tax authority and the development of an agreement with the Superintendency of Corporations could contribute to improve information sharing between key enforcement authorities.

The report and its recommendations reflect the findings of experts from Chile and Luxembourg, and were adopted by the Working Group on 12 December 2019. It is based on legislation and other materials provided by Colombia and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its three-day on-site visit to Bogota on 18-20 June 2019, during which the team met with representatives of Colombia's public and private sectors, media and civil society. The Working Group invites Colombia to submit an oral report to the Working Group within one year on progress made to adopt whistleblower protection legislation (i.e. by December 2020), and a written follow-up report within two years on its implementation of all recommendations and follow-up issues (i.e. by December 2021).

1. Introduction

1.1. The on-site visit

1. On 18-20 June 2019, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group or WGB) visited Bogota as part of the Phase 3 evaluation of Colombia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention); the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation); and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from Chile and Luxembourg as well as members of the OECD Secretariat.¹ Before the on-site visit, Colombia responded to the Phase 3 general and supplementary questions, and provided relevant legislation and documents. The responses provided were exhaustive and thorough. During the on-site visit, the evaluation team met representatives of the Colombian public and private sectors, civil society, and the media.² The evaluation team expresses its appreciation to Colombia for its efforts in the evaluation process, and to all participants for their openness during the on-site visit discussions. During and following the on-site visit, Colombia made commendable efforts to provide additional information and the evaluation team wishes to express its appreciation of a very good co-operation with the authorities throughout the evaluation process.

1.2. Summary of the monitoring steps leading to Phase 3

3. Monitoring of implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review monitoring system.³ The monitoring process is subject to specific agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2), including meetings with non-government actors, and reports are systematically published. The evaluated country has no right to veto the final report and recommendations. All of the OECD WGB evaluation reports and recommendations are made public on the OECD website.

Previous WGB evaluations of Colombia

2018 [Phase 2 Written Follow-Up Report](#)

2015 [Phase 2](#)

2012 [Phase 1](#)

¹ **Chile** was represented by **Mr. Alejandro Litman**, Legal Advisor, Anti-Corruption Specialised Unit, Public Prosecutor's Office. **Luxembourg** was represented by **Ms. Cindy Coutinho**, Attachée, Criminal and Judicial Affairs Department, Ministry of Justice, and **Mr. Steve Schmitz**, Director, Police Judiciaire. The **OECD Secretariat** was represented by **Ms. France Chain**, Co-ordinator of the Phase 3 Evaluation of Colombia and Senior Legal Analyst; **Ms. Solène Philippe**, Legal Analyst; **Mr. Apostolos Zampounidis**, Legal Analyst; and **Ms. Silvia Rubio-Alvarez**, Junior Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

² See Annex 1 for the List of Participants in the Phase 3 on-site visit.

³ The description of each evaluation phase is available at:

www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm

4. The Working Group evaluated Colombia's level of implementation of its Phase 2 recommendations in 2018, in the context of Colombia's Phase 2 Written Follow-Up. As of February 2018, Colombia had fully implemented 28 of 50 recommendations (see Figure 1 and Annex 2).

Figure 1. Colombia's Implementation of its Phase 2 Recommendations
(WGB Assessment - Phase 2 Two-Year Written Follow-Up Report - 2018)



1.3. Outline of the report

5. This report is structured as follows. Following this Introduction, Part 2 examines Colombia's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to both Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part 3 sets out the Working Group's recommendations and issues for follow-up.

1.4. Economic background

6. Colombia is the 27th economy among Working Group members in terms of real gross domestic product (GDP of USD 330.23 billion), 37th in terms of exports (at current prices) and 27th in terms of outward foreign direct investment (FDI stock at current prices) in 2018⁴. Colombia faces a crucial moment in its history due to two major events that impact significantly its economy: the signature of the Peace Agreement in 2016 between the Government and the largest guerrilla group, which brought to a formal end one of the longest conflicts in recent history⁵, and the economic and social challenge of Venezuelan migration.⁶

7. After having been positioned as the third largest economy in Latin America in 2014⁷, and as the region's fastest growing economy, with a 6.4% growth in the first quarter of 2014,⁸ Colombia has suffered a decline in its economic growth. Between 2009 and 2014, Colombia's economy grew by an average of 4.3% – more than double than OECD average –⁹ but in 2015 growth slowed to 3.1%, driven by weakening investment. In 2016, growth slowed further.¹⁰ The political, economic and social turbulences in Colombia,¹¹ together with the fall of world market prices for oil and local lower production due to insurgent

⁴ World Development Indicators and UNCTADstat.

⁵ OECD Integrity Review of Colombia 2017

⁶ OECD Policy note on the migration in Colombia and its fiscal implications

⁷ International Business Times, March 2014, "[Colombia Surpasses Argentina As Latin America's Third-Largest Economy Due To Inflation, Currency Changes, GDP Growth](#)"

⁸ The Economist, August 2014, "[Latin American economies: Passing the baton](#)"

⁹ OECD ECONOMIC SURVEYS: Colombia 2017, available at: <http://www.oecd.org/economy/colombia-economic-snapshot/>.

¹⁰ *Idem*.

¹¹ Especiales SEMANA, June 2019, "[Las 100 empresas más grandes de Colombia \(June 2019\)](#)"

attacks on pipeline, negatively affected economic growth in 2017 to 2018. Colombia heavily depends on energy and mining exports, making it vulnerable to fluctuations in commodity prices.¹²

8. Nonetheless, in 2019, Colombian economy remains among the strongest in the region. Colombia is today Latin America's fourth biggest economy, trailing Brazil, Mexico and Argentina¹³ and is expected to further boost its economic growth. In 2019 and 2020, economic growth is expected to strengthen to around 3.5% as lower corporate taxes boost investment,¹⁴ reflecting Colombia's general improvement in economic, fiscal and social outlook.

9. Apart from the production of such primary goods as oil, coffee and mining, Colombia's economy has been favoured by the liberalisation of such sectors as retail trade, finance, insurance and real-estate.¹⁵ Colombia has opened its economy to the world, signing free-trade agreements with seven countries: the United States (its largest trading partner), Canada, Mexico, Chile, Cuba, Costa Rica, and Korea; and with regional trade organisations such as the Northern Triangle of Central America (Guatemala, Honduras, El Salvador), the CAN Andean Community, the CARICOM Caribbean Community, EFTA European Free Trade Association, MERCOSUR, the Pacific Allianz and the European Union¹⁶.

10. The National General Accounting Office recorded in March 2019 a total number of 1 760 State-Owned or State-controlled Enterprises (SOEs) in Colombia. According to figures from the Ministry of Commerce, Industry and Tourism, small and medium-sized enterprises (SMEs) represent 90% of Colombian companies, generate 80% of national employment and contribute 50% of the Gross Domestic Product¹⁷. The most recent Survey on SMEs (*Gran Encuesta Pyme*) (2006-2017), indicated i) low recent export orientation (about 70% of SMEs do not export); ii) low levels of access to financing for SMEs (less than 45%); iii) a strong correlation of the sector with the macroeconomic performance of the country; and iv) little capacity for innovation (30% -40% do not perform any improvement action)¹⁸.

11. In terms of exports, Colombia is a country endowed with abundant natural resources. It is Latin America's 4th largest oil producer and the world's 4th largest coal producer, 3rd largest coffee exporter, and 2nd largest cut flowers exporter.¹⁹ Colombia's economy depends heavily on the export of natural resources to countries that could be perceived as more prone to receiving bribes, according to the 2018 Transparency International (TI) Corruption Perception Index (CPI).²⁰

¹² CIA-The World Factbook, May 2019, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html>

¹³ International Monetary Fund, "[Report for selected Countries and Subjects](#)", World Economic Outlook Database, October 2018

¹⁴ OECD – Colombia Economic Snapshot 2019, available at: <http://www.oecd.org/economy/colombia-economic-snapshot/>; IMF Executive Board

¹⁵ DNP (2014) Plan Nacional de Desarrollo 2014-2018; Todos por un nuevo país. Paz, Equidad, Educación. Departamento Nacional de Planeación. República de Colombia, available at: <https://colaboracion.dnp.gov.co/CDT/Prensa/PND%202014-2018%20Bases%20Final.pdf>

¹⁶ Acuerdos vigentes TLC Colombia, available at: <http://www.tlc.gov.co/acuerdos/vigente>

¹⁷ La Republica, January 2019, "[Gobierno presentará ley para proteger a las Pyme, como sucedió en Chile](#)"

¹⁸ La Republica, April 2018, "[Resultados de la Gran Encuesta a las Microempresas 2018](#)"

¹⁹ CIA-The World Factbook, May 2019

²⁰ In this index, a country or territory's score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean).

12. In 2017, exports from South America totalled USD 551.4 billion, with Colombia in the top 10 of exporter countries in South America. Colombia ranks 5th, after Brazil, Chile, Argentina and Peru, with a total of USD 41.8 billion in exports²¹. In 2018, Colombia's exports registered USD 41.831 billion showing an increase of 10.4% relative to 2017, due to the rise in the export of fuels.²² Colombia's primary trading (export) partner is the US (USD 10.616 billion, 25.4% of the total external sales), followed by China (9.7%), Panamá (7.3%), Ecuador (4.4%), Turkey (4.0%), Mexico (3.9%) and Brazil (3.7%)²³.

13. Colombia's exports in 2018 were classified by the National Administrative Department of Statistics under the following groups: agriculture, livestock, hunting and forestry (6.5%), mining (48.9%) and industrial (44.3%) sectors. As part of the industrial sector, the main groups of products exported were elaboration foodstuff (10.6%), coking, manufacture of petroleum refining products and fuel mixing activity (9.3%), manufacture of chemical products (6.2%), and manufacture of metallurgical basic products (6.1%).

1.5. Colombia's foreign bribery risks and approach to corruption

14. Domestic corruption is one of Colombia's main national concerns. In 2018, Colombia occupied the 99th position in the ranking of the TI CPI, with a score of 36. In this context, national corruption issues – rather than the foreign bribery offence – have mobilised the attention of both the public and private sectors, as exemplified by recent investigations of high-profile corruption cases involving governmental and law enforcement authorities.

15. In relation to domestic bribery, the “Cartel de la toga” (the gown cartel) case, a recent corruption scandal involving politicians and members of the judiciary, received great attention in Colombia. The scandal exposed lawyers and magistrates who received bribes in exchange for influencing judicial decisions in the Supreme Court of Justice and in the Prosecutor General's Office (PGO – *Fiscalía General de la Nación*). The designated chief of Anti-Corruption in the PGO from 2016 up to when the scandal was disclosed in 2017, Luis Gustavo Moreno, was extradited to the United States, due to his alleged implication in a conspiracy to launder the assets of bribery and corruption purposes in Colombia.²⁴ The “demand” side of the Odebrecht corruption scandal in Colombia has also received great attention from the media (see also section 2.5(d) below).²⁵

1.6. Cases involving the bribery of foreign public officials since Phase 2

16. Since Phase 2 and the adoption of Law 1778 of 2016 which reformed Colombia's regime for liability of legal persons, Colombia reports the following foreign bribery enforcement actions, as of the time of this review:

- 1 foreign bribery case concluded by the Superintendency of Corporations in 2018 with sanctions against 1 legal person (*Water Utility Company case*);
- 2 ongoing foreign bribery investigations by both the Superintendency of Corporations and the PGO (*Water Utility Company and + Construction Company cases*) into natural and legal persons, with indictments against 2 legal persons. In the context of one of these

²¹ Daniel Workman - World's Top Exports – Top South America Export Countries – December 2018, available at: www.worldstopexports.com/top-south-american-export-countries/; WITD Colombia Exports by country and Region 2017, available at: wits.worldbank.org/CountryProfile/en/Country/COL/Year/2017/TradeFlow/Export

²² DANE – Boletín Técnico Exportaciones 2018 p. 6, available at:

www.dane.gov.co/files/investigaciones/boletines/exportaciones/bol_exp_dic18.pdf

²³ DANE (Departamento Administrativo Nacional de Estadística) – Boletín Técnico Exportaciones 2018, p. 10.

²⁴ See e.g. El Espectador, October 2017, “[Seis lecturas para entender el cartel de la toga](#)”; and La FM, January 2019, “[Luis Gustavo Moreno no está siendo castigado en EE.UU por lo que pasó en Colombia](#)”.

²⁵ See e.g. Reuters, May 2019, “[Colombia's attorney general resigns over court refusal to extradite FARC leader](#)”

investigations, 1 company has been sanctioned for obstruction to the investigation; the investigation into the alleged foreign bribery offence is still ongoing;

- 1 formal foreign bribery investigation by the PGO into natural persons (*Contracting Services Company* case);
- 31 preliminary foreign bribery investigations into legal persons, of which 11 have been closed due to lack of evidence, and 20 are still ongoing (data as of December 2019); and
- 1 foreign bribery investigation opened with indictment against a legal person, and archived due to insufficient evidence.

17. At the time of the on-site visit, the evaluation team was aware of three further alleged foreign bribery schemes involving Colombian companies and individuals, which had not been investigated by the Colombian authorities.²⁶ The Superintendency of Corporations explained that the liability of the legal persons could not be engaged in relation to these three cases as these allegations relate to facts predating Law 1778 of 2016. In December 2019, the PGO opened a formal investigation into one of these three allegations.

(i) Completed case

18. *Water Utility Company case:* A Colombian public water utility company, subsidiary of a Spanish public water utility company, was investigated by the Superintendency of Corporations (*Superintendencia de Sociedades*) for an alleged USD 11 000 in bribes paid to two public officials in Ecuador to expedite the payment of government contracts. This case was detected through media reports in 2017. The initial sanction against the company was USD 1.7 million, the publication of the decision in a national newspaper, on the company's website and its registration in the Companies' Registry. However, due to the company's collaboration, the final fine was reduced to USD 1.3 million in August 2018. No debarment was imposed. The investigation is still ongoing regarding natural persons, as well as regarding the company for bribery of foreign public officials in other neighbouring countries.

(ii) On-going foreign bribery investigations

19. *Water Utility Company case:* Investigations into individuals are being conducted by the PGO, which has requested mutual legal assistance (MLA) from a country not Party to the Convention. In parallel, the Superintendency of Corporations has extended preliminary investigations against the company for alleged foreign bribery committed in a country not Party to the Convention.

20. *Construction Company case:* a Colombian company dealing in raw materials supply is being investigated for allegedly bribing public officials in Venezuela through its Panamanian subsidiary in the context of a construction project for a baseball stadium. The Superintendency of Corporations opened a foreign bribery investigation into the company, under which it requested information from the company. The company refused to provide such information and was consequently sanctioned with a USD 50 000 fine for obstruction to the investigation in March 2018. The investigation by the Superintendency of Corporations and the PGO into the foreign bribery conduct is still ongoing.

21. As of October 2019, the Superintendency of Corporations reported another 19 ongoing foreign bribery investigations into legal persons, all at a very preliminary stage.

²⁶ Following the practice of prior country evaluations by the WGB, the allegations used in this evaluation come from the Matrix, a collection of foreign bribery allegations prepared by the OECD Secretariat using public sources, such as the media. The inclusion of allegations in the Matrix does not prejudge the issue of whether the allegations are, in fact, an offence under any applicable law.

22. *Contracting Services Company case:* a Colombian company allegedly obtained contracts for public lighting projects in El Salvador. On 3 December 2019, the PGO opened a formal investigation into individuals potentially involved in the bribery scheme.

(iii) Suspended foreign bribery investigations

23. *Airline Company case:* A Colombian airline company was investigated by the Superintendency of Corporations for alleged foreign bribery. Ultimately, the case was closed due to insufficient evidence. The investigation could be reopened if new evidence arises.

General commentary

The lead examiners welcome the proactive foreign bribery enforcement by Colombian authorities, especially the Superintendency of Corporations, reflected in the significant number of investigations opened. This is especially worthy of mention given the recent entry into force of Colombia's corporate liability legislation, just three years before this Phase 3. Nevertheless, as already noted in Phase 2 and further explained in this report, interrogations remain concerning the Superintendency's investigative capacities, in particular concerning access to certain financial intelligence and the requesting of MLA, and whether this may hinder its foreign bribery investigations; this should therefore be followed-up closely by the Working Group. To enhance enforcement against both natural and legal persons, the lead examiners also recommend that the PGO and the Superintendency of Corporations more effectively and proactively cooperate and exchange information in foreign bribery investigations.

The lead examiners are also concerned with the decreased engagement of a number of key government agencies. In Phase 2, Colombia had demonstrated significant commitment to combatting transnational bribery: important legislative amendments were adopted to respond to Phase 1 and Phase 2 recommendations, and a number of agencies were engaged in providing training and raising awareness on transnational bribery and committed to detecting and reporting foreign bribery. The limited mobilisation of these agencies on foreign bribery issues between the time of the Phase 2 follow-up and the Phase 3 on-site visit is therefore all the more noticeable and regrettable. The lead examiners also note the decreased engagement of Colombia with the WGB, which has notably led to its absence in all WGB meetings in 2018 and early 2019, and a breach in communications between the WGB and the Colombian enforcement authorities on enforcement matters. While combating domestic corruption is understandably a fundamental objective in Colombia, it should not be incompatible with efforts to address foreign bribery, notably taking account Colombia's international commitments, as well as the operations abroad of certain Colombian companies in high-risk sectors. The lead examiners welcome Colombia's intention, expressed following the Phase 3 on-site visit, to resume its involvement in the fight against transnational bribery: they note in particular several awareness-raising initiatives launched in December 2019 to engage key agencies and the private sector, as well as Colombia's resumed attendance at WGB meetings since the Phase 3 on-site visit in June 2019. They encourage Colombia to continue to move forward promptly and efficiently with these expressed intentions and initial steps.

2. Implementation and application by Colombia of the Convention and the 2009 Recommendations

2.1. The foreign bribery offence

24. Colombia's foreign bribery offence is included in article 433 of the Colombian Penal Code (PC). Article 433 was amended by Law 1778 of 2016, notably to respond to the Working Group Recommendations made in Phase 1 and 2.²⁷ On the occasion of Colombia's Phase 2 Written Follow-Up Report, the WGB considered amendments introduced by Law 1778 of 2016 and found that its Phase 2 recommendations were fully implemented; only recommendation 8d – concerning the offer of a bribe that does not reach the foreign public official – was converted to a follow-up. No changes have been made to Colombia's foreign bribery offence since the Phase 2 Written Follow-Up Report.

(a) Would the offer that does not reach the public official constitute a bribe?

25. With regard to the application of "offer", the WGB examined in Phase 1 and 2 whether an offer, which does not reach the public official, would constitute an offence. Although article 433 PC did not appear prima facie to pose any problems, the variance in views during the Phase 2 on-site visit on the application of the law²⁸ indicated that further clarification was needed. Colombia indicated at the time its intention of addressing the issue by way of an amendment to the law to clarify that "even if the offer does not reach the knowledge of the foreign public official". However, the amendments introduced by Law 1778 did not expressly clarify the issue but defined the foreign bribery offence in the same terms as domestic bribery. Accordingly, at the time of its Phase 2 Written Follow-Up, Colombia argued that Supreme Court jurisprudence relevant to domestic bribery would be applicable, which provides that bribery is a unilateral offence i.e. it is considered to be committed by giving or offering the bribe even if the public official does not accept it.²⁹ This led the Working Group to convert recommendation 8d to a follow-up.

26. Colombia maintained the same position in its responses to the Phase 3 Questionnaire and during the on-site visit, although no jurisprudence has been developed since the Phase 2 Written Follow-Up in respect of this element of the offence, whether in a domestic or foreign bribery context. In particular, there was consensus among judges, prosecutors and private sector lawyers that a mere offer would be sufficient to constitute an offence under article 433 PC. Concerning corporate liability for foreign bribery, the Superintendency of Corporations confirmed during the on-site visit that, in the Water Utility Company case, the offence was considered constituted without having proofs of the payments being received. However, in that case, there was an evidence of a promise to pay and thus an offence was committed under Colombian law.

(b) Defences and exemptions

27. There are no specific defences to foreign bribery under Colombia's legislation, nor an exception for small facilitation payments, which remain prohibited under Colombian law. There can however be benefits for collaboration for legal persons in the context of foreign bribery proceedings, which can lead

²⁷ In particular Phase 2 recommendations 8a, b and c.

²⁸ Phase 2 Report, para. 209.

²⁹ The Supreme Court of Justice, Chamber of Cassation, Judgment of 26 November 2003, Case No. 17674, Reporting Judge Mauro Solarte Portilla.

to the complete exoneration of the legal person (see section 2.2). Where natural persons are concerned, the principle of opportunity may also result in full exoneration of the individual (see section 2.5(c)(ii)).

Commentary

The lead examiners note that the application of article 433 PC remains to be tested in Colombian courts. For this reason, they recommend that the Working Group continue to follow-up on the application in practice of article 433 to ensure that an offer that does not reach the intended public official amounts to an offence under Colombian law.

2.2. Responsibility of legal persons

(a) Legislation on liability of legal persons

28. Law 1778 of 2016 sets out Colombia's regime for liability of legal persons for foreign bribery. In addition to the definition of the foreign bribery offence, the legal persons covered – including successor liability – and the sanctions that may be imposed (see section 2.3 below on sanctions), Law 1778 of 2016 sets out the administrative procedure for foreign bribery enforcement by the Superintendency of Corporations, and promotes the adoption of anti-corruption compliance programmes by companies.

29. At the time of Colombia's Phase 2 Written Follow-Up in 2018, the Working Group found that Colombia's regime for liability of legal persons was largely in line with the Convention. With the adoption of Law 1778 of 2016, Colombia had addressed the Working Group's concerns as expressed in Phase 1 and Phase 2.³⁰ The Working Group therefore considered the majority of Phase 2 recommendations relating to Colombia's corporate liability regime fully implemented, with the exception of recommendation 9e on benefits for collaboration, which it deemed only partially implemented. In addition, a follow-up issue remained concerning liability for acts by related legal persons.³¹

30. At the time of the Phase 3 on-site visit, Colombia indicated that a bill (Bill 117/18 Senate – 256/18 House of Representatives) was tabled to introduce criminal liability of legal persons, including for foreign briber. However, the bill did not make it to discussions in Parliament before the end of the session; as a result, it is no longer up for consideration. Colombian authorities did not indicate any intention to re-introduce criminal liability in a future session.

(i) Guidance on benefits for collaboration

31. The application of the benefits for collaboration may lead to the full or partial exoneration of the legal person. Phase 2 recommendation 9e therefore asked Colombia to clarify the application of benefits for collaboration in article 19 of Law 1778, to ensure they do not in practice prevent the effective enforcement of the foreign bribery offence against legal persons. The Working Group was concerned that if such benefits led to the full exoneration of the legal person in a foreign bribery context, there may be potential for misuse and a possible loophole in the implementation of the Convention. The Working Group therefore recommended that Colombia provide a framework for the application of this provision in a foreign bribery context, to ensure that benefits for collaboration do not, in effect, undermine the effective application of the foreign bribery offence.³²

32. To address these concerns Colombia clarified in article 19 of Law 1778 that full exoneration can be granted only when the legal person self-reports to the Superintendency prior to the commencement of an administrative action against it and exercises no obligations or rights arising from the contract obtained through a bribe. At the time of the Phase 2 Written Follow-Up, Colombia was working on guidance to

³⁰ See in particular Phase 2 recommendations 9a-e and 13b and d.

³¹ Phase 2 follow-up issue 14h.

³² Phase 2, para. 243 and recommendation 9e.

further address the way benefits for collaboration could be granted, which led the Working Group to conclude that recommendation 9e was partially implemented.

33. Resolution 200-000816 of 27 September of 2018 provides welcome guidance on the application of article 19 of Law 1778 of 2016. The Resolution sets forth the conditions, criteria, and procedure that the Superintendency of Corporations is expected to follow to grant the benefit of total or partial exoneration from sanctions. According to the Resolution, collaboration must be: (i) effective and timely, (ii) with useful information, of quality, relevant to the facts and subjects of the investigation, for the clarification of the facts, repression of illegal behaviour, determination of its modality, duration and effects, identification of the responsible, degree of participation, and benefit obtained. To this end, the information must allow to establish some of the following elements: (i) the identity of the individuals who performed the conduct; (ii) their connection with the infringing legal person; (iii) the time, place and circumstance; (iv) the foreign public servant involved; (v) the perquisites, benefits, or gains received, offered, or promised; and (vi) the purpose intended or obtained, in the terms of article 20.

34. The intention to promote self-reporting and collaboration in investigations through article 19 and Resolution 200-000816 is commendable. Indeed this can lead to enhanced detection and enforcement of foreign bribery. Nevertheless, some deficiencies in Resolution 200-000816 remain regarding self-reporting in particular. Under the current Resolution, self-reporting is available to legal persons at any time before the commencement of administrative action by the Superintendency. As currently phrased, this fails to address situations where, for instance, the legal person self-reports before the commencement of an administrative action by the Superintendency but, for instance, following media reports, or after the commencement of an investigation by another Colombian or foreign authority – a potentially frequent occurrence in transnational bribery cases. Colombia explains that, in practice, it would not accept self-reporting following media reports but concedes that the Resolution is unclear in this respect. In addition, Resolution 200-000816 does not provide for remedial action by the legal person following self-reporting, including efforts to implement an effective internal controls, ethics and compliance programme or improve an existing one, impose sanctions on wrongdoers etc.

(ii) Liability for acts by related legal persons

35. The Phase 2 report recommended that the Working Group follow up on whether a legal person can be held liable for foreign bribery committed by related legal persons, in line with Annex I.C. to the 2009 Anti-Bribery Recommendation.³³ Colombia contends that article 2 of Law 1778 specifically addresses this issue. However, this provision only refers to responsibility of parent companies (*matrices*) for their subsidiaries (*sus subordinadas*), which casts doubts as to whether the reverse situation would be covered (responsibility of a subsidiary where the parent company committed the bribe for the benefit of its subsidiary), as well as bribery committed by other related legal persons, such as for instance a member of the same industrial group, or a holding company. Colombia confirmed that there is no case law to date testing this issue.

Commentary

The lead examiners welcome the guidance provided by Resolution 200-000816 of 27 September of 2018 on application of article 19 of Law 1778 of 2016 on benefits for collaboration. The lead examiners acknowledge that promoting self-reporting and collaboration may indeed, under certain circumstances, lead to enhanced detection and enforcement of the foreign bribery offence. Nevertheless, they retain some concern that the overly broad acceptance of self-reporting under the current Resolution may affect foreign bribery enforcement if it were to lead to the complete exoneration of a legal person. They therefore recommend that Colombia clarify

³³ Phase 2 follow-up issue 14h.

that self-reporting (i) is possible only prior to the discovery of the misconduct, by providing original information to the Superintendency and (ii) should be accompanied by appropriate remedial action by the legal person. The lead examiners also recommend that the Working Group follow up on the practical application of the benefits of collaboration in foreign bribery cases to ensure that they result in effective, proportionate and dissuasive sanctions.

Furthermore, in the absence of sufficiently clear legal provisions and of case law, the lead examiners recommend that the Working Group continue to follow up the application of Law 1778 of 2016 to ensure that a legal person cannot avoid responsibility for foreign bribery by using related legal persons.

(b) Institutional framework: the role of the Superintendency of Corporations in proceedings against legal persons

36. Law 1778 of 2016 entrusts enforcement of the foreign bribery offence against legal persons exclusively to the Superintendency of Corporations. Since Phase 2, the Superintendency has been active in its efforts to investigate foreign bribery. It reports 34 foreign bribery investigations since 2016, of which:

- 1 concluded case with sanctions against the company (*Water Utility Company case*),
- 2 formal investigations with indictments (*2nd Water Utility Company case*, *Construction Company case*),
- 1 formal investigation terminated due to insufficient evidence (*Airline Company case*), and
- 31 preliminary investigations, of which 11 have been closed, and 20 are still ongoing. (See Introduction section 1.6 for the description of cases.)

Notwithstanding this high-level of activity, it is nevertheless regrettable that the Superintendency was unaware, prior to the Phase 3 on-site visit, of the work carried out in the context of the WGB on foreign bribery enforcement, in particular the WGB Matrix of foreign bribery cases. (See below section 2.3 on sanctions imposed against legal persons.)

37. In Phase 2, the Working Group made five recommendations to Colombia relating to the institutional framework for proceedings against legal persons. Three of these five recommendations were considered fully implemented at the time of Colombia's Written Follow-Up. However, recommendations 10c and 10e, relating respectively to investigative means and cooperation with other domestic agencies, remain only partially implemented.

(i) Investigative capacity of the Superintendency

38. As noted in Phase 2, Colombia's Constitution does not allow administrative authorities to "exercise investigative functions that would interfere with fundamental rights." For this reason, investigative tools available to the Superintendency of Corporations are more limited than those available to criminal law enforcement authorities, and do not include wire-tapping, surveillance etc. There is also no power to compel the production of information from financial institutions or anti-money laundering (AML) authorities. Overall, powers are weaker than those available to the PGO for investigating natural persons, which raised the Working Group's concern.³⁴ On the other hand, being an administrative authority, the Superintendency operates with more flexibility than criminal law enforcement agencies, which enables it to operate expeditiously. Furthermore, the Superintendency has developed intelligence gathering capacities focusing on foreign bribery. During the on-site visit, representatives explained that they carry out regular reviews of media sources, as well as information reported by companies in the context of their reporting obligations to the Superintendency. Coupled with other databases, the Superintendency carries out thorough risk-based analysis with a view to identifying companies, which could be the subject of administrative visits (*visitas administrativas*) under article 20 of Law 1778. Companies are not informed of these visits ahead of time. In the context of these visits, representatives and other relevant company

³⁴ Phase 2, para. 245 *et seq.* and recommendation 10c.

employees may be interviewed; the company may also be required to submit computers and mobile devices, although the Superintendency reports that this rarely occurs. The Superintendency representatives explained that this process has been the source of detection in at least two ongoing foreign bribery investigations.

39. As mentioned above, the Superintendency's investigative powers include being able to send information requests, conduct audits and question witnesses at companies under its jurisdiction. It does not have police powers for coercive measures, e.g. search and seizure. A company can refuse entry or the production of documents, thereby risking a fine for "reluctance to provide information". At the time of Colombia's Phase 2 Written Follow-Up, the Working Group considered as a positive step the increase in fine for refusing to provide information introduced by Law 1778, which brought it to the same level as the fine for the foreign bribery offence. However, the Working Group questioned whether such fines would ever be imposed in practice for mere obstruction. Since the Phase 2 Written Follow-Up, one company has been sanctioned with a fine of USD 50 000 for obstruction in the context of one of the ongoing formal foreign bribery investigations (*Construction Company case*).

40. In 2019, a constitutional challenge arose with respect to the Superintendency's power to compel the production of information from companies. In summary, the plaintiff argued that the surprise visits carried out by the Superintendency, as well as requests to enter premises, compel the production of information and documents, and review the content of IT equipment, should be declared unconstitutional. In its decision of 10 April 2019, the Constitutional Court confirmed the constitutionality of the existing Superintendency's powers, in particular as they relate to Law 1778 of 2016 on foreign bribery, as long as these visits are carried out in the context of investigating offences for which it has competence (i.e. no "fishing expeditions"). The Court also acknowledged that the compliance of the challenged provisions with the Constitution is based on the understanding that the competencies of the Superintendency do not include the execution of interceptions or searches or any other activities subject to judicial review.³⁵

41. *Accessing information covered by bank secrecy* – In Phase 2, the Working Group expressed concern about the impossibility for the Superintendency to request information from financial institutions, which could prove problematic in "following the money trail" in the context of foreign bribery investigations. Discussions at the on-site visit revealed differing, if not altogether opposing, views from the different stakeholders. Representatives of the Superintendency tend to take a broad approach to article 20 of Law 1778 and considers it a sufficient basis to request information from banks. Article 20 is couched in general terms and does not address explicitly the right of the Superintendency to access information protected by bank secrecy. It provides that the Superintendency may "request natural and legal persons the provision of data, reports, books and commercial papers that may be required for the clarification of the facts." The above-mentioned Constitutional Court decision of April 2019 did not address specifically the right of the Superintendency to request information protected by bank secrecy. Representatives of the Superintendency indicated having successfully made such requests on four occasions between June and November 2019 to two banks in the context of a foreign bribery investigation; they provided to the evaluation team the responses by these banks to confirm that the requested information was indeed provided promptly. On the other hand, representatives of the banking sector, the legal profession and the PGO expressed the view during the on-site visit that the Superintendency's powers do not allow it to request information covered by bank secrecy, and that any such information can only be obtained with a request approved by the judge of guarantees.

42. *International cooperation* – Finally, due to its administrative nature, the Superintendency is limited in its capacity to obtain international cooperation from foreign authorities. While it has undoubtedly made efforts to conclude memoranda of understanding with several jurisdictions, MLA is likely to remain

³⁵ Judgement C-165/19.

an obstacle to its enforcement capacity in cases where no parallel criminal investigation into a natural person is taking place in Colombia. This issue is explored in greater detail in section 2.9 on international cooperation.

(ii) Cooperation between the Superintendency and the PGO

43. Following recommendations by the Working Group in Phase 2, Law 1778 provides for enhanced cooperation between the Superintendency of Corporations and the PGO, including with respect to exchange of information on cases.³⁶ Agreements between the two bodies were signed in 2015, 2017, 2018 and 2019.³⁷

44. Although both the Superintendency and the PGO stated during the on-site visit that they cooperate fully, practice in concrete foreign bribery cases raises questions. Law 1778 of 2016 is silent on the moment when the Superintendency must report possible offences to the PGO.³⁸ Following the on-site visit, Colombia explained that such reports are made whenever the facts are known to the Superintendency, as required by article 38 of Law 1952 of January 2019, which obliges public servants to denounce crimes. However, in practice, the 30 preliminary investigations into potential foreign bribery opened by the Superintendency since Phase 2 (of which 11 have now been closed) do not appear to have been transmitted to the PGO. During the on-site visit, the PGO explained that the Superintendency only reports possible offences upon opening a formal investigation.

45. Similarly, in at least one criminal foreign bribery case opened by the PGO, the information was not immediately transmitted to the Superintendency, in part due to the fact that the criminal investigation concerns an offence for which there is no liability of legal persons, but also due to concerns of confidentiality. This situation is further addressed in section 2.5.(a)(iii) on cooperation between the PGO and the Superintendency.

46. To remedy the concerns raised in this report, Colombia took further action following the on-site visit. In November 2019, Colombia indicated its intention to establish bi-monthly committees to support the implementation of these agreements; the first of these meetings took place in late November 2019 and provided an opportunity to exchange information on foreign bribery cases. On 2 December 2019, the Protocol of Exchange of Information between the PGO and Superintendency formally established the Coordination and Monitoring Committee to bring together, on a bi-monthly basis, representatives from both authorities, with the objective to “conduct joint investigative and sanctioning actions” and facilitate the exchange of information on foreign bribery cases. The Protocol is also clear in stating that PGO will retain the discretion to share, or not, “reserved information” with the Superintendency, in accordance with the law. The PGO explained that they will make decisions on sharing information on a case by case basis.

(iii) Cooperation between the Superintendency and other government agencies

47. Similar to the above issue regarding access to information covered by bank secrecy is the capacity of the Superintendency to obtain financial information held by other Colombian agencies. This was already identified as a concern at the time of Phase 2:³⁹ Agencies such as the tax and money laundering authorities were under an obligation to report any suspected offence to the PGO, but not to the Superintendency. Nor did the Superintendency have the power to request information from the tax authorities. At the time of the

³⁶ Phase 2 recommendation 7f and Phase 2 Written Follow-Up.

³⁷ Only the first of these agreements was shared with the evaluation team.

³⁸ Article 18: “If the facts that are the subject matter of the sanctioning procedure may constitute a crime, disciplinary infringement or any other type of administrative infringement, the Superintendency of Corporations shall inform the Prosecutor General’s Office, the Attorney General’s Office or the relevant entity, and shall attach a copy of the relevant documents”.

³⁹ Phase 2 recommendation 10e.

Phase 2 Written Follow-Up, some progress had been achieved with respect to interaction with the tax administration, but not the financial intelligence unit (FIU); this has since been remedied to some degree.

48. *Cooperation with tax authorities* – With respect to cooperation between the Superintendency and the National Directorate for Taxes and Customs (DIAN), Law 1778 of 2016 (article 22) inserted an obligation on DIAN to “inform the Superintendency of Corporations all suspicious activity reports indicating alleged conducts of typical behaviours established as transnational bribery.” At the time of the Phase 2 Written Follow-Up, negotiations were underway between the two entities to set up a framework to create alerts and a system of collaboration to ensure the quick transfer of information. Discussions at the on-site visit indicate that this process has not yet been completed: a Working Group was set up in 2018 but did not yield any result. However, work on a Memorandum of Understanding (MoU) is reportedly underway, which would inter alia establish the type of information that may be exchanged and offer opportunities for joint working groups to develop and study transnational bribery-related typologies. In practice, DIAN indicates that three reports have been sent to the Superintendency of Corporations over the last three years for alleged offences of technical smuggling with a possible foreign bribery component (see section 2.8 on tax). Finally, while Law 1778 requires DIAN to transmit suspicious activity reports to the Superintendency, it is unclear whether the Superintendency would be able to request information from DIAN in the context of its foreign bribery investigations. DIAN representatives at the on-site visit were not aware of such a possibility.

49. *Cooperation with the FIU* – With respect to collaboration between the Superintendency of Corporations and the UIAF (*Unidad de Información y Análisis Financiero*), Colombia’s FIU, there has been limited progress since Phase 2. During the on-site visit, the Superintendency referred to a May 2019 MoU concluded with the UIAF which it purports will enhance information sharing capacities between the two bodies. Based on the assessment by the evaluation team, however, the information appears to flow essentially from the Superintendency to the UIAF: the Superintendency has indeed transmitted two suspicious activity reports with possible foreign bribery components to the UIAF (see section 2.6 below). For their part, UIAF representatives reported that they would only share general information with the Superintendency, such as statistical information or strategic analysis, but never any case-specific information. The MoU is also very clear in stating that any information provided by UIAF to the Superintendency cannot be used for the imposition of sanctions or as evidence in administrative investigations conducted by the Superintendency, nor can UIAF deliver “operation financial intelligence information whose recipient is the PGO”. Under this agreement, the UIAF may, for its part, request information from the Superintendency of Corporations. The Superintendency contends that although the language in the MoU limits the sharing of information, in practice, UIAF could provide information that may be useful as guidance in specific foreign bribery cases investigated by the Superintendency, and that time will show that these mechanisms can function in practice.

(iv) *Independence of the Superintendency*

50. The Superintendency of Corporations is an independent agency in charge of inspection, oversight and control of legal persons. Its decisions cannot be altered by the government, but only judicially reviewed. Nevertheless, at the time of Phase 2, the Working Group expressed concerns about the power of the President to remove the Superintendent, who in turn could remove his/her deputies, and recommended that Colombia strengthen safeguards for the independence of the Superintendency of Corporations (recommendation 10a).⁴⁰ Following Phase 2, Colombia passed Administrative Decree 1817, providing for (i) the appointment of Superintendents through a transparent process based on professional criteria; (ii) a non-renewable four year term to coincide with the Presidential mandate; and (iii) any removal of a Superintendent/deputy prior to the end of the term to be “duly reasoned”, albeit not made public. The

⁴⁰ Phase 2 paras. 248-250 and commentary after para. 266.

Working Group considered the recommendation to be fully implemented but maintained it as a follow-up issue.

51. During the Phase 3 on-site visits, civil society representatives and private sector lawyers were of the view that the independence of the Superintendencies (of Corporations, as well as others) were not sufficient under the law, since the Superintendents may be freely removed from their functions by the President. They acknowledged, however, efforts in recent years to give more independence to the Superintendencies, for instance by maintaining the same Superintendent for the four consecutive years of his/her mandate, but most notably by nominating the Superintendents based on their technical expertise rather than their political connections. While these efforts are welcome, it remains that the current trend towards granting greater independence to the Superintendencies is at the mercy of political changes, which could well go the other way, since these safeguards are not grounded in law. Thus, there is still room for improvement in Colombia to strengthen safeguards for the independence of the Superintendency of Corporations, with a view to avoiding any risk of improper influence by concerns of a political nature or factors prohibited under Article 5 of the Convention. Colombia considers that the safeguards currently in place are sufficient.

Commentary

The lead examiners welcome the proactive approach taken by the Superintendency of Corporations, which has already led to one concluded case against a legal person, and a significant number of ongoing – albeit preliminary – investigations. As is the regular Working Group’s process, these investigations will be closely followed-up in the context of its regular monitoring. Colombia’s representation to the WGB is also encouraged to share information regularly with the Superintendency of Corporations on work carried out by the WGB, in particular as it relates to foreign bribery enforcement.

The lead examiners welcome the recent confirmation by the Constitutional Court of the investigative powers of the Superintendency to conduct administrative visits for the purpose, in particular, of foreign bribery investigations. They also commend the Superintendency of Corporations for its efforts to enter into agreements with other Colombian agencies as well as with foreign authorities to facilitate the exchange of information in the context of foreign bribery investigations. They note that some questions remain about the capacity of the Superintendency to access information protected by bank secrecy, although they acknowledge that the Superintendency has successfully been able to obtain such information over recent months. Given the importance of accessing financial information and “following the money trail” in foreign bribery investigations, the lead examiners recommend that the Working Group follow up this issue to ensure that access to the necessary financial information is possible in the context of foreign bribery investigations concerning legal persons, even in the absence of prosecution of a natural person. The lead examiners are also concerned that the inability to obtain information held by certain government agencies such as Colombia’s FIU, or to obtain MLA, may constitute a significant obstacle to the effective enforcement of the foreign bribery offence against legal persons. They therefore recommend that Colombia establish appropriate mechanisms for cooperation and coordination between the Superintendency of Corporations and the UIAF to ensure all suspicions of foreign bribery can be effectively investigated by the Superintendency. The lead examiners also recommend that the Working Group follow up on the effectiveness in practice of the agreement concluded between the Superintendency of Corporations and DIAN to ensure it allows for the necessary sharing of information in relation to foreign bribery cases. (See commentary after section 2.9 in relation to MLA.)

Finally, regarding the independence of the Superintendency of Corporations, the lead examiners acknowledge recent efforts to de-politicise the nomination process for the Superintendent. Nevertheless, they consider that the current process for nomination and removal of the Superintendent may lead, at the very least, to a perception of insufficient

independence of the agency, and that further safeguards surrounding the nomination process are necessary. For this reason, the lead examiners recommend that the Working Group continue to follow up on the independence of the Superintendency of Corporations to ensure it cannot be subject to improper influence by concerns of a political nature and factors prohibited by Article 5 of the Convention.

2.3. Sanctions

(a) Legislative provisions applicable to natural and legal persons

52. In Phase 2, the Working Group was concerned that sanctions in Colombia for foreign bribery against natural and legal persons were not sufficiently effective, proportionate and dissuasive. By the time of the Phase 2 Written Follow-up Report in 2017, the Working Group considered that Colombia had taken all appropriate legislative measures to fully implement Phase 2 recommendations in this respect.⁴¹ The sanctions for foreign bribery are currently as follows:

	Offence	Imprisonment	Financial penalty	Additional sanctions
Natural persons	Foreign bribery (article 433 PC)	9 to 15 years	650 to 50 000 minimum legal monthly wages <i>(approx. USD 170 000 to 1.3 million)</i>	Deprivation of political rights and prohibition from exercising public functions for 9 to 15 years
				Debarment from public procurement contracting for up to 20 years <i>(article 8 of Law 80 of 1993 (as amended by Law 1474 of 2011))</i>
Legal persons	Foreign bribery (article 2 of Law 1778 of 2016)	N / A	Up to 200 000 minimum legal monthly wages <i>(approx. USD 52 million)</i>	Debarment from public procurement contracting for up to 20 years
				Prohibition of receiving government incentives or subsidies for 5 years
				Publication of sanctions to the media and on the legal entity's website for one year

53. In addition to improvements to the sanctions regime for foreign bribery, Law 1778 of 2016 introduced criteria for determining the sanctions imposed on a legal person convicted for foreign bribery (article 7). These include both mitigating and aggravating factors such as the economic benefit obtained or sought by the legal person, the capacity of the legal person to pay, the reiteration of the conduct, the admission of guilt, the use of an intermediary, the adoption and effectiveness of corporate ethics programmes, self-reporting and the degree of collaboration with the Superintendency of Corporations during the investigation. As discussed in section 2.2(a)(i) the application of the benefits of collaboration can lead to insufficiently effective, proportionate and dissuasive sanctions against legal persons. The *Water Utility Company* case, discussed below, illustrates this to some extent.

⁴¹ Phase 2 recommendations 13a, b and d, and Phase 2 Written Follow-Up Report.

(b) Sanctions in practice

54. As of the time of this review, there have not been any concluded foreign bribery cases against natural persons. Colombia was repeatedly asked for statistics on the sanctions imposed against natural persons in domestic bribery cases (articles 405 and 406 PC) but could not provide these because it does not maintain such statistics. For this reason, the evaluation team was not able to adequately assess the level of sanctions against natural persons in practice. According to publicly available data on the Anticorruption Observatory of the Secretariat for Transparency,⁴² between 2008 and 2018, criminal courts have convicted 3 398 natural persons for crimes against the public administration of which 49.7% were for domestic bribery. With regard to the effective, proportionate and dissuasive nature of the imposed sanctions, civil society representatives expressed the view during on-site discussions that there is lack of awareness of available sanctions for domestic bribery among judges, who tend to go only for imprisonment; they further noted that, in practice, prison sentences are often suspended.

55. With regard to concluded foreign bribery cases against legal persons, Colombia has imposed sanctions against one legal person in the *Water Utility Company* case. The sanctions included an initial financial penalty of USD 1.7 million, publication of the decision in national newspapers and on the company's website. The fine was calculated based on the economic benefit obtained or sought (the value of the contract being estimated at approx. USD 14 million), the capacity to pay, the non-reiteration of the conduct, the adoption of a corporate ethics programme and the provision of additional facts and evidence on the commission of the conduct. The Superintendency did not impose debarment from public procurement contracting or prohibition of receiving government incentives or subsidies due to the legal person's collaboration during the investigation. Following an appeal by the company, the financial penalty was reduced to USD 1.3 million.

56. The procedure for applying sanctions in the *Water Utility Company* case as well as the adequacy of the sanctions could raise some concerns. The Superintendency imposed the initial sanction of USD 1.7 million based on two charges for foreign bribery. After the appeal, the Superintendency dropped one of the charges and reduced the sanction to USD 1.3 million. In both instances, it was the Superintendency that decided on the liability of the company and the calculation of sanctions based on evidence that the same authority had gathered. Moreover, the level of the financial penalty imposed, both initially and after the appeal, is far below the maximum available penalty and lower than the benefit obtained or sought.

57. The Superintendency has made commendable efforts to disseminate the decision in the *Water Utility Company* in national media. The decision was also published on the company's website. Nevertheless, the level of awareness of the decision was quite low among participants in the on-site visit. Only two of the eight companies and only one of the four business organisations that attended the panels were aware of it. Further efforts by the Superintendency to raise awareness of the imposed sanctions in future foreign bribery cases could become an effective tool to increase deterrence.

Commentary

The lead examiners recommend that Colombia maintain detailed statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery against legal and natural persons, in order to allow for the assessment of whether they are sufficiently effective, proportionate and dissuasive.

With respect to natural persons, in the absence of concluded foreign bribery cases, or data and statistics on similar offences, the lead examiners recommend that the Working Group follow up, once foreign bribery cases have been concluded, on the effective, proportionate and dissuasive nature of sanctions imposed against natural persons.

With respect to legal persons, the lead examiners are concerned about the process for calculating and applying sanctions in Colombia's first foreign bribery case against a legal

⁴² <http://www.anticorruccion.gov.co/Paginas/index.aspx>.

person. They therefore recommend that Colombia ensure that sanctions imposed in practice against legal persons for foreign bribery are effective, proportionate and dissuasive.

Finally, the lead examiners recommend that the Working Group follow up on Colombia's efforts to raise awareness of sanctions imposed in foreign bribery cases.

2.4. Confiscation of the bribe and the proceeds of bribery

58. In Phase 2, the Working Group was concerned that confiscation⁴³ in Colombia could not be enforced in practice against legal persons. This was because the available procedures under which the bribe and proceeds of bribery may be seized and confiscated are either based on a criminal conviction (article 82 CPC (Criminal Procedure Code) “*comiso*” – only applicable to natural persons) or dependent on the initiation of a criminal investigation into a natural person (Law 793 of 2002 “*extinción de dominio*”). The Working Group therefore recommended that Colombia ensure that confiscation of the proceeds of foreign bribery could be enforced in practice against legal persons, even in the absence of proceedings against a natural person.⁴⁴

59. Colombia introduced changes to its confiscation framework in 2014 by Law 1708, and in 2017 by Law 1849. Law 1708 of 2014 (Asset Forfeiture Law) introduced confiscation *in rem* (asset forfeiture) independent from criminal procedure (article 18), which can affect any person, natural or legal, who claims to be the owner of the assets that are subject to forfeiture (article 30). In addition, the Asset Forfeiture Law expanded considerably the types of assets that may be subject to forfeiture, including indirect proceeds of crimes and assets of lawful origin that are used to conceal or are mixed with assets of illicit origin. The decision for asset forfeiture is taken by a judge (article 33) based on a request by the PGO (article 26). Despite these improvements, the Working Group found at the time of the Phase 2 Written Follow-up Report that confiscation against legal persons, through asset forfeiture, could still not be fully enforced in practice. This was because the Superintendency of Corporations has no powers to request asset forfeiture by a judge and the PGO, which has such powers, but no jurisdiction over legal persons or their assets.

60. The situation in Phase 3 remains unchanged. During the on-site visit, the Superintendency and the PGO confirmed that forfeiture of the bribe and proceeds of bribery in the hands of legal persons is, if not impossible, at least seriously complicated. As of the time of this review, there are no domestic or foreign bribery cases where asset forfeiture against a legal person has been enforced. In the *Water Utility Company* case, the PGO is in the process of seeking the forfeiture (*extinción de dominio*) of 82% of the shares of the company. While this is undoubtedly a positive step, as noted by the Working Group in Phase 2, this procedure is reliant on action by the PGO and, in this specific case, the PGO's application for asset forfeiture refers extensively to the criminal proceedings against several natural persons.⁴⁵

61. In addition, Colombia's confiscation framework does not provide for the imposition of monetary sanctions against legal persons with effect comparable to confiscation (Article 3.3 of the Convention). Colombia maintains that article 5 of Law 1778 enables the Superintendency to apply financial sanctions against legal persons up to 200 000 minimum monthly wages (USD 52 million). However, as with Phase 2, the Working Group considers that these sanctions have the nature of a fine, and not confiscation. As

⁴³ As explained in Colombia's Phase 1 and 2, confiscation, as understood under Article 3(3) of the Anti-Bribery Convention, is provided for in Colombian law under a different terminology, which encompasses two distinct concepts: “*comiso*” and “*extinción de dominio*”. Confiscation should not be confused with the Spanish “*confiscación*”, which is prohibited under Article 34 of Colombia's Constitution.

⁴⁴ Phase 2 recommendation 13c.

⁴⁵ The application for *extinción de dominio* in the *Water Utility Company* case was made in April 2019.

consistently noted by the Working Group in its country evaluations, significant fines as well as confiscation or forfeiture measures are both important elements of an effective sanctions regime for foreign bribery.

62. In the absence of concluded foreign bribery cases against natural persons, Colombia was asked to provide statistics on confiscation imposed against legal persons in domestic bribery cases. Colombia was not able to respond to the request because it does not maintain such statistics.

Commentary

The lead examiners are seriously concerned that confiscation against legal persons cannot be enforced in practice in the absence of prosecution or conviction of a natural person. They therefore reiterate Phase 2 recommendation 13c and recommend that Colombia introduce the necessary legislation to allow the Superintendency of Corporations to request the forfeiture of the bribe and proceeds of foreign bribery, or property the value of which corresponds to that of such proceeds, or introduce monetary sanctions of comparable effect against legal persons.

The lead examiners also recommend that Colombia maintain detailed statistics on the use of confiscation against natural and legal persons.

2.5. Investigation and prosecution of the foreign bribery offence

63. In Colombia, two types of investigations can be conducted in the context of a foreign bribery case. Criminal investigations are conducted by judicial police bodies against natural persons; administrative investigations are conducted by the Superintendency of Corporations against legal persons. This section focuses on criminal proceedings against natural persons. Proceedings against legal persons are discussed under section 2.2 above.

64. In Phase 2, the Working Group made a series of recommendations, and identified issues for follow-up, that mainly pertained to the prioritisation of foreign bribery; institutional arrangements, resources and expertise; detection; and considerations prohibited under Article 5 of the Convention in the conduct of proceedings related to foreign bribery. In Phase 3, Colombia has started to take steps to enforce the foreign bribery offence, and prosecutors met on-site demonstrated a good level of engagement in this respect, although the level of priority given to addressing the offence remains unclear. Cooperation between the PGO and the Superintendency has been facilitated but remains to be reinforced. Further clarity is also needed as concerns the safeguards protecting prosecutors against risks of political interference.

(a) Institutional framework, resources, training and coordination

(i) Institutional arrangements

65. As per article 114 CPC, the PGO is in charge of investigating and prosecuting persons suspected of having committed an offence. For this purpose, the PGO directs and coordinates the *judicial police functions*, which may be carried out by various bodies, including the National Police, which reports to the President of the Republic, and the *Cuerpo Técnico de Investigación* (Corps of Technical Investigators – CTI), which is a Directorate of the PGO. The PGO has undergone two in-depth restructuring in recent years: one in 2014 (as described in Phase 2), and one in 2017, both of which have directly impacted the allocation of responsibilities for investigating and prosecuting financial and economic crimes, including foreign bribery.

66. The current organisation of the PGO is based on Decree-Law 898 of 2017. As part of the structural changes introduced by this Decree, the responsibilities for the investigation and prosecution of economic crimes, including foreign bribery, were reallocated. All foreign bribery cases are allocated to the prosecutors of the *Dirección Especializada de Investigaciones Financieras* (Special Directorate for Financial Investigations – DEIF), which is part of the *Delegada para las Finanzas Criminales* (Department for Financial Crimes) of the PGO. The DEIF has national jurisdiction and is in charge of “modalities of

fraud that are committed through the financial system, in order to undermine criminal structures”. According to the authorities, in addition to foreign bribery, this covers a broad range of offences, including, for example, “facts that have characteristics of economic-financial criminality in the financial, insurance or stock market sector” (articles 300, 301, 302, 305, 310, 311, 314, 315, 316, 316A and 317 PC) involving USD 380 000 or more; competition crimes (article 410A PC); “investigations received from the Superintendency of Corporations in relation to events that involve possible illicit activities in the areas of its competence”, or in relation to articles 316 and 316A PC (“massive and habitual capture of money from the public” and “refusal to refund” proceeds from the former); and private corruption (articles 250A and 250B PC) involving USD 250 000 or more. Other types of corruption are normally dealt with by the *Dirección Especializada contra la Corrupción* (Specialised Directorate against Corruption), which belongs to the *Delegada contra la Criminalidad Organizada* (Department against Organised Crime). There seems to be some flexibility in allocating corruption cases within the PGO, depending on the nature of the specific skills needed: a major transnational bribery case (domestic, passive bribery) was for example reallocated in 2018 from the Specialised Directorate against Corruption to the DEIF to ensure that appropriate expertise (accounting in particular) was mobilised to investigate the sophisticated financial schemes relied on in this case.

67. In foreign bribery investigations, the prosecutors generally rely on the dedicated unit within the CTI (CTI/DEIF). However, they may also decide to solicit the National Police’s *Dirección de Investigación Criminal e Interpol* (Criminal Investigations and Interpol Directorate – DIJIN) support, depending on the specific needs of the case. DIJIN’s expertise and resources in asset forfeiture are deemed particularly helpful by the PGO. During the on-site visit, the representative of DIJIN’s Anti-Corruption Division (*Área Investigativa Anticorrupción*) confirmed that, while its main counterpart in the PGO is the Specialised Directorate against Corruption of the PGO, it has experience working with DEIF and CTI/DEIF, but not in a foreign bribery case. Both judicial police bodies have the full range of investigative powers.⁴⁶

(ii) Resources and expertise

68. In total, 114 officials work for DEIF and CTI/DEIF, including 8 prosecutors, 5 assistant prosecutors, 42 analysts with a range of expertise, including in MLA, accounting and finance, and 41 investigators with full judicial police powers. DIJIN has 160 criminal investigators. Its Anti-Corruption Division consists of 50 officials, including 12 investigators, eight accountants and four forensic accountants.

69. In Phase 2, the Working Group decided to follow up on whether the PGO’s workload was adequately managed so that it did not hinder its capacity to efficiently investigate foreign bribery, including in the preliminary stages of investigations.⁴⁷ During the Phase 3 on-site visit, judges expressed the view that the PGO lacks resources and that individual prosecutors face an excessive workload, which may result in delays in the conduct of criminal proceedings. However, the authorities appear to have taken several concrete steps in order to improve this situation. Although comparisons are made difficult by the fact that the allocation of foreign bribery cases changed in 2018, as did the scope of offences covered by the team to which this responsibility was assigned, overall, human resources allocated to the team in charge of investigating and prosecuting foreign bribery have increased since Phase 2. Recruitments have particularly focused on reinforcing accounting expertise in the CTI/DEIF. Further recruitments of analysts with accounting, legal, and engineering expertise are being conducted. The PGO considers that, with these

⁴⁶ See Phase 2, para. 155 *et seq.* on the range of investigative tools available in criminal investigations.

⁴⁷ Phase 2 follow-up issue 14c.

additional recruitments, DEIF's and CTI/DEIF's resources will be sufficient to fulfil their duties. In addition, the introduction of monetary thresholds for the referral of cases to DEIF⁴⁸ has helped limit the teams' workload and allowed it to focus its efforts on larger cases.

70. Nevertheless more efforts could be achieved to enhance foreign bribery expertise. Although the authorities explained that they have started to build specific expertise in foreign bribery cases, based on the information available, very limited training was provided to DEIF and CTI/DEIF personnel on the specificities of the foreign bribery offence. In December 2019, Colombia indicated that specific training focusing on the detection and investigation of foreign bribery, relying on typologies, took place on 5 December 2019, and was attended by eight persons from the PGO together with staff from the Superintendency of Corporations.

71. Investigators and prosecutors have received significant training on the use of relevant investigative techniques, including with support from other Parties to the Convention. As in Phase 2, prosecutors are satisfied with the broad range of investigative techniques, as described under articles 213-250 CPC, that are available in complex cases, including foreign bribery.

(iii) Cooperation and coordination between the PGO and the Superintendency of Corporations

72. In response to recommendations made by the Working Group in Phase 2, Law 1778 of 2016 provided for enhanced cooperation between the PGO and Superintendency of Corporations.⁴⁹ In particular, under article 28, the PGO must now inform the Superintendency of any criminal notice provisionally labelled as transnational bribery, immediately after the initiation of the preliminary investigation. Under article 27, the PGO and the Superintendency must further have agreements on information exchange and coordination of investigations; three such agreements have been signed between the two bodies. While, during the on-site visit, both the PGO and the Superintendency reported that they cooperate and coordinate their work in a constructive manner, in practice, both institutions appear to have a restrictive interpretation of their obligation to exchange information (see section 2.2.(b)(ii) above). In at least one investigation carried out by the PGO that may have a foreign bribery component, the PGO did not immediately inform the Superintendency of the criminal notice. The PGO explained that the investigation focuses on money laundering, which is not covered by the Law or the agreement between both institutions and is likely not a corporate offence (see section 2.6 below), and for which the Superintendency has no competence. More importantly, the PGO considered that providing such information could have compromised its investigation, since, under the Superintendency's procedures, it may be shared with the companies it investigates. While, technically, article 26 of Law 1778 of 2016 authorises the PGO to refuse to provide information to the Superintendency when this may affect a criminal investigation⁵⁰, this restriction applies to cases where the Superintendency requests such information, not to cases where the PGO has an obligation to report immediately all *noticias criminales* provisionally qualified as transnational bribery under article 28. Similarly, the transmission of information from the Superintendency to the PGO does not appear to systematically take place in the context of the Superintendency's own foreign bribery investigations. Following the on-site visit, in November and December 2019, the PGO and Superintendency took some additional steps to facilitate exchange of information between the two bodies in specific cases (see section 2.2.(b)(ii) above).

⁴⁸ Note that no such threshold has been introduced for the referral of foreign bribery cases to DEIF. All foreign bribery cases are referred to DEIF.

⁴⁹ Phase 2 recommendation 7f and Phase 2 Written Follow-Up.

⁵⁰ Article 26: "When the Superintendency needs information about an ongoing criminal investigation or requires the transfer of undiscovered material evidence or physical evidence to the administrative sanctioning action, it shall request it from the Prosecutor General's Office. In each case, the Prosecutor General's Office will evaluate the request and determine what information or evidentiary material elements or physical evidence it can deliver, without affecting the criminal investigation or jeopardizing its success."

Commentary

In light of the several recent reorganisations within the PGO, the lead examiners recommend that the Working Group follow up on the PGO's capacity to ensure clear and stable arrangements for the allocation of foreign bribery cases, so that expertise can be built in relation to such cases.

The lead examiners further note the concrete steps taken by the authorities to ensure consistency between the resources allocated to the DEIF and its workload. They welcome initial steps taken in December 2019 to provide training, but noting this is a very recent occurrence, recommend that specific training continue to be provided on a regular basis to investigators and prosecutors on the specificities of the foreign bribery offence.

Finally, the lead examiners welcome Law 1778 of 2016 which has reinforced cooperation between the PGO and the Superintendency of Corporations by providing a legal basis for the former to give information. However, in spite of Law 1778 of 2016 and the agreements signed between these two bodies, they note the absence of information sharing, both from the PGO to the Superintendency, and from the Superintendency to the PGO, in a number of foreign bribery cases. Additional steps taken by Colombia in late 2019 to address these deficiencies are a welcome first step. Nevertheless, and while recognising the importance of ensuring the confidentiality of investigations, the lead examiners recommend that Colombia take further steps to ensure that the PGO and the Superintendency of Corporations are effectively and proactively exchanging information in foreign bribery cases.

(b) Detection of foreign bribery cases by the PGO

73. At the time of Phase 2, Colombia had not detected foreign bribery cases and, in general, did not keep statistics on sources of detection of crimes, which made it difficult to assess the priority given, and efforts made, to detect foreign bribery.

74. In Phase 3, Colombia reported enforcement efforts in relation to foreign bribery. Information available on ongoing foreign bribery cases are summarised in section 1.6 of the Introduction. In total, three ongoing investigations by the PGO are related to foreign bribery misconduct. One was detected on the basis of an MLA request from a Party to the OECD Anti-Bribery Convention; the detection source is unspecified in the second case; and the third case was brought to the attention of Colombia via the WGB Matrix of foreign bribery cases. A criminal investigation focusing on money laundering, with a possible foreign bribery component, is also ongoing. It was detected by the Superintendency of Corporations and reported to the PGO through Colombia's FIU (see section 2.6).

75. The PGO did not provide information on potential proactive steps taken to detect foreign bribery. Cooperation with liaison officers from foreign embassies in Colombia was highlighted during the on-site visit, but this does not appear to have triggered the opening of any foreign bribery investigation. Of further concern, open source allegations collected by the Working Group in its Matrix of foreign bribery cases have not been exploited by the enforcement authorities, who were not aware of this potential source of detection until the on-site visit. This may be a result of the decreased engagement of Colombia in the Working Group's activities, which has lacked continuity in 2018 and 2019.

76. More generally, the priority given to detecting and investigating foreign bribery, both at the operational and policy level, is unclear. Representatives of the PGO met on-site appeared very knowledgeable of the offence and highlighted their willingness to build expertise on foreign bribery. However, as already noted, training and proactive detection steps specifically related to foreign bribery have been very limited. While combating corruption is very high on the national policy agenda, the

emphasis is placed on domestic forms of corruption.⁵¹ The ramifications of the Odebrecht case in Colombia have given significant visibility to transnational bribery in the country, but essentially to its domestic component. For several actors interviewed during the on-site visit, foreign bribery appeared to be understood as bribery of Colombian officials by foreign companies, with limited interest or concern for active bribery of foreign public officials by Colombian companies. In general, as analysed in further detail in other sections of this report, efforts aimed at raising awareness of the offence and encouraging reporting have been limited, except for initiatives taken by the Superintendency of Corporations.

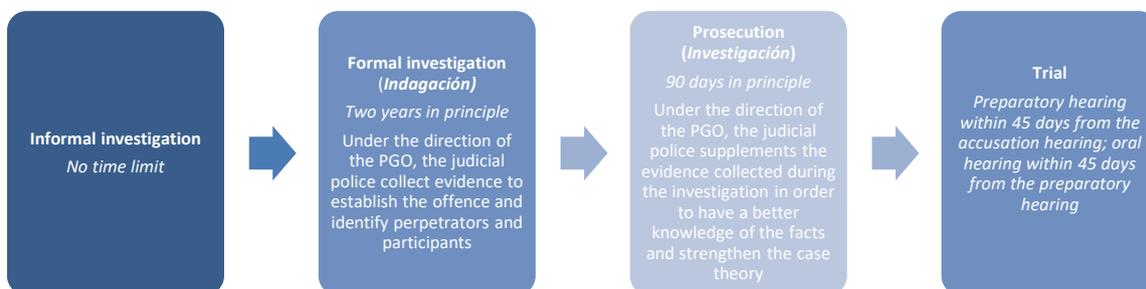
Commentary

The lead examiners welcome initial steps taken by Colombia to enforce the foreign bribery offence since Phase 2. However, while prosecutors met on-site appeared very knowledgeable of the offence, and expressed their willingness to build relevant expertise and obtain enforcement results in relation to foreign bribery, the lead examiners note that no policy or strategic document, or training initiative, appear to place any emphasis on foreign bribery enforcement. The lead examiners also regret the decreased engagement of Colombia in the WGB, which has led notably to a break in communications with Colombian enforcement authorities on potential foreign bribery cases and with respect to the WGB matrix of foreign bribery cases in particular. In light of the above, the lead examiners recommend that Colombia adequately address foreign bribery issues in its anti-corruption policy and strategy, as well as in training addressed to law enforcement. They further recommend that Colombia make the necessary arrangements to regularly attend the WGB meetings and to share the necessary information with its law enforcement authorities.

(c) Opening and terminating foreign bribery cases

77. The CPC governs criminal proceedings in Colombia, which, in the case of foreign bribery, can be schematised as follows:

Figure 2. Criminal procedure in Colombia, as applicable to the foreign bribery offence



(i) The rule: mandatory prosecution

78. Pursuant to Article 250 of the Constitution, the PGO has the obligation to prosecute and investigate facts that present the characteristics of a crime and that are brought to its attention, “provided that there are sufficient grounds and factual circumstances to indicate the possible existence of the crime.” Article 322 CPC sets out the legality principle, which requires the PGO to prosecute the authors of, and participants in, facts that present the characteristics of a punishable conduct, except when the principle of opportunity applies. Article 66 CPC also provides that the PGO must investigate and prosecute facts that present the characteristics of a punishable conduct, *ex officio* or brought to the PGO’s knowledge in any way, except when exceptions set out in the Constitution or the CPC apply. The PGO explained that an

⁵¹ For example, the National Development Plan 2018-2022 or the National Strategy for the Comprehensive Anti-Corruption Public Policy do not specifically refer to foreign bribery.

informal investigation may be conducted before a formal investigation is opened. Informal investigations have no time limits, and aim to assess whether facts “present the characteristics of a crime”, which is the condition for opening a formal investigation. A formal investigation is always opened on the basis of a criminal complaint by a citizen, but formal investigations are not automatically opened where the source of information is an investigative initiative by the judicial police. As with reports from the UIAF or the Superintendency of Corporations, possible cases detected by the judicial police trigger a formal investigation when the evidentiary threshold established in Article 250 of the Constitution is met. The decision not to open a formal investigation is not formalised or subject to review.

79. Once opened, a formal investigation (*indagación*) may have three outcomes: prosecution (*investigación*); extinction (article 77 CPC) (declared by the PGO by means of a succinctly reasoned order and approved by a judge (article 331 on preclusion), which has the authority of *res judicata* (for reasons of death, statute of limitations, principle of opportunity, amnesty, oblation, expiration of the complaint, withdrawal or other cases provided by law); or filing (article 79 CPC) when the prosecutor finds that there is no factual motive or circumstance that allow the characterisation of an offence. In the latter case, the investigation can be reopened if new evidence is found. It is unclear whether and how decisions of provisional filing can be reviewed and challenged, and by whom. Prosecutions (*investigaciones*) may have two outcomes: referral to trial (*acusación*) or extinction (article 77 CPC).

(ii) The exception: the principle of opportunity

80. In Phase 2, the Working Group gave particular consideration to the principle of opportunity and how it could apply in foreign bribery cases involving natural persons. As per article 324 CPC, it may result in the suspension or the extinction of investigations and prosecutions on a series of alternative grounds, including situations where the victim has been compensated or the defendant is extradited to another country for the same conduct. The Working Group considered that satisfactory safeguards were in place for the application of the principle on the ground that the criminal procedure represents a risk or a serious threat to the foreign security of the State (article 324(8) CPC).⁵²

81. Concerns were however raised about the possibility of applying the principle of opportunity where the person having committed or participated in bribery filed the formal complaint having initiated the investigation, provided useful evidence, served as prosecution witness and amended the harm done (article 324(18) CPC). In Phase 2, the Working Group noted that there was no certainty as to whether the provision could apply to foreign bribery. It was concerned that, if applied in foreign bribery cases, the complete exoneration of the briber may altogether result in the termination of the proceedings in Colombia, contrary to Parties commitment under the Anti-Bribery Convention. The Working Group thus recommended that Colombia take appropriate steps, such as by adopting guidance, to ensure that the application of article 324(18) does not hinder the enforcement of the foreign bribery offence (recommendation 7h). At the time of the Phase 2 written follow-up, the Working Group concluded that the recommendation was not implemented.

82. During the Phase 3 on-site visit, the PGO confirmed that article 324(18) CPC may apply to foreign bribery. While the law remains unchanged, in Phase 3, Prosecutor General Resolution 4155 of December 2016 provides more detail on the procedure for applying the principle of opportunity, which it recalls should meet the criteria of appropriateness, necessity and strict proportionality. The application of the principle on the grounds defined by, *inter alia*, article 324(8) and (18), is the exclusive competence of the Prosecutor General, which cannot be delegated. It is a discretionary power of the PGO, which may choose not to apply it even when the conditions for its adoption are met. The process can be initiated by the prosecutor in charge of the case or the Prosecutor General (except when she/he is involved in the case)

⁵² See Phase 2 report, paragraphs 167-169.

by sending the request to the Group of Mechanisms for Early Termination and Restorative Justice (*Grupo de Mecanismos de Terminación Anticipada y Justicia Restaurativa*) within the PGO, which is in charge of advising the Prosecutor General in approving or rejecting the request. If the Prosecutor General, as advised by this Group, supports the request, then the prosecutor carries out the legality control before the guarantee control judge.

83. During the on-site visit, the PGO explained that, under article 324(18), the objective of the principle of opportunity is to support criminal proceedings. It can only be used if it generates benefits for the investigation or prosecution of other persons or other offences. The PGO explained that a prosecutor cannot use article 324(18) in a manner that would result in the complete termination of the case in Colombia, even if the offender's collaboration could support a foreign country's proceedings (for example, in the case of transnational bribery, if this would be helpful in the country of the foreign official having received the bribe). Prosecutors firmly indicated that a prosecutor would never request the application of the principle if it were to result in the complete termination of proceedings in Colombia, and, in any event, a judge would never accept a request that would have such consequences. Based on the explanation of the PGO, the application of article 324(18) to acts of foreign bribery cannot result in the complete termination of criminal proceedings in Colombia.

84. However, since, in general, the provision offers the possibility to drop foreign bribery charges in order to support proceedings related to other offenders or offences, it remains to be demonstrated that, in practice, the principle of opportunity does not hinder the effectiveness of the enforcement of the foreign bribery offences as case law develops. While the application of the principle of opportunity has increased very significantly since Phase 2⁵³, Colombia indicates that the application of the principle on the grounds of article 324(18) remains limited, and has never been used in a foreign bribery case.

85. During the on-site, judges highlighted the practical difficulties in assessing the adequacy of the collaboration provided by the natural person. Guidelines on the application of the principle of opportunity were published in 2017 on the PGO's website and circulated to prosecutors, and training provided to regional and national prosecutors accordingly. However, guidance contained in the ten-page document remains general in nature, and does not address potential practical difficulties such as assessing the benefits of collaboration under article 324(18). In written comments, Colombia noted that such guidance is unnecessary since the respective benefits for prosecution and for the offenders are very specific in each case. Importantly, in practice, benefits are assessed by various authorities, at different stages, since decisions to apply the principle of opportunity are closely reviewed both by the Group of Mechanisms for Early Termination and Restorative Justice and the guarantee control judge, and followed up by the office of the Prosecutor General after one year, although the legal basis for this ex-post monitoring is unclear.

Commentary

The lead examiners welcome the explanations provided by the Colombian authorities in relation to the application of the principle of opportunity, and in particular article 324(18) CPC. Nevertheless, given the increased application of this principle, they recommend that the Working Group follow up on whether the provision does not hinder the enforcement of the foreign bribery offence.

(d) Independence of criminal law enforcement authorities – Article 5 of the Convention

86. In Phase 2, the Working Group welcomed the existing framework aimed at preserving the independence of law enforcement in Colombia. The essential legal safeguards and institutional framework appeared to be in line with Article 5 of the OECD Anti-Bribery Convention. However, this framework

⁵³ The number of decisions to apply the principle of opportunity has increased from 14 in 2012 to 13 237 in 2018, Colombian authorities explained that this is a consequence of the delegation of this competence from the Prosecutor General to prosecutors themselves in Resolution 4155.

remained to be tested in a foreign bribery investigation, and there were concerns about undue influence on the judicial police, prosecutors and judges. The Working Group decided to follow up on whether foreign bribery cases are preserved from undue influence and large-scale corruption in the judiciary, as well as efforts made by Colombia to reform the judiciary and address its independence (follow-up issue 14b). This included following up on the issue of independence of individual prosecutors and investigators.⁵⁴

87. In its Phase 2 written follow-up report, Colombia reported that, as part of the PGO's Strategic Plan 2016-2020, the "Bolsillos de Cristal" plan prioritised investigating and prosecuting corruption in a number of critical sectors, including the judicial police, the PGO and the judiciary. In Phase 3, the authorities reported that 256 members of the judicial branch and 122 PGO officials were being investigated under the "Bolsillos de Cristal" plan. Some of these officials had been working on a major transnational bribery case (domestic, passive bribery for Colombia), but no information is available about the possible involvement of officials working on foreign bribery cases. The National Police's website provides significant information on efforts to address internal corruption (based on annual "Anti-corruption Plans"), including internal audits and "corruption risk maps". During the on-site visit, the representatives of DIJIN and PGO highlighted the measures taken to prevent and detect wrongdoings by their personnel with judicial police powers, including the satisfactory level of remuneration for prosecutors, and the regular use of the polygraph for assessing officials. Since Phase 2, the media has continued to report on corruption in the police forces, in particular in the National Police, including efforts to investigate these allegations.⁵⁵ Judges met on-site noted that, while that there are many cases of corruption within the judicial police, only a few reach trial, and additional efforts are needed from the authorities.

88. *Independence of the prosecution* – During the Phase 3 on-site visit, two interconnected issues were highlighted by several panellists, including civil society representatives and judges, as making individual prosecutors vulnerable to political interference in practice: the risks of politicisation of the appointment of the Prosecutor General, associated with the risks of direct intervention from the Prosecutor General in individual proceedings, including to terminate them.

89. The procedure for the appointment of the Prosecutor General has long been the subject of intense debate in Colombia. Pursuant to Article 249 of the Constitution, the Supreme Court selects the Prosecutor General among three candidates proposed by the President of the Republic. Candidates must meet a set of requirements defined by Article 232 of the Constitution.⁵⁶ As noted in Phase 2, the nomination of the Prosecutor General was controversial in 2009.⁵⁷ The Supreme Court refused to select any of the candidates proposed by the President on the ground that none was suitable for the position. The President refused to amend his proposal for almost a year, during which the appointment process was blocked. The selection of a new Prosecutor General in 2010 was then cancelled on the basis that the Supreme Court adopted this decision in the absence of a quorum. In this context, Decree 450 of 2016 aimed to establish a more transparent procedure, with the organisation of a public call for applications; the publication of the list of

⁵⁴ See Phase 2 report, commentaries following paras 139 and 148.

⁵⁵ See for example: RCN Radio, October 2018 ("[Investigan a policías por casos de corrupción en operativos contra juegos de azar](#)"); El Colombiano, November 2018 ("[2.488 policías investigados en el país ¿qué delitos cometen?](#)"); and El Tiempo, June 2019 ("[80 policías detenidos este año por corrupción](#)").

⁵⁶ Be Colombian by birth and a practicing citizen; be a lawyer; Not have been convicted by a judicial sentence of deprivation of liberty, except for political crime or negligence; and have held, for 15 years, positions in the Judicial Branch or in the Public Ministry, or to have exercised, with good credit, for the same time, the profession of lawyer or university chair in legal disciplines related to the area of the magistracy to be practiced in officially recognized establishments.

⁵⁷ Phase 2, para. 130.

candidates from which the President of the Republic must select the three persons to be proposed to the Supreme Court; and the establishment of an official channel for citizens to comment on listed candidates.

90. During the on-site visit, some representatives from civil society and the legal profession noted that the appointment procedure still does not establish sufficient safeguards for transparency and against politicisation. Shortly after the on-site visit, Decree 450 was repealed by Decree 1163 of July 2019, mainly on the ground that proposing candidates is an exclusive and autonomous competence of the President of the Republic, that should be exercised according to a strict interpretation of the Constitution and the Law on the Administration of Justice, and that cannot be modified by regulatory means. Decree 1163 is being challenged by an NGO before the Council of State of Colombia. This NGO criticised the repealing of Decree 450 as being legally flawed and harming citizen's respect for Colombia's judicial system.⁵⁸

91. In addition, one Prosecutor General was strongly criticised by civil society for his alleged conflict of interests in the Odebrecht case.⁵⁹ The Colombian authorities explained that progress accomplished in the Odebrecht case illustrates the effectiveness of safeguards in place to protect the independence of prosecutors. Indeed, in line with the rules under Colombian law to manage conflicts of interest, the incumbent recused himself from the case and decisions to be taken by the Prosecutor General (e.g. application of the principle of opportunity) were made by the office of the Deputy Prosecutor General. In the final stages of the investigations, the Office of the Prosecutor General requested the Supreme Court to appoint an independent ad hoc prosecutor to fulfil the Prosecutor General's functions in the Odebrecht case.

92. During the on-site visit, judges expressed the view that, in practice, individual prosecutors may be subject to political influence, through their hierarchical subordination to the Prosecutor General, given the modalities for her/his appointment. According to them, this influence may be exerted through two main mechanisms: technical-legal committees that may intervene in specific cases, and where the office of the Prosecutor General may be represented; and the Prosecutor General's competence to allocate or reallocate cases to individual prosecutors. These two elements were the subject of much discussion between the prosecutors and the evaluation team during the on-site visit.

93. *Technical-legal committees* are regulated by Decree-Law 16 of 2014, partially modified by Decree-Law 898 of 2017, and Prosecutor General Resolution 1053 of 2017. Their purpose is to "review situations and cases and take actions to ensure the effective and efficient conduct of criminal investigations" (Decree-Law 16 of 2014). They are defined as a mechanism to support, follow up, assess and monitor criminal investigations in order to ensure the unity of management and hierarchy within the PGO, without prejudice to the autonomy and independence of prosecutors (Resolution 1053). Committees may be convened by the Prosecutor General, the Deputy Prosecutor General or Directors of the PGO at any stage of the case. The prosecutor in charge of a case may ask the relevant Director to convene a committee, but the Director retains discretion over such decision. Participants are designated by the convener. The Prosecutor General and the Deputy Prosecutor General may designate an official to participate in any committee. A committee convened by the Prosecutor General or the Deputy Prosecutor General can overrule a decision by a previous committee. Decisions are taken by a simple majority vote. The prosecutor is always invited to take part in the committee but his/her presence is not required for a quorum to be met. Where the prosecutor in charge of the case disagrees with the committee's decision, he/she may submit a written request to reconsider the case to the Prosecutor General. A different committee is then set up and called to vote on the matter, informed by the prosecutor's request and supporting arguments. The second committee's decision cannot be appealed. A written report is always prepared after any committee meeting. It is however confidential and cannot in any case be disclosed to a third party. The PGO indicates that any type of decision may be taken by committees, including applying the principle of

⁵⁸ Dejusticia, 20 August 2019, <https://www.dejusticia.org/demandamos-el-decreto-con-el-que-ivan-duque-modifico-el-procedimiento-para-conformar-la-terna-para-fiscal/>

⁵⁹ See e.g. Reuters, May 2019, "[Colombia's attorney general resigns over court refusal to extradite FARC leader](#)"

opportunity, or referring a person to trial. Colombia explained that, while committees do decide to apply the principle of opportunity or file a case (a decision that is not reviewed or subject to appeal), they most frequently decide to prosecute, refer to trial or request the collection of additional evidence. Colombia explained that a committee has never decided to request the extinction of an investigation. However, associated with risks of politicisation of the office of the Prosecutor General, the possibility for her/him to convene and select the members of committees, and intervene in specific cases, even against the opinion of the prosecutor in charge of the case, may make criminal proceedings vulnerable to political interference.

94. *Allocation of cases to individual prosecutors.* Cases are automatically and randomly assigned to specific prosecutors, taking into account objective criteria, including the principle of speciality (article 3 of Prosecutor General Resolution 985 of 2018). A case may however “freely” be assigned or reassigned by the Prosecutor General by means of a reasoned order, which may not be appealed (article 253(1) of the Constitution, article 116(2) of Law 906 of 2004, article 115(4) of Law 600 of 2000, article 4(3) and (4) of Decree-Law 16 of 2014, partially modified by Decree-Law 898 of 2017). The PGO provided two substantiated examples showing that cases had been reallocated by the Prosecutor General to a specific unit but not to a specific prosecutor. Article 12 of Resolution 985 provides that such assignments or reassignments are exceptional, and may be decided at the initiative of the Prosecutor General, or the subjects of the proceedings, parties or participants in the proceedings or those who demonstrate a legitimate interest in the proceedings. The motives for which the Prosecutor General can make such decision on his/her own initiative are not clearly defined: Law 600 provides that such allocation should pursue the “efficiency of proceedings”; Decree-Law 16 provides that it should be done where the service or the seriousness or the complexity of the case so require; but the Constitution or Resolution 985 do not set out more explicit criteria. Associated with the risks of politicisation of the office of the Prosecutor General, the absence of clear criteria for, and possibility to appeal, decisions to assign cases to specific prosecutors, could be problematic in sensitive foreign bribery cases which could potentially impact high-level officials or important Colombian companies, relations with another state, or the national economic interest.

Commentary

In light of enduring concerns since Phase 2, the lead examiners recommend that the Working Group continue to follow up on whether foreign bribery cases are preserved from undue influence and large-scale corruption in the judicial police.

The lead examiners further recommend that Colombia put in place clear safeguards against any political interference in foreign bribery cases, with a view to ensuring that foreign bribery investigations and prosecutions cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal person involved.

(e) A potential challenge to foreign bribery enforcement: investigative time limits

95. In Phase 2, the Working Group noted that the statute of limitations for criminal investigations into foreign bribery (a minimum of 15 years; 20 years if initiated or committed abroad) appeared appropriate. However, it decided to follow up on whether procedural timelines might constitute a challenge for law enforcement authorities in the context of such investigations (follow-up issue 14d).

96. Pursuant to article 175 CPC, formal investigations into foreign bribery should not exceed two years (four years in case the investigation involves at least three persons or three offences). The authorities explain that, as clarified by the Constitutional Court (decision D-9067), the time limit was introduced to encourage the PGO to conduct investigations in a diligent and effective manner. The Constitutional Court mentions that, when the time limit is reached, the investigation “may” be filed, if the conditions set out in

article 79 CPC are met,⁶⁰ and should resume where new evidence is found, pursuant to article 79 CPC. During the on-site visit, the PGO explained that, in practice, the case is not automatically filed. When the prosecutor expects more information to be collected (for example, if MLA from a foreign country is pending), the investigation would not be filed. The PGO also explained that the person being prosecuted cannot retroactively challenge a decision to extend the investigation beyond the legal limit. The time limit as set out in article 175 CPC does not seem to constitute a possible obstacle to the conduct of investigations into complex crimes, since it can be extended according to the needs of the investigation.

97. The time limit for prosecution appears more problematic. Pursuant to article 175, the PGO has 90 days to complete prosecution (120 days when there are several offences or at least three accused, in the case of foreign bribery).⁶¹ In Phase 2, some observers considered that such a short time period to complete prosecution was challenging to meet in complex crimes, and acted as a disincentive to pursue such crimes. The Working Group thus decided to follow up on the procedural timelines (follow-up issue 14d). During the Phase 3 on-site visit, judges considered that this time limit is too short for prosecuting complex cases. They however suggested that difficulties are more fundamentally related to the lack of resources of prosecutors. The PGO noted that the time limit may be missed for reasons that are independent from prosecutors, such as, for example, the unavailability of lawyers.

98. This suggests that the issue of the time limit for prosecution should be considered as part of a broader discussion on delays in the administration of criminal justice. In that respect, the PGO noted that criminal proceedings are also slowed down by the courts' own case management difficulties.

Commentary

The lead examiners recommend that the Working Group follow up on the existence of delays in the administration of criminal justice in complex cases, and in particular on the appropriateness of time limits for prosecution, resources allocated to prosecutors and the level of expertise of judges, to ensure this does not impede the effective enforcement of the foreign bribery and related offences.

2.6. Money laundering

99. In Phase 2, while commending Colombia for its continued efforts in developing a comprehensive anti-money laundering (AML) regime, the Working Group identified areas for further improvements, most of which had not been fully addressed at the time of the Phase 2 Written Follow-Up. The relevant Phase 2 recommendations and issues for follow-up are discussed in detail in this section.

100. At the time of this Phase 3 evaluation, efforts to enforce money laundering predicated on foreign bribery remain to be demonstrated. Despite some further improvements to Colombia's general legal and institutional AML framework since 2017, and recent positive steps aimed to address, more specifically, corruption-related money laundering cases, the potential for the AML regime to detect foreign bribery remains insufficiently exploited.

⁶⁰ If “no factual reasons or circumstances that would permit its characterisation as a criminal offence, or indicate its possible existence as such.”

⁶¹ Note that, pursuant to article 294 CPC, if the prosecutor has not formulated an *acusación* or asked for the extinction of the case within the time limit, the prosecutor's superior designates a new prosecutor. A new time limit of 60 days (90 days when there are several offences or at least three accused, in the case of foreign bribery). If this second term expires before a decision is made, the accused is immediately released, and the defence or the Public Minister will request the preclusion from the trial judge.

101. Colombia is a member of the Financial Action Task Force of Latin America (GAFILAT). This section takes into consideration the findings of the country's latest GAFILAT evaluation report (November 2018).⁶²

(a) Money laundering predicated on foreign bribery

(i) Legislation

102. The money laundering offence remains unchanged since Phase 2.⁶³ Money laundering is criminalised pursuant to article 323 PC and covers, *inter alia*, the laundering of property that originates directly or indirectly from foreign bribery. Money laundering is sanctioned with a prison sentence of 10 to 30 years and a fine of 1 000 to 50 000 legal minimum monthly wages (approximately USD 800 000 to 4 million). These penalties are the highest in the Colombian legal system.

103. Legal persons cannot be held liable for committing money laundering. Under the Financial Action Task Force's Recommendations the responsibility of legal persons for money laundering is a requirement. In its report on Colombia, GAFILAT noted that the absence of liability for money laundering represents an important loophole given the frequent use of legal persons in money laundering schemes. Although corporate liability for money laundering per se does not exist in Colombia, article 7 of Law 1778 of 2016 provides that the concealment of the offence, benefits or bribes is an aggravating factor when determining sanctions for foreign bribery, although this provision has never been applied in practice. The Superintendency of Corporations or the Superintendency of Finance may also impose sanctions on the legal persons they supervise for breaches of AML preventive measures; while no company has been sanctioned for such a breach, 2 companies are under indictment for inadequate measures, and since 2016, 90 companies have been sanctioned by the Superintendency of Corporations for failure to complete the AML survey.

(ii) Institutional framework and enforcement

104. Since Phase 2, the institutional arrangements for investigations and prosecutions into money laundering have changed. Decree-law 898 of 2017 established a separate AML unit within the PGO: the *Dirección Especializada contra el Lavado de Activos* (Specialised Directorate against Money Laundering - DECLA) within the Department for Financial Crimes (which also comprises DEIF). Previously, money laundering cases were assigned to the unit in charge of drug trafficking cases, reflecting the drug trafficking-focused nature of Colombia's money laundering enforcement efforts. The setting up of DECLA is expected to promote investigations into money laundering predicated on a broader set of proceeds-generating offences, including corruption. Steps have also been taken to ensure that cases disseminated by the UIAF (*Unidad de Información y Análisis Financiero*, Colombia's financial intelligence unit) are given adequate priority. All disseminations are directed to DECLA, which must report on steps taken to the Office of the Prosecutor General within three months. Since 2018, larger money laundering cases (e.g. money laundering cases related to organised armed groups or drug trafficking organisations, as detected or prioritised by the Specialized Directorate against Drug Trafficking, or reported by the UIAF) must be referred to the prosecutors of this unit. Investigations may be carried out by a special unit against money laundering within the CTI, which comprises 65 investigators, and/or DIJIN within the National Police. According to GAFILAT, the authorities have the necessary expertise and tools to carry out money laundering investigations, including in relation to complex cases, although the PGO would benefit from

⁶² <http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/GAFILAT-MER-Colombia.pdf>

⁶³ Phase 2, para. 68 *et seq.*

more resources to be able to pursue a greater number of complex money laundering cases, in line with the country's risk profile.

105. The allocation of cases and the division of tasks between DECLA and DEIF, and the prioritisation of offences to be pursued in cases of money laundering with a foreign bribery component, raise a number of questions. There have been no prosecutions or convictions for foreign bribery-related money laundering as of the time of this review. However, one of the ongoing investigations related to foreign bribery misconduct (see section 1.6(b) of the introduction) has an important money laundering component, which is the focus of the PGO. In addition, another ongoing money laundering investigation, triggered by a suspicious activities reports (SAR) from the Superintendency disseminated by the UIAF to the PGO may have a foreign bribery component. During the on-site visit, the authorities explained that another SAR from the Superintendency was being analysed by the UIAF, in cooperation with the PGO, and may result in the opening of a further investigation into money laundering with a possible foreign bribery component.

106. At the time of the on-site visit, the two ongoing investigations into money laundering with a possible foreign bribery component were led by prosecutors from DECLA, with the support of investigators and analysts from DEIF/CTI. Colombia explains that this was because, at the time these proceedings started, there were no criteria for the allocation of cases, suggesting that new cases with a foreign bribery component would now be led by prosecutors from DEIF. In any event, DECLA had the lead on these ongoing cases, and the authorities indicated that they both focused on the money laundering component. It was therefore unclear whether the foreign bribery component of both cases was actually pursued and to what extent it was. In December 2019, the PGO indicated that these cases are now focused on the foreign bribery element. In any case, prioritising money laundering has some advantages – first, in Colombia, sanctions available for money laundering are higher than for foreign bribery; second, from a resource management perspective, the PGO, having more experience dealing with money laundering, may pursue this offence more efficiently. However, prioritising money laundering over foreign bribery also has downsides. Persons responsible for foreign bribery – including legal persons – may not be liable for money laundering and escape investigations. In addition, such cases may offer opportunities for Colombia to acquire experience in enforcing the foreign bribery offence, i.e. build specific operational skills and test the offence in courts. This is essential as there has never been a criminal conviction for foreign bribery in Colombia since the ratification of the OECD Anti-Bribery Convention.

Commentary

The lead examiners note that efforts to enforce foreign bribery-related money laundering remain to be demonstrated. No prosecutions or sanctions for foreign bribery-related money laundering have yet occurred. The lead examiners recommend that the Working Group follow up on the PGO's handling of foreign bribery components in larger money laundering cases, in particular to assess whether all persons responsible for foreign bribery are effectively prosecuted.

(b) Detection of foreign bribery through the AML reporting framework

(i) Role of the UIAF

107. As described in Phase 2, the UIAF is a special administrative unit within the Ministry of Finance and Public Credit, and acts as the national centre for receiving and analysing SARs and other relevant information related to money laundering and predicate offences. The UIAF may disseminate, spontaneously or upon request, the results of its analysis to relevant authorities, including to the PGO, but only in a limited manner to the Superintendency of Corporations (see section 2.2). The UIAF has 65 officials, which represents an increase since Phase 2 (49 officials at the time), but which the UIAF considers remains insufficient.

108. In general, the UIAF does not appear to give any particular priority to detecting foreign bribery, which one of its representatives noted during the on-site visit only represents “one of the 66 offences they investigate”. Recent encouraging developments can however be noted. The specific risks of foreign and domestic bribery-related risks in Colombia were analysed as part of the 2019 National Money Laundering Risk Assessment, although the findings were not communicated by Colombia. The UIAF’s staff received training on transnational bribery by UNODC and the Superintendency of Corporations. The UIAF is developing training guidelines for the private sector on detecting bribery-related money laundering, including foreign bribery.

109. In general, GAFILAT considered that Colombia’s access to and use of financial intelligence was substantially effective and, in particular, that the UIAF provides useful analysis to law enforcement upon request. However, GAFILAT also noted that the UIAF demonstrated a lack of proactivity in detection, and that its detection capacity was hindered by the poor quality of SARs (see below). GAFILAT’s report also highlighted the need for the PGO to provide feedback to the UIAF to enhance its capacity to proactively initiate and build robust cases. Recent positive developments can also be noted in this respect. In general, in 2018 the UIAF adopted new technological tools and methodologies, combining analytical techniques (macro-sector analysis, machine learning and network analysis complex) and big data in order to enhance its detection and analytical capacity. During the on-site visit, the PGO explained that it has given feedback to the UIAF, recommending that it concentrate on better focused, larger and more structured cases, and take more time to build cases. Colombia explains that the UIAF and the PGO have also been holding very frequent coordination meetings, as well as maintaining “bidirectional work tables” to strengthen coordination and improve the usefulness of the information disseminated by the UIAF. More specifically, in May 2017, the PGO and the UIAF signed an agreement to enhance collaboration in corruption-related ML investigations.

110. The UIAF has recently spontaneously disseminated 17 cases of corruption to the PGO (September 2018 to September 2019). On the basis of two SARs from the Superintendency of Corporations, the UIAF successfully disseminated one case with a possible foreign bribery component to the PGO, which triggered a large investigation, and is finalising work on another possible foreign bribery case. In both instances, the UIAF’s cases were built in close cooperation with the PGO. These are welcome signs and the UIAF should be encouraged to continue to engage proactively with the PGO to build solid cases for disseminations, in particular where indications of foreign bribery have been identified.

(ii) AML reporting obligations

111. The scope of professions covered by AML obligations has been marginally extended since Phase 2. The Working Group then recommended that suspicious activities reporting obligations be extended to lawyers.⁶⁴ The Phase 2 follow-up noted that the Basic Legal Circular of the Superintendency of Corporations was modified in March 2017⁶⁵ to extend AML obligations to companies deriving the majority of their profit from legal or accounting services with an annual gross income of 30,000 legal monthly minimum wages (approximately USD 7.5 million). In practice, authorities report that 10 to 12 law firms

⁶⁴ Phase 2 recommendation 6d.

⁶⁵ Basic Legal Circular of the Superintendency of Corporations as modified by External Circular of 21 March 2017, available at:

https://www.supersociedades.gov.co/nuestra_entidad/normatividad/normatividad_circulares/Circular%20Basica%20Juridica.PDF

and 9 accounting firms meet this criterion⁶⁶. The Phase 2 follow-up thus deemed the recommendation partially implemented. In its response to the Phase 3 questionnaire, the Superintendency reported that it planned to further modify the Basic Legal Circular to expand the scope of non-financial entities covered by AML obligations, with a view to include all professionals with an annual gross income of 3 000 monthly minimum wages (approximately USD 750 000), which may not fully meet the FATF Standards. In light of the high money laundering risks faced by lawyers, auditors and accountants, it is regrettable that this recommendation remains only partially implemented.

112. In addition, and despite some improvements, the AML obligations⁶⁷ continue to present serious gaps. In Phase 2, the Working Group recommended that Colombia align obligations related to politically exposed persons (PEPs) with international standards.⁶⁸ In the Phase 2 follow-up, the recommendation was found to be partially implemented: although Colombia had issued a decree defining PEPs,⁶⁹ this definition and the related obligations remained incomplete. No further steps have been taken since Phase 2. Current gaps in customer due diligence measures, including in relation to PEPs and beneficial ownership, are detailed in the 2018 GAFILAT report. At the time of the adoption of this report, Colombia informed that a law and a decree aimed at addressing the issues identified in both areas are being adopted. The WGB could not assess the precise content of these measures.

(iii) Detection by reporting entities in practice

113. Since Phase 2, efforts have been made to enhance the private sector's capacity to detect and report suspicious activities. However, the private sector's reporting practice continues to present weaknesses, and remains inexistent in relation to foreign bribery.

114. In general, the number of SARs received by the UIAF has been steadily increasing over the past years (from 7 615 in 2011 to 15 252 in 2018). Nevertheless, GAFILAT noted that, critically, SARs were not in line with the country's risk profile. In particular, some professions facing high money laundering risks, including lawyers, auditors and accountants, file a very low number of SARs. Overall, the quality of SARs is moderate and does not seem to be improving, as suggested by the fact that the proportion of SARs having resulted in UIAF cases decreased over 2012-2016. Despite the UIAF's efforts to raise awareness and provide guidance on reporting, GAFILAT identified several possible factors for this situation, including: limited coverage of high-risk professions by the AML regime; lack of understanding or risks and AML obligations in the non-financial sector; lack of focus on higher risks in the UIAF's strategic analysis; and the UIAF's decision in 2014 to stop providing individual feedback to professionals on the quality of their SARs ("IEROS system"). However, in Phase 3, the UIAF indicated that IEROS has been replaced by a new, electronic feedback system, which generates ratings, taking into account criteria such as the completeness, clarity and level of detail of reported facts, including the source of criminal proceeds, the financial or other movements and warning signs.

115. Regarding foreign bribery, in Phase 2, the Working Group noted the UIAF's efforts to train and guide the private sector on reporting did not specifically address active bribery, and recommended that

⁶⁶ Note that, under the article 207 of the Code of Commerce, all accountants who are *revisores fiscales*, regardless of their level of income, are subject to an obligation to report suspicious activities.

⁶⁷ AML obligations for the private sector are mainly set out in Circulars of the Superintendency of Finance (Circular 55/2016, *Sistema de Administración del Riesgo de Lavado de Activos y de la Financiación del Terrorismo*, SARLAFT) and the Superintendency of Corporations (Basic Legal Circular, Chapter X (25/10/2016), *Sistema de Autocontrol y Gestión del Riesgo de Lavado de Activos y Financiación del Terrorismo*, SAGRLAFT).

⁶⁸ Phase 2 recommendation 6c.

⁶⁹ Decree 1674/2016, available at:

https://www.uiaf.gov.co/recursos_user///2016/oaj/DECRETO%201674%20DEL%2021%20DE%20OCTUBRE%20DE%202016%20PEP.pdf

Colombia issue appropriate directives and training materials (e.g. typologies) on identifying and reporting active bribery.⁷⁰ Since the adoption of the Phase 2 report in 2012, it is unclear whether Colombia has taken specific steps to train the private sector on reporting suspicions of foreign bribery-related money laundering to the UIAF. The Superintendency of Corporations, jointly with UNODC and the Secretariat of Transparency, has provided training to companies on transnational bribery, but it is unclear whether this specifically covered the obligation to report such suspicions as part of the AML/CFT regime. In any case, the absence of SARs related to foreign bribery from the private sector calls for more specific awareness-raising or guidance in this respect. As noted above, only the Superintendency of Corporations has filed two SARs in relation to money laundering with possible links to foreign bribery, and the Superintendency has no competence or capacity to sanction money laundering. The development of guidance by the UIAF on the reporting obligation in relation to bribery is a welcome development.

Commentary

The lead examiners are encouraged by recent steps taken by the UIAF to assess foreign bribery-related money laundering risks, receive training on this offence and improve its handling of corruption-related suspicions. They recommend that the Working Group follow up on the UIAF's capacity to proactively build solid cases for dissemination to the PGO, in particular where indications of foreign bribery have been identified.

Nevertheless, Colombia's AML legal framework continues to present important shortcomings, as already identified in Phase 2 recommendations, which remain either not or only partially implemented. While steps have been taken to improve the feedback system, the private sector's performance in detecting suspicious activities is generally insufficient, as demonstrated in particular by the absence of any foreign bribery-related SARs. For this reason, the lead examiners reiterate the following recommendations made in Phase 2:

- (i) Align the scope of professionals covered by AML preventive measures, as well as customer due diligence obligations (including in relation to PEPs and beneficial owners), with the FATF Standards; and*
- (ii) Provide adequate guidance and training on identifying and reporting active (foreign) bribery, which is a fundamental measure to leverage the AML regime for the detection of foreign bribery.*

(c) Statistical information

116. In Phase 2, the Working Group recommended that Colombia maintain statistics on offences underlying SARs (recommendation 6b); and on sanctions imposed in money laundering cases, including the size of fines and forfeited/confiscated assets, and whether foreign bribery is the predicate offence (recommendation 11). Statistics remained insufficient at the time of the Phase 2 written follow-up and the recommendations were considered only partially implemented.

117. In Phase 3, Colombia indicated that it has been developing a new statistical monitoring system, which consolidates information on prevention, detection, investigation, prosecution and confiscation. In addition, the PGO's information systems keep detailed statistics in relation to money laundering cases, including on sanctions, fines and asset seizure or confiscation. However, while useful information on SARs and their predicate offences was shared by Colombia, data concerning sanctions imposed in foreign bribery related money laundering case were not provided to the evaluation team. The PGO indicated that a request for including predicate offences in its data collection system was submitted in October 2019.

⁷⁰ Phase 2 recommendation 6e.

Commentary

The lead examiners are encouraged by the current establishment of a new statistical monitoring system by Colombia, it notes that no relevant data on sanctions could be provided to the evaluation team. The lead examiners recommend that Colombia ensure that its data collection systems are able to produce statistics on sanctions for foreign bribery-related money laundering.

2.7. Accounting requirements, external audit, and company compliance and ethics programmes

118. In Phase 2, the Working Group made recommendations on the alignment of accounting standards with international norms, the reporting of suspected foreign bribery by the accounting and auditing profession, the development of anti-bribery internal controls by Colombian companies and the independence and training of *revisores fiscales*. Since Phase 2, Colombia has taken steps to align its accounting norms with international standards. However, it is unclear whether all false accounting misconducts listed by Article 8 of the Convention are effectively sanctioned. *Revisores fiscales* are now required to report suspicions of a range of offences, and steps have been taken to ensure their independence and provide specific training. With respect to anti-corruption compliance, important steps have been taken by Colombia to promote the adoption and implementation of anti-bribery internal controls, but the effectiveness of such measures remains to be demonstrated.

(a) The false accounting offence

(i) Accounting standards

119. The Code of Commerce (CoC) and Law 1314 of 2009 are the main legal bases for the country's accounting norms. The CoC contains general accounting requirements for commercial enterprises. Businesses should keep "regular accounts of their business operations in accordance with legal requirements" (article 19). Accounts must be kept in Spanish according to the double-entry system in registered books, to provide a clear, complete and accurate account of the business operations (article 50).

120. Law 1314 of 2009 allocates responsibilities for issuing accounting rules. The *Consejo Técnico de la Contaduría Pública* (CTCP – Technical Council for Public Accounting) is in charge of proposing principles, standards, interpretations and guidelines on accounting, which must be approved by the Ministry of Finance and the Ministry of Commerce, Industry and Tourism. In line with the CTCP's recommendations formulated in its 2011 Strategic Direction Document⁷¹, the Law also provides for the convergence of Colombian generally accepted accounting principles (GAAP) with International Financial Reporting Standards (IFRS), as well as with International Standards on Auditing (ISA). Implementing decrees issued in 2012 and 2013 provided for the gradual and differentiated application of the IFRS to Colombian companies. Under a series of Decrees issued in 2012 and 2013, Group 1 (listed and other large Colombian companies) was required to apply the full set of IFRS as of 2014, while Group 2 (SMEs) was required to apply an-SME specific version of the IFRS as of 2015. Group 3 (microenterprises) is allowed to apply simplified rules. Regarding ISA, Decree 302 of 2015 issued the Normative Technical Framework of Information Assurance Standards, which contains, *inter alia*, ISA, and applies to Groups 2 and 3. As with IFRS, Group 3 is allowed to apply simplified rules.

121. Law 43 of 1990 regulates the practice of public accounting as a profession. Under this law, the *Junta Central de Contadores* (Central Board of Accountancy) monitors public accountants and accounting companies to ensure that they carry out their functions in line with the law, and may impose sanctions in

⁷¹ *Direccionamiento Estratégico del proceso de convergencia de las normas de contabilidad e información financiera y de aseguramiento de la información, con estándares internacionales*, 22 June 2011

cases of breaches (suspension, fines up to approximately USD 1 200, suspension or cancelation of the licence).

122. Financial institutions are also subject to specific accounting obligations, which are mainly set out in the Basic Accounting and Financial Circular of the Superintendency of Finance.

(ii) Sanctioning false accounting

123. Colombian legislation does not clearly provide for adequate sanctions for companies engaging in all types of omissions and falsifications prohibited under Article 8 of the Convention.

124. The PC does not contain specific “false accounting” offences. However, article 289 PC provides that the falsification and use of “a private document that can serve as proof” is liable to imprisonment from 16 to 108 months. The Colombian authorities indicate that article 289 covers all types of conduct prohibited under Article 8 and, including the omissions (off-the-book accounts or transactions). Criminal sanctions only apply to natural persons.

125. The CoC sanctions undue alterations of books⁷² (article 57). The penalty for violating article 57 (applicable to natural and/or legal persons), as well as other accounting obligations, such as maintaining regular accounts of their business operations in accordance with legal requirements, was increased to a fine of up to USD 250 000, to be imposed by the Superintendency of Finance or of Corporations or other competent authorities, without prejudice to criminal proceedings against natural persons. Where the actual offender cannot be determined with certainty, the owner of the books, the accountant and the *revisor fiscal* shall be held jointly responsible (article 58 CoC). The General Code of Procedure (article 264) addresses double accounting, defined as keeping two or more identical books in which the same transactions are recorded differently, or having different supporting documents for the same acts. Where a business entity engages in such conduct, their books and papers shall only count against the business entity (article 264 General Code of Procedure). Sanctions appear limited, in particular for double accounting.

126. The Tax Statute sanctions a range of accounting misconducts under article 655 and 657. However, sanctions may only be imposed to business entities or activities subject to Colombian tax legislation – which may not be systematically true in cases of foreign bribery-related false accounting –, and the penalties available are limited. A fine of 0.5% of the greatest value between the liquid patrimony and the net income of the year prior to its imposition, without exceeding approximately USD 200 000, can be imposed for violations of article 655. DIAN may also close commercial establishments for three days (unless the taxpayer pays a fine in the amount of 20% of the operational income obtained in the previous month) for violations of article 657. No more than one pecuniary sanction may be imposed in relation to accounting books in the same calendar year, nor more than one sanction in the same taxable year.

127. Since sanctions available under the PC only apply to natural persons, and sanctions available under Law 43 of 1990 only apply to accountants, sanctions applicable to companies under the CoC seem insufficient.

⁷² Article 57°. It is prohibited in accounting and business books to:

1. Alter the order of book entries or the date of transactions that they refer to;
2. Leave blank spaces that facilitate the intercalation or insertion in book entries or at the end of these;
3. Insert interlines, scratch or amend book entries. Any error or omission shall be addressed with new book entries with the date of its establishment;
4. Delete or strike through all or part of the book entries, and
5. To strip off sheets, alter the order of the latter or damage the books, or alter electronic files.

(iii) Statistics

128. In Phase 2, Colombia did not provide information on the enforcement of false accounting offences and the WGB recommended that Colombia maintain detailed statistics in this area (recommendation 12b). At the time of the Phase 2 follow-up, Colombia provided limited data and the recommendation was deemed not implemented. Data provided in Phase 3 remains insufficient. Colombia indicated that, as of 1 April 2019, the PGO had recorded 23 investigations into “forgery of private documents related to corruption”. No further detail was provided on these cases. No information is available on possible breaches of relevant provisions of the CoC, the Tax Statute or Law 43 of 1990. During the on-site visit, representatives from the audit profession showed limited awareness of enforcement actions taken in relation to sanctions for accounting misconduct.

Commentary

The lead examiners are concerned about the limited sanctions available for false accounting, especially for legal persons. They recommend that Colombia ensure that effective, proportionate and dissuasive sanctions are available, including for legal persons, for all types of misconduct described in Article 8 of the Convention.

They also regret that efforts made by the authorities to enforce the relevant PC, CoC and Tax Statute provisions cannot be assessed given the limited data available in this respect. The lead examiners therefore reiterate the Phase 2 recommendation that Colombia should maintain adequate statistics in this respect.

*(b) Detection of foreign bribery through external audit**(i) Independence and training of external auditors*

129. The legal framework for audit rules is essentially based on Law 43 of 1990, Law 1314 of 2009 and Decree 302 of 2015, as well as the CoC. In Phase 2, the WGB expressed concerns about the lack of independence of external auditors (*revisores fiscales*) and recommended that Colombia develop and implement more stringent auditing requirements to address the issue (recommendation 5c). The Phase 2 follow-up noted that no steps had been taken to ensure the independence of auditors.

130. *Independence of auditors* – The adoption of Decree 302 of 2015, which introduced ISA in Colombia, modified the functions of *revisores fiscales* and addressed issues related to their independence, including by the introduction of the International Ethic Code in Decree 302 of 2015. Article 203 CoC provides that a *revisor fiscal* must be employed by all stock companies, branches of overseas companies and “companies in which, by law or under their statutes, their administration does not correspond to all the partners, when so determined by partners excluded from the administration who represent no less than 20% of the capital”. Article 215 adds that the *revisor fiscal* must be a public accountant and may not serve as the auditor of more than five stock companies at any given time.

131. *Training* – In Phase 2, regarding the competence and professional standards of *revisores fiscales*, the Working Group noted that this category of public accountants, despite their specific responsibilities, only receives generic training available to all public accountants, an issue that was recognised by both the Central Board of Accountants and the Superintendency of Corporations. The Working Group recommended that Colombia provide adequate education and training to *revisores fiscales* (recommendation 5c). In the Phase 2 follow-up, some training was reported by Colombia. In Phase 3, Colombia indicated that the Superintendency of Corporations trains *revisores fiscales* for financial statements matters (e.g. how to elaborate and present such statements to the Superintendency). Some very recent steps have been taken to train and provide guidance to *revisores fiscales* on their reporting requirements, including foreign bribery (see below).

(ii) *Awareness and detection*

132. In Phase 2, the WGB found that Colombian legislation did not contain any specific legal obligation for *revisores fiscales* to report a suspected act of foreign bribery to management or corporate monitoring bodies⁷³. The WGB therefore recommended that Colombia consider introducing such obligation, and, if the requirement were introduced, ensure that auditors making such reports reasonably and in good faith are protected from legal action (recommendation 5d). The WGB further recommended that Colombia encourage the detection and reporting of suspected foreign bribery by accountants and auditors, in particular by providing guidelines and training to these professionals, and raising the awareness of the management and supervisory boards of companies (recommendation 5a).

133. The Phase 2 written follow-up concluded that recommendation 5d was fully implemented: Law 1778 of 2016 introduced an obligation for *revisores fiscales* to report to the criminal, disciplinary and administrative authorities, acts of corruption (including suspected foreign bribery) and alleged acts of crime against the patrimonial economic order that they discover in the exercise of their work (article 32). They should also bring these facts to the attention of the governing bodies and the administration of the company. However, limited efforts were made to provide guidance or training to accountants and auditors or raise the awareness of management and supervisory boards of companies, and recommendation 5a was deemed partially implemented. Furthermore, although the establishment of the obligation under Law 1778 of 2016 is a welcome step in enhancing detection through auditing standards, it does not provide protection for *revisores fiscales* reporting suspected acts of foreign bribery to competent authorities from legal actions that may be taken against them by any legal person.

134. In addition, the reporting channels to be followed by *revisores fiscales* in order to comply with article 32 are complex. The authorities to which reports should be submitted are not precisely identified (“criminal, disciplinary and administrative authorities”), and *revisores fiscales* are also subject to other reporting obligations (requirements to report suspicious activities to the UIAF under article 207 CoC and the Basic Legal Circular; and to report crimes under article 10 of Law of 1990 and article 38 of Law 1952 of 2019). During the on-site visit, the representatives of the audit profession explained that they would identify the relevant authority based on the nature of the offence detected. Colombia explained that crimes should be reported to the PGO (except for transnational bribery by legal persons, which should be reported to the Superintendency of Corporations, and misconduct by a supervised professional, which should be reported to its supervisor) and suspicious activities should be reported to the UIAF.

135. The Colombian authorities indicate that whistleblowing channels are also open to *revisores fiscales* (external channel to the Superintendency of Corporations, as well as companies’ internal channels), and that such reports would be considered acceptable for the purpose of complying with article 32 (see section 2.10(c) on the inadequacy of whistleblower protection systems).

136. Where companies are concerned, the 2009 Anti-Bribery Recommendation (X.B.iv) requires that Member countries encourage companies that receive reports of suspected acts of bribery of foreign public officials from an external auditor to actively and effectively respond to such reports. The Colombian authorities consider that companies have an obligation to act on the basis of an audit report, citing a series of legal and other provisions. Article 23 of Law 222 of 1995 provides that company managers must “guarantee strict compliance with legal or statutory provisions”, which the Colombian authorities explain

⁷³ Generic obligations in place in Phase 2 were as follows: article 207 CoC – *revisores fiscales* have to give timely account, in writing, to the assembly or board of partners, the board of directors or the manager, of irregularities that occur in the company’s operations and business development; article 208 CoC – internal auditors’ report on the financial statements should include reservations or exceptions about the faithfulness of the statements. In addition, ISAs 240 and 250 both require an external auditor to report detected wrongdoing to the company, although not specifically foreign bribery.

should be interpreted as including taking action where an audit reports a case of transnational bribery. There is also a general duty of denunciation under article 67 CPC that applies to any individual. The Basic Legal Circular of the Superintendency of Corporations provides that the board of directors, specifically the audit committee, must evaluate the relevant recommendations by the audit committee and the other internal and external control bodies and adopt pertinent measures. However, these provisions are generic and Colombia could consider introducing more explicit provisions on measures to be taken by companies upon receiving reports of suspected acts of foreign bribery.

137. The authorities have nevertheless taken some steps to promote detection by *revisores fiscales*. Colombia has started to enforce article 32 in at least one ongoing case that contains a possible foreign bribery element, using the services of external forensic auditors. During the Phase 3 on-site visit, the representatives of the audit profession mentioned having received training on foreign bribery from the Superintendency and the Secretariat of Transparency. In December 2019, the Superintendency also adopted guidelines for *revisores fiscales* on their role in detecting and reporting crimes, such as transnational bribery and money laundering. These professionals, who represent large international companies, showed a good level of awareness of the foreign bribery offence as well as related enforcement efforts, and their reporting obligation under article 32.

138. Nevertheless, no case of foreign bribery has been triggered by an auditor's report as of the time of this review (there is no data available on reports made by auditors on possible cases of other types of corruption). Two potential factors may explain this lack of detection. First – and not unique to Colombia, the representatives of the audit profession met on-site did not seem to understand their potential role in detecting foreign bribery. Second, as noted above, reporting processes for *revisores fiscales* are complex. For these reasons, the adoption of guidance in November 2019, which the authorities indicated will serve as a basis for future training and dissemination, is a welcome development.

Commentary

The lead examiners welcome the introduction of an obligation for revisores fiscales to report suspicions of a range of offences, including foreign bribery, to the authorities and to the governing bodies and administration of the company. However, they recommend that steps be taken to ensure that revisores fiscales making such reports are protected from legal actions by companies. They further recommend that Colombia clarify and promote the reporting role and obligations of revisores fiscales, including by providing training on the detection of foreign bribery red flags, based on the recently adopted guidance.

(c) Anti-corruption internal controls, ethics and compliance

139. The 2009 Anti-Bribery Recommendation recommends that Parties encourage companies to adopt internal controls and compliance programmes to prevent and detect foreign bribery. Annex II to the Recommendation provides guidance to companies on how to implement such controls. While at the time of Phase 2, the WGB found uneven adoption of anti-corruption compliance systems across Colombian companies,⁷⁴ by the time of Colombia's Written Follow-Up, measures had been taken to remedy the situation and the Working Group welcomed positive developments in the field of accounting and auditing, including measures to strengthen internal controls, along with improvements in the use of internal audit committee, notably where SOEs were concerned.

(i) Promoting anti-corruption compliance

140. Law 1778 of 2016 triggered important developments in corporate governance, directly related to foreign bribery. Under article 23, the Superintendency of Corporations is responsible for promoting the

⁷⁴ See in particular Phase 2 recommendation 5b.

adoption of corporate ethical programmes for preventing foreign bribery. The Superintendency has taken a range of steps to implement article 23:

- The Superintendency created an obligation to adopt **corporate ethical programmes** for a set of companies defined on the basis of criteria such as international activities, use of third parties, operating in specific sectors (pharmaceuticals, infrastructure and construction, manufacturing, mining and energy, technology of information and communication) and level of gross income, assets or personnel (Resolution 100-002657 of 2016, modified by Resolution 558 of 2018).
- A **Guide to implement corporate ethical programmes for the prevention of foreign bribery** (Circular 100-000003 of 2016) has been developed, incorporating the Good Practice Guidance on Internal Controls, Ethics, and Compliance (Annex II of the 2009 Recommendation) and the guide on compliance programmes related to the US Foreign Corrupt Practices Act and the United Kingdom’s Anti-Bribery Act. It further refers to the 2014 OECD *Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials*. The Guide contains recommendations for legal persons in eight areas: commitment of senior management; risk assessment; principles for corporate ethical programmes; role of compliance officers; due diligence measures towards associates; supervision of programmes; communication of programmes, including awareness-raising and training; and internal reporting channels.
- The Superintendency has conducted several **awareness-raising and training initiatives** on Law 1778 of 2016. For example, with the Secretary of Transparency, and under the sponsorship of the United Nations, it held workshops in various Colombian cities for compliance officers, lawyers and officials from the PGO, the courts and the Superintendency. Companies met on-site noted that they were regularly solicited by the Superintendency to participate in such training, especially in 2016-2017.

141. In addition to these efforts to promote anti-corruption compliance, the Secretariat of Transparency has signed “pacts of transparency” and codes of ethics with business organisations to promote the adoption of common ethical standards at sector level. As of January 2019, 15 transparency pacts had been signed, covering more than 1 000 private entities. A further ten integrity pacts were signed on 9 December 2019 (see also section 2.10(a)).

142. Between 2015 and 2018, the Secretariat of Transparency also conducted an initiative called Active Companies in Anti-Corruption (*Empresas Activas Anticorrupción – EAA*), which promoted high anti-corruption standards in companies (referring to international standards and Law 1778 of 2016) by assessing the implementation of corruption prevention mechanisms in companies and including them in a public register where the required standards are met. Participation by companies was free and done on a voluntary basis. Companies were associated in the management of the initiative. As of July 2018, four rounds of evaluations for large companies and two rounds for SMEs had been conducted. Around 18 companies entered the register. During the on-site visit, several companies reported participating in the programme, which they consider provides very useful guidance in building effective programmes. In 2018, the initiative was terminated and replaced by a strategy named “Business Integrity”, which aims to promote transparency and compliance in both the private and the public sectors. The strategy notably includes the establishment sectoral forms of pacts of transparency and the development of a guide to raise the awareness of companies of all sizes about corruption risks, and is conducted jointly with the Alliance for Integrity.

143. Lastly, Law 1901 of 2018 provides that any commercial company may add the acronym BIC (*Beneficio e Interés Colectivo – Collective Benefit and Interest*) to its name (and benefit from tax, credit

and other advantages from the State) if a set of conditions are met, which include the implementation of good corporate practices against corruption. The implementing was adopted in November 2019.

144. During the on-site visit, companies indicated a good knowledge of the foreign bribery offence (although they were largely unaware of enforcement actions by the Superintendency in this respect), and highlighted that the development of corporate compliance programmes in the private sector, in particular in relation to foreign bribery, has been significant over the past years. The main drivers of this evolution, in their view, have been the adoption of Law 1776 in 2016, which a panellist noted is more stringent than international standards, as well as the first sanction imposed by the Superintendency. Companies report a clear cultural change in corporate compliance practices (see section 2.10(a) for a more general discussion on foreign bribery awareness in the private sector).

145. However, during the panel with representatives of the civil society, some respondents noted that, although being developing at a fast pace, compliance practices often remain broadly formalistic, and further awareness-raising and training initiatives should be conducted. In addition, the situation in SMEs is unclear. The Chamber of Commerce of Bogota reported some initiatives aimed to promote the adoption of internal controls by SMEs, but it is difficult to assess the situation in SMEs, which were not represented during the on-site and for which, limited information is available.

(ii) Failure to implement anti-corruption compliance: the supervisory role of the Superintendency of Corporations

146. In 2017, the Superintendency requested 531 companies identified as likely to meet the criteria of Resolution 100-002657 of 2016 to certify that they have adopted and implemented a programme. Administrative sanctioning procedures were initiated against 102 companies that did not respond to the request. Eight companies were fined under article 86(3) of the Law 222 of 1995 (sanctions for legal persons who do not comply with the Superintendency's orders, the law or the statutes). In March 2019, the Superintendency of Corporations requested a further 173 companies to indicate whether they meet the criteria and, if so, have implemented a programme. The Superintendency is now reviewing the companies' responses. The Superintendency also conducts "preventive inspections" aimed at assessing whether programmes are in place and adequate. The approach is described as "educational". Inspectors issue orders (*órdenes*) for improvements based on their findings, and companies must report on their implementation. Sanctions may be applied if no progress is shown in further inspections, which has not happened yet. The Superintendency conducted 12 visits in 2017, 23 in 2018 and 18 in 2019.

147. Although these efforts should be commended, there may be room for further strengthening. Some of the companies met on-site and which have been inspected by the Superintendency themselves, described inspections as following a "checklist" approach, and noted the absence of real conclusions, and follow-up, provided by the Superintendency. This suggests that inspections, which follow a standard protocol and usually last up to one day, remain essentially formal and provide limited operational guidance to companies on how to implement the Superintendency's *órdenes*. A possible explanation is the insufficient resources currently allocated to inspections. The Superintendency, however, explained that inspectors are very experienced, and that three posts are to be reassigned to the inspection team by June 2020.

148. An important issue requiring attentive scrutiny pertains to the dual role of the Superintendency of Corporations – enforcement and prevention. Under article 7 of Law 1778 of 2016, corporate ethics programmes may be taken into account by the Superintendency as a mitigating factor when applying sanctions for foreign bribery. As recommended to other Parties in previous WGB reports, where an authority has advisory and enforcement roles, some safeguards should be in place to avoid conflicts of interest. In the case of Colombia, the Superintendency explained that it does not give "automatic recognition" to compliance programmes in the context of preventive inspections. However, the Superintendency explained that it issues *órdenes* and assesses progress made by companies to implement them, which may act as a form of indirect validation. Given the limited number of cases, it is unclear to what extent such tacit approval may be taken into account for the purpose of article 7. This is all the more

problematic in the context of Colombia, where a single team (*Grupo de cumplimiento de las prácticas empresariales*) is in charge of preventive, administrative (including foreign bribery enforcement) and AML inspections. The team's personnel may be involved in any type of inspections. An inspector involved in preventive inspections relating to a company, and having issued *órdenes* on its corporate ethics programme, may thus be directly involved in an investigation into the commission of foreign bribery by the same company, which is the basis for the possible application of sanctions. The Superintendency considers that this dual role has a positive effect on the Superintendency's capacity to detect bribery. However, representatives of civil society expressed concerns about this possible conflict of interest during the on-site visit, and suggested that, at the very least, responsibility for supervision of compliance and for enforcement should be entrusted to different units of the Superintendency.

Commentary

The lead examiners welcome the important steps taken by Colombia, in particular the Superintendency of Corporations, to promote the adoption and implementation of corporate ethics programmes. Companies, at least larger ones, have been increasingly paying attention to and investing in the development and reinforcement of compliance programmes. However, the effectiveness of compliance programmes, and their development in SMEs, remain to be demonstrated. The lead examiners recommend that the Working Group follow-up on steps taken by Colombia to promote the adoption of effective compliance programmes, notably by SMEs active in foreign markets.

In light of the dual advisory and enforcement functions of the Superintendency of Corporations, the lead examiners recommend that the Working Group follow up to ensure that sufficient resources are allocated to preventive inspections and to foreign bribery enforcement.

2.8. Tax measures for combating bribery

149. Colombia's tax legislation appears to broadly conform with the requirements under the 2009 Anti-Bribery Recommendation and the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation). It effectively and explicitly disallows the tax-deductibility of bribes, and allows for domestic and international sharing of tax information with law enforcement authorities. In addition, Colombia has taken steps to raise awareness and provide training on the detection of foreign bribery by tax examiners and auditors. Nevertheless, in the Phase 2 and Phase 2 Written Follow-Up Report, the WGB expressed concerns that the statutory time during which a tax return may be re-examined was too short.

(a) Non-tax deductibility of bribes

150. Colombia's regime of non-tax deductibility of bribes is included in articles 105, 107 and 107-1 of the Tax Statute (TS). Articles 105, 107 and 107-1 of the TS were amended by Laws 1607 of 2012 and 1819 of 2016, notably to respond to the Working Group Recommendations made in Phase 1. As a result, in Phase 2, the Working Group welcomed the amendments made by Colombia to its Tax Statute to explicitly disallow the tax deductibility of expenses from any criminal conduct, including foreign bribery, thus bringing Colombia in compliance with requirements under the 2009 Tax Recommendation. In Phase 3, Colombia also clarified that, pursuant to article 105 of Decree 624 of 1989, "fines, sanctions, penalties, penalty interests with a sanctioning nature and convictions arising from administrative, judicial or arbitral proceedings different from the labour ones" are not tax deductible.

151. The Phase 2 report noted that tax returns may be re-examined for two years after the deadline for filing has expired. If tax losses are declared or compensated, the limitation period is five years. Representatives of the Colombian National Directorate of Taxes and Customs (DIAN) explained at that

time that the opening of a criminal investigation would not justify reopening a tax return beyond the two or five year period. The Working Group therefore expressed concern “that the two (or even five) year limitation period to reopen tax returns may be insufficient” to readjust a tax return where foreign bribery has occurred and recommended that Colombia extend the statutory time limit.⁷⁵

152. At the time of the Phase 2 written follow-up, Colombia noted that Law 1819 of 2016 had modified the statutory time limit. The general time for a tax return to be re-examined rose from two to three years. If the taxpayer “is subject to the transfer pricing regime” the time rose from five to six years. If the taxpayer “incurs in tax losses or offsets them”, the statute of limitations may be increased by up to 15 years. On examining the legislation, the Working Group, noted that the actual legislation makes it clear that the ordinary period is 3 years, and there is no explicit reference to 15 years. The only way a tax return can be reopened after 15 years is if a company (but not an individual) can offset losses against income up to 12 years in the future. Therefore, the actual time the tax authorities have to investigate a tax return is only increased from two to three years from the time it is filed (with the limited exception of transfer pricing). The (disguised) additional payment of a bribe would, under international accounting practices, constitute an expense rather than a loss (unless the value was so great to mean there was an overall loss in that year), and so the period most likely remains at three years in any event. In conclusion, although there was a minimal improvement, the Working Group noted that “the three year period that now applies in most cases is still considered to be inadequate”⁷⁶ and considered recommendation 4b only partially implemented.

153. Since then, and as confirmed during the on-site visit, Colombia confirms that the general statute of limitations for income tax returns has not been extended beyond three years. DIAN further confirmed that it has not yet adopted any policy of systematic review of defendant’s tax returns to verify whether bribes have been deducted. DIAN representatives interviewed on-site were not aware of the finalised case against a Colombian company, but expressed willingness to improve coordination with the PGO and Superintendency in the future (see below on sharing of information).

Commentary

As in Phase 2, the lead examiners remain concerned that the three-year limitation period to reopen tax returns may still be insufficient to allow tax authorities to effectively make a readjustment of taxes when criminal proceedings reveal a foreign bribery offence has occurred in a previously filed tax claim. They therefore reiterate the Phase 2 recommendation that Colombia sufficiently extend the statutory time during which a tax return may be re-examined to effectively determine whether bribes have been deducted.

The lead examiners further recommend that Colombia put in place the necessary mechanisms to inform promptly DIAN of foreign bribery-related convictions so that DIAN may verify whether bribes were impermissibly deducted.

(b) Detection and reporting of foreign bribery by tax officials

(i) Awareness and training on detection of foreign bribery red flags

154. At the time of Phase 2, the WGB welcomed the efforts undertaken by Colombia to raise awareness and provide training on the detection of foreign bribery to tax auditors. These efforts took the form in particular of training of DIAN officials and circulation of the OECD Bribery and Corruption Awareness Handbook for Tax Auditors, demonstrating attention to prevention as well as detection through the identification of possible (foreign) bribery red flags.⁷⁷

⁷⁵ Phase 2, paras 59-60 and subsequent commentary, and recommendation 4a.

⁷⁶ Phase 2 Written Follow-Up Report, para. 9.

⁷⁷ Phase 2, para. 61 *et seq.*

155. Since Phase 2, there have been more limited efforts to pursue awareness raising and training initiatives. In February 2018, the Superintendency of Corporations carried out a training session for DIAN officials working on customs matters on their role in the investigation and sanctioning of foreign bribery. DIAN representatives interviewed during the on-site visit reported that tax officials undergo regular training, which includes a foreign bribery component, but acknowledged that more in-depth training would be necessary, and that awareness-raising initiatives for tax officials and auditors to enhance detection would be welcome.

156. DIAN further indicated that a restructuring was underway as part of an Action Plan under the aegis of the OECD Tax Inspectors without Borders programme. This pilot project, to be implemented over a period of 18 months, involves the setting up of a tax crimes unit within DIAN and a new framework for inter-agency co-operation. This new criminal unit would cover tax and customs-related criminality, including in relation to bribery, and ensure a more coordinated approach among the different units in the tax administration. Admittedly, DIAN's currently takes a piecemeal approach, with one unit focusing on tax returns, another police unit of DIAN dealing with customs and money laundering, while yet other units may cover other types of criminality; furthermore there is no single database covering all taxpayers. The new approach is expected to facilitate the sharing of information internally, as well as to enhance DIAN's capacity to exchange and share information with law enforcement authorities.

(ii). Sharing of information with Colombian law enforcement authorities

157. Tax information is generally subject to confidentiality rules in Colombia.⁷⁸ Nevertheless, tax confidentiality may be waived under certain specified circumstances, and such a waiver has been incorporated into specific legislation, which confers the right to certain entities to request the disclosure of confidential tax information from DIAN. These entities include in particular the PGO and UIAF, but not the Superintendency of Corporations. For this reason, the Working Group recommended in Phase 2 that Colombia establish appropriate mechanisms for cooperation and coordination between the Superintendency and DIAN.

158. A significant improvement welcomed by the Working Group at the time of the Phase 2 Written Follow-Up was the adoption of article 22 of Law 1778 of 2016, which inserted an obligation on DIAN to report to the Superintendency of Corporations all suspicious activity indicating the existence of alleged conduct characterised as foreign bribery. Colombia indicated at the time that negotiations were underway between the two entities to set up a framework to create alerts and a system of collaboration to ensure the quick transfer of information.⁷⁹

159. As of the time of Phase 3, the MoU between DIAN and the Superintendency of Corporations was nearing finalisation, and its main elements were communicated to the evaluation team. The objective of the MoU is to facilitate the cooperation and exchange of information between the Superintendency and DIAN. In particular, it will recall article 22 of Law 1778, define the purpose of such sharing of information, and propose the organisation of joint training for Superintendency and DIAN officials. It remains to be seen whether the MoU will allow for the sharing of information from DIAN in specific cases. Currently, article 22 requires DIAN to transmit suspicious activity reports to the Superintendency, but DIAN officials expressed the view that the current framework would not necessarily allow them to respond to requests from the Superintendency in the context of specific foreign bribery investigations.

⁷⁸ Article 15 of the Constitution and article 583 of the Tax Code. See Phase 2, para. 65 *et seq.* for a more detailed description.

⁷⁹ Phase 2 Written Follow-Up Report, p. 18; on this basis the WGB concluded that recommendation 4b was fully implemented.

160. In practice, over the past three years, DIAN made over 20 000 reports to the PGO, none of which related to foreign bribery. 1 274 SARs were also made to the UIAF, some of which related to corruption, but not foreign bribery. With respect to the Superintendency, over the same period, DIAN made 22 SARs, of which 3 for alleged “technical smuggling” possibly associated with foreign bribery. Following these reports, the Superintendency indicated that it had conducted a study of the companies, visited most of them, and had not identified transnational bribery behaviour.

(iii). Sharing of information internationally

161. The 2009 Tax Recommendation I.(iii) asks countries to consider adding optional language in bilateral tax treaties, as referenced in in paragraph 12.3 of the former commentary to Article 26 of the OECD Model Tax Convention. The optional language allows for the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. to combat foreign bribery). In Phase 2, the WGB congratulated Colombia on the measures in place to allow for the sharing of information between Colombian tax authorities and criminal law enforcement authorities in Colombia and abroad, on the basis of reciprocity.⁸⁰ The Phase 2 report further noted that Colombia had exchange of information relationships with 86 jurisdictions, as a result of its ratification of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.⁸¹ As of the time of Phase 3, Colombia indicated that it is Party to three conventions for the exchange of tax information, none of which have entered into force.

Commentary

The lead examiners recommend that Colombia resume efforts to provide training to DIAN officials with a view to enhancing their capacity to detect foreign bribery red flags.

The lead examiners welcome Colombia’s expressed intention to reorganise DIAN to set up a tax crime unit, which, if adequately resourced and trained, could contribute significantly to improved sharing of information. In addition to the ongoing development of an MoU between DIAN and the Superintendency of Corporations, this may improve the sharing of information between DIAN and law enforcement authorities. The lead examiners recommend that Colombia proceed with these plans and more generally ensure that mechanisms are in place for the effective sharing of information between the tax and law enforcement authorities, to ensure that both the PGO and Superintendency of Corporations receive timely and relevant reports from DIAN concerning suspected foreign bribery, and are also able to request information from DIAN in the context of their foreign bribery investigations into natural and legal persons.

2.9. International cooperation

162. In Phase 2, the lead examiners commended Colombia for the quality of its MLA system and the high level of priority given to responding to MLA requests. In the absence of relevant cases, the WGB decided to follow up on Colombia’s capacity to seek MLA in relation to legal persons (follow-up issue 14f). In Phase 3, this capacity, although improved, remains limited. The Working Group has also identified issues for follow-up or recommendations in the allocation of central authority functions for MLA related to foreign bribery, statistics and Colombia’s effectiveness in soliciting MLA in some instances.

⁸⁰ Phase 2, para. 71 and following commentary.

⁸¹ Article 22.4 of the Convention allows information received for tax purposes to be used for non-tax purposes, and therefore to be passed to law enforcement authorities to be used in criminal investigations (e.g. for foreign bribery) with the permission of the country providing the information.

(a) Mutual legal assistance

(i) Framework for mutual legal assistance (MLA)

163. The allocation of central authority functions for MLA related to foreign bribery lacks clarity. In Phase 2, Colombia indicated that the Ministry of Foreign Affairs (MFA) was the central authority for making and receiving MLA requests under the OECD Anti-Bribery Convention. However, in Phase 3, the Ministry of Justice (MoJ) explained that it shares this function with the MFA. In addition, during the Phase 3 on-site visit, the MFA noted that this function is currently attributed to the Secretariat of Transparency. The PGO also explained that it acts as the central authority for all offences under the PC (together with the MoJ⁸²), and has already done so in practice in relation to foreign bribery. In addition, article 24 of Law 1778 of 2016 allows the Superintendency of Corporations to engage directly in MLA in relation to proceedings related to legal persons. The Colombian authorities indicated that respective responsibilities are being reviewed for the purpose of clarification. While noting that, so far, current arrangements do not seem to have negatively affected the effectiveness of the provision or solicitation of MLA related to foreign bribery, the Working Group welcomes this initiative.

164. Colombia's legal framework for MLA in criminal matters has not changed since Phase 2. It is set out in articles 484 to 489 CPC, as well a number of multilateral and bilateral MLA treaties, including with Parties, e.g. Argentina, Brazil, France, Mexico, Spain and the United Kingdom. Since Phase 2, Colombia signed an agreement with Ecuador and, at the time of the adoption of the report, the country is in the process of ratifying further bilateral agreements on MLA with Italy and Costa Rica. Colombia is a Party to the United Nations Convention against Corruption (UNCAC) and the Inter-American Convention against Corruption. As noted in Phase 2, article 489 CPC provides that dual criminality is not a condition for rendering MLA. In principle, the only grounds for refusing MLA are the constitutional values set out in the preamble to the Constitution (life, work, justice, equality, peace and freedom). No request has been refused based on article 489. MLA cannot be refused on the grounds of bank secrecy.⁸³

165. The revision of the Asset Forfeiture Law in 2017 enhanced Colombia's capacity to recover criminal assets abroad. Although the new provisions have never been applied in a foreign bribery case, the authorities report that they were successfully used in a corruption case where proceeds generated in Colombia and moved to another Party were effectively seized in cooperation with this country's authorities.

(ii) MLA related to foreign bribery

166. Data on MLA collected by Colombia does not appear to be fully comprehensive and up-to-date. The PGO's database of incoming and outgoing requests does not contain requests processed by the MoJ. The MFA maintains a data collection platform that centralises information on the execution of foreign requests by all domestic authorities. However, such reporting only takes place every six months, and the authorities explained that it is performed on a voluntary, unsystematic basis in practice.

167. Given these statistical limitations, and the lack of clarity in the allocation of central authority functions, data provided respectively by the MFA and the PGO differs. While the MFA did not report any incoming or outgoing MLA related to foreign bribery, the PGO indicated that it has sent one request to a non-Party (November 2018, reiterated in March 2019 after an incomplete response was received) in relation to a domestic investigation into foreign bribery, and responded to nine requests for MLA from

⁸² The PGO acts as a central authority for requests related to criminal investigations and prosecutions; the MoJ for requests related to trials.

⁸³ Phase 2, paras. 182-194.

three countries, including two Parties, in relation to four foreign investigations into foreign bribery. One incoming request from another Party pointed to a possible case of bribery involving a Colombian company. This request triggered the opening of an investigation into foreign bribery in Colombia. Although the requesting country later indicated that the case was closed, the investigation remains ongoing in Colombia.

168. Colombia appears to provide timely assistance to foreign partners. In the case where a Party's request for assistance potentially pointed to foreign bribery, the Party's request for bank and company records was answered within five months, i.e. no more than the time needed to obtain similar information in the context of a domestic procedure.

169. Cooperation in some of the high profile domestic and foreign bribery cases involving Colombia has been effective, including in the context of joint investigative teams. This has included cooperation under the *2017 Declaration of Brasilia on International Legal Cooperation against Corruption*, under which the PGO, as well as its counterparts from Argentina, Brazil, Chile, Ecuador, Mexico, Panama, Peru, Portugal, Dominican Republic and Venezuela, had committed to providing the widest, fastest and most effective MLA in the Odebrecht and *Lava Jato* cases. Cooperation has also been active between Colombian and Spanish prosecutors in relation to the Water Utility company case, as facilitated by the signature of a memorandum to strengthen judicial cooperation and enable joint investigations in 2017.

170. It is unclear whether Colombia systematically takes proactive steps to overcome difficulties in obtaining cooperation from countries in relation to foreign or domestic bribery. In one instance, insufficient information received from a non-Party was promptly followed by the reiteration of the initial request, along with additional background information on the purposes and importance of this request. In another case, where a Party conditioned the sharing of information to a guarantee that none of its companies or nationals would be prosecuted in Colombia, Colombia's reaction was not specified.

(iii) Requesting MLA in the context of proceedings against legal persons

171. In Phase 2, the WGB decided to follow up on the Superintendency of Corporations' ability to seek MLA in foreign bribery cases against a legal person (follow-up issue 14f). The Superintendency could only engage in MLA indirectly through the PGO and, in the absence of relevant cases, it was unclear whether this was conditional upon the existence of criminal proceedings against a natural person.

172. As noted above, article 24 of Law 1778 of 2016 allows the Superintendency to engage directly in MLA. This clarification is a positive but essentially formal development. In practice, foreign judicial authorities do not provide MLA directly to administrative authorities such as the Superintendency, as confirmed by participants at the on-site visit.

173. In addition, the PGO clarified that it cannot seek MLA on behalf of the Superintendency without opening a criminal investigation into a natural person since, in practice, foreign authorities do not respond to MLA requests sent outside the scope of a criminal investigation. The PGO explained that an investigation into a legal person by the Superintendency is normally associated with an investigation into natural persons by the PGO. However, by law, the Superintendency and the PGO can open formal investigations independently from each other. In addition, based on available information, it does not appear that all investigations by the Superintendency have actually been "mirrored" by investigations by the PGO. At the time of Phase 3, at least one foreign bribery case was being investigated by the PGO and the Superintendency. No cooperation appears to have taken place between the two authorities in seeking international cooperation in this case.

174. Colombia has taken a number of concrete steps to try and enhance the Superintendency's capacity of effectively and directly engage in international cooperation. The Superintendency has concluded an agreement with Brazil's administrative authority in charge of enforcement against legal persons. With respect to MLA in particular, since 2017, the Superintendency has signed two agreements on direct information exchange in transnational bribery investigations with criminal law enforcement authorities in Peru (Public Ministry) and the United Kingdom (Serious Fraud Office), and reports "aggressively"

pursuing the establishment of similar agreements with as many countries as possible, prioritising Latin America. The Superintendency has submitted various direct requests for information in relation to foreign bribery to foreign prosecutors, either on the basis of such agreements, or not. The outcomes of the requests suggest that, in the absence of an agreement, the Superintendency cannot engage directly in MLA in criminal matters, but that an agreement does allow for it.⁸⁴ The Superintendency acknowledged that, given its administrative nature, negotiations with foreign prosecutors are difficult.

175. In the Phase 3 questionnaire, the Superintendency noted that, where obtaining MLA is not possible, other proactive steps are taken to obtain evidence “by other means” and its officials have “developed skills to find alternative solutions thanks to the training received and to the experience, for example, searching for specific words in the forensic laboratory, relevant open sources, and specific accounting items.” What these means, skills and alternative solutions mean in practice is not clear, although Colombia further explained that they include the collection of information found in the servers of the companies in other countries, and the establishment of a channel allowing anyone from anywhere in the world to send information and provide evidence to investigate and sanction transnational bribery. In the example provided by Colombia, evidence from a non-Party could be collected without requiring MLA because information could be accessed on Colombian servers. Overall these techniques do not seem sufficient to ensure effective access to evidence from a third country where an MLA agreement has not been signed with the prosecutors, and the PGO has not opened a criminal investigation in Colombia.

(b) Extradition

176. The legal framework on extradition remains unchanged since Phase 2.⁸⁵ Rules are laid out in articles 490 to 514 CPC, as well as multilateral and bilateral treaties. The MFA is the central authority for receiving and sending extradition requests. Foreign bribery is an extraditable offence. As per article 494 CPC, extradition may be granted in the absence of a treaty. It is conditional upon dual criminality. Colombia will extradite its nationals for offences committed abroad if dual criminality is deemed to exist. After the Supreme Court has assessed the legality of and approved the extradition decision, extradition may be granted by the Government, at its sole discretion.

177. As in Phase 2, Colombia has no record of extradition requests based on the OECD Anti-Bribery Convention. However, in May 2018, Colombia granted the extradition of a Colombian prosecutor to another Convention Party to face various charges including conspiracy to launder money to promote foreign bribery.

Commentary

As noted in Phase 2, Colombia has a sound framework for providing and seeking MLA and extradition, including in relation to foreign bribery. However, the lead examiners recommend that the Working Group follow-up on steps taken by Colombia to ensure that central authority functions for MLA related to foreign bribery are clearly allocated and adequately reported to the OECD and the Working Group in line with Article 11 of the Convention. They also recommend that Colombia ensure that comprehensive data on MLA, including in relation to foreign bribery cases, is systematically collected.

The lead examiners consider that proactive steps taken by the Superintendency to enhance its capacity to seek MLA, including by signing MLA agreements with foreign prosecutors should be commended. However, this capacity remains limited as the PGO cannot channel the

⁸⁴ The Superintendency has sent 14 outgoing MLA requests to six countries. Only Peru has provided assistance. The other requests are either pending or rejected on the ground that they have been submitted through inappropriate channels.

⁸⁵ Phase 2, paras. 195-198.

Superintendency's outgoing MLA requests where a parallel criminal investigation has not been opened, and only a small number of MLA agreements are in place at this stage. The lead examiners thus recommend that the Working Group continue to follow up on steps taken by Colombia to ensure that the Superintendency can effectively seek MLA to ensure the effective enforcement of the foreign bribery offences against legal persons. The Working Group should also follow up on steps taken to ensure coordination and cooperation between the PGO and the Superintendency in seeking evidence from third countries, where both institutions carry out parallel investigations into the same foreign bribery case.

2.10. Public awareness and the reporting of foreign bribery

178. This section considers efforts to raise awareness of foreign bribery, encourage reporting of this crime to law enforcement, and protection of whistleblowers. The reporting obligations of accounting and auditing professionals, tax officials, and officials involved in the disbursement of public advantages are addressed separately under sections 2.7, 2.8 and 2.11 respectively.

(a) Awareness of the Convention and the offence of foreign bribery

179. Colombia's efforts to raise awareness of the Convention and the offence of foreign bribery since Phase 2 have been inconsistent. By the time of the Phase 2 Written Follow-up Report in 2017, Colombia had undertaken positive efforts to raise awareness in both the public and private sector. Regrettably, in more recent years, these efforts appear to have decreased considerably. For example, Colombia's National Development Plan 2018-2022 does not refer to the fight against foreign bribery, a setback compared to 2014-2018 Plan, which indicated that Colombia should cooperate with the Working Group by providing "permanent, comprehensive assistance to monitor corruption cases with a high national or regional impact". It is not clear how the National Strategy for the Comprehensive Anti-Corruption Public Policy, which is currently under development addresses the fight against foreign bribery. More alarming however, is the decrease of engagement of a number of key government agencies, such as the Secretariat of Transparency and the MFA.

(i) Public sector awareness

180. In recent years, Colombia's efforts to raise awareness of Colombian public officials on the issue of foreign bribery and its detection has been largely carried out by the Superintendency of Corporations. Following previous work with the public sector, the Superintendency carried out in February 2018 a foreign bribery training for DIAN officials. The Superintendency has also co-organised high-level public events on the "20 Years of the OECD Anti-Bribery Convention: Latin American Perspectives" and the 15 years of the adoption of the UNCAC in February and December 2018 respectively. The two events brought together more than 270 participants from different sectors. Both the Superintendency and the PGO participated actively in the inaugural meeting of the Latin America and Caribbean Law Enforcement Anti-Corruption Network (LAC LEN) in October 2018 in Buenos Aires and presented Colombia's first foreign bribery case to the group. None of these authorities attended however, the 2019 LAC LEN meeting, which focused on the topic of responsibility of legal persons and corporate investigations.

181. At the time of the Phase 2, the Working Group considered that the Secretariat of Transparency was one of the most important authorities in Colombia's efforts in raising awareness and noted in particular its efforts in providing training on foreign bribery. Regrettably, the Phase 3 evaluation saw a considerable decrease not only in the Secretariat's efforts to raise awareness of Colombian public officials on the issue of foreign bribery but also in its own engagement with the WGB. Despite being the designated head of delegation to the Working Group, the Secretariat of Transparency has not engaged in its work nor participated regularly in its quarterly meetings throughout 2018 and in March 2019. Colombia has resumed attendance in the Working Group meetings in June 2019, following the Phase 3 on-site visit. A significant consequence of this withdrawal has been the failure to communicate to its law enforcement authorities

relevant foreign bribery enforcement information concerning Colombia, notably the Matrix of foreign bribery cases. During the on-site visit, law-enforcement officials reported either not being aware of the existence of such information, or having learned of it only through the Phase 3 questionnaire communicated to Colombian authorities in the context of the present review.

182. Despite the initiatives of Superintendency of Corporations to raise awareness of foreign bribery, this appeared relatively low among public officials and judges during the on-site visit. Participants agreed that the fight against domestic bribery continues to remain a priority and a number of public officials seemed not to fully understand all aspects of foreign bribery. For several participants in the on-site visit, including the judiciary, the understanding and focus was on bribery of Colombian officials by foreign companies, with limited interest or concern for active bribery of foreign public officials by Colombian companies, which may affect adversely enforcement. Detection through public agencies, including overseas diplomatic missions, is also lacking despite the critical role that these authorities can play in raising awareness and detecting foreign bribery. At the time of Phase 2, the MFA had issued a Circular for all diplomatic missions highlighting key features of the Convention's implementation in Colombian law, and recalling reporting obligations for officials when they detect foreign bribery. However, as of today, the circular has not yielded results and law enforcement authorities and private sector participants who attended the on-site visit expressed scepticism about its effectiveness. Colombia indicated after the on-site the plans of the MFA to update Circular and take active steps to promote its dissemination, including through integration in regular trainings.

(ii) Private sector awareness

183. Since the Phase 2 Written Follow-Up, the Superintendency of Corporations has also continued to lead Colombia's foreign bribery awareness-raising efforts in the private sector. The awareness raising and training activities target mainly companies that operate in the sectors identified by Resolution 100-002657 of 2016, with a view to promoting the Superintendency's Guide for companies to implement corporate ethical programmes for the prevention of foreign bribery. As of the time of the on-site, the Superintendency had conducted workshops for companies in the pharmaceutical, infrastructure and construction, manufacturing, and mining and energy sectors with a total of 186 participants. In addition, 57 SMEs have participated in the awareness raising and training activities of the Superintendency. With the majority of efforts focusing on foreign companies operating in Colombia, more efforts are needed to ensure that these activities cover equally Colombian companies operating abroad.

184. Other awareness-raising efforts by the Superintendency include partnerships with intergovernmental organisations (e.g. UNODC) and business organisations (e.g. National Business Association of Colombia - *Asociación Nacional de Empresarios de Colombia* (ANDI)) on joint awareness raising and training activities for the private sector and the employment of new technologies, such as virtual fora and online videos, to provide more accessible training activities for companies. After the on-site visit, the Secretariat of Transparency provided information on its own efforts to promote a culture of integrity in the private sector through the conclusion of transparency pacts with professional organisations. As of January 2019, the Secretariat had signed 15 pacts, 9 of them with business associations, 5 with binational chambers of commerce and 1 with a foundation, impacting more than 1000 professional organisations in Colombia (see also section 2.7(c) on promotion of anti-corruption compliance).

Commentary

The lead examiners are encouraged by the efforts made in particular by the Superintendency of Corporations to increase awareness of the foreign bribery offence. However, they regret the serious decrease since Phase 2 in the engagement of a number of key government agencies, including the Secretariat of Transparency and the Ministry of Foreign Affairs, and query whether the responsibility for awareness-raising and training should rest so heavily on a law

enforcement authority such as the Superintendency of Corporations. The lead examiners are also disappointed by the low level of awareness displayed by a number of public officials and the judiciary at the on-site visit, especially when compared to similar levels at the time of Phase 2.

The lead examiners therefore recommend that Colombia remobilise key government agencies, in particular the Secretariat of Transparency and Ministry of Foreign Affairs, and increase its efforts to raise awareness within the public sector, in particular among officials in foreign embassies and all those in contact with Colombian businesses operating abroad, as well as the judiciary. The lead examiners also recommend that Colombia ensure regular attendance at the meetings of the Working Group and engagement as appropriate in its work, including where foreign bribery enforcement is concerned.

(b) Reporting suspected acts of foreign bribery

185. Colombia's framework for reporting suspected acts of foreign bribery has not changed since Phase 2. Public officials have a duty to report criminal acts under article 417 PC and article 34 of the Single Disciplinary Code for public officials. Sanctions for those who fail to report, delay or obstruct a report may include a fine, loss of employment, removal from office and disqualification from the exercise of public functions. In the absence of information with regard to cases of breach of the reporting obligation by public officials, it is difficult to assess whether this obligation is enforced in practice. The level of awareness of public officials of both their duty to report and potential penalties for failure to report continues to remain high as demonstrated by the discussions with panellists during the on-site visit. Colombia indicates that in general, public authorities and entities have in place mechanisms and protocols that enable the reporting of suspected criminal acts both internally and directly to law enforcement authorities. However, relevant statistics are maintained only by the PGO, which provide that, between 2016 and 2019, it has received 2,314 reports from public officials, 441 of which are currently under investigation. None of these reports relate to foreign bribery.

186. In 2019, the Single Disciplinary Code was updated by Law 1952. Colombia's questionnaire responses indicate that the duty to report has been extended to judicial employees, notaries, individuals and other authorities who administer justice on a permanent or temporary basis, lawyers, students of law and all people who need to recognise, study and apply the rules of disciplinary law. The law will come into force in July 2021. In the absence of relevant awareness raising efforts, the lawyers who participated in the panels during the on-site visit were completely unaware of this new reporting obligation. Moreover, some expressed serious concerns about possible limitations to the reporting obligation by the attorney client privilege.

187. Finally, in addition to these reporting obligations applicable to specific professions, Colombian law places a general duty to report criminal activity on all people under article 67 CPC. Colombia provides that the same sanctions of the article 417 PC would also apply those who fail to report under article 67 CPC. As of the time of this report, this general reporting obligation has not yielded any reports regarding suspected foreign bribery instances.

Commentary

The lead examiners recognise the high level of awareness of Colombian public officials of their general reporting obligation. They note, however, that this has not yielded any result where foreign bribery is concerned, which is not surprising given the serious decrease in efforts to raise awareness of this issue. Furthermore, the lead examiners regret the lack of knowledge of certain private sector professionals of their new reporting obligation. The lead examiners therefore recommend that Colombia resume targeted awareness-raising and training for relevant public sector officials and private sector professionals on foreign bribery red flags and

the available channels for reporting suspected foreign bribery or related offences of money laundering and false accounting.

(c) Whistleblowing and whistleblower protection

(i) Legal framework for protecting reporting

188. In Phase 2, the WGB expressed serious concerns about the circumstances faced by whistleblowers and journalists reporting corruption in Colombia, and recommended that Colombia adopt, as a matter of priority, appropriate protections for those who report suspected acts of foreign bribery (Phase 2 recommendation 2). Due to limited progress, this recommendation was deemed unimplemented at the time of the Phase 2 Written Follow-up Report. The Working Group was however, encouraged by the draft legislation presented by Colombia on whistleblower protection and encouraged Colombia to promptly proceed with its adoption. Regrettably, the draft law that was presented to Congress in late 2017 was dropped soon thereafter. The MoJ reported at the Phase 3 on-site visit that the adoption of a comprehensive whistleblower legislation remains a priority.

189. Following the on-site visit, a Bill No. 008 “By which regulations aimed at strengthening the mechanisms of analysis and incentives for acts to combat and prevent corruption and other provisions - Law Pedro Pascasio Martínez” was introduced in Congress in July 2019. Due to late submission, the evaluation team had very limited time to review the content of the draft law. Nevertheless, it appears to include some positive elements, including application across the public and private sector, prohibition against retaliation (at least in the public sector), and confidential reporting. At the time of this review, the first debate on the draft law had yet to be scheduled. As per usual practice, the Working Group will assess more closely the legislation once it is adopted.

190. In the meantime, Colombia continues to rely on its labour laws, in particular the Work Harassment Law (Law 1010 of 2006), and the Single Disciplinary Code for the protection of whistleblowers. However, as the Working Group noted in Phase 2, the current framework is inadequate and has proven ineffective to protect from retaliation whistleblowers who report corruption and foreign bribery. Since Phase 2, media reports about the sudden deaths of a whistleblower who reported allegations of corruption related to the Odebrecht scandal and his son⁸⁶, as well as the suicide of a witness who was about to testify in an Odebrecht related investigation⁸⁷ suggest that the situation for whistleblowers and those who report corruption in Colombia is perceived as hostile. These highly publicised cases of alleged retaliation against whistleblowers have had an additional deterrent effect on those who could potentially report allegations of corruption and foreign bribery. Responses to the Phase 3 questionnaire as well as discussions during the on-site visit further revealed a certain level of confusion between measures to protect whistleblowers, witness-protection programmes and cooperating offenders – a confusion already identified as problematic in Phase 2.

(ii) Channels for reporting foreign bribery

191. Despite the absence of a legal framework for protecting whistleblowers, Colombia has set up channels for reporting foreign bribery – none of which appears particularly effective in practice. This includes the channel of the Superintendency of Corporations, which allows any person to report suspicions of foreign bribery anonymously. Whistleblowers may still choose to provide contact information in case they wish to be contacted by the Superintendency by way of follow-up to their report. The foreign bribery

⁸⁶ The Economist, November 2018, “[Colombia’s biggest corruption scandal gets more complicated](#)”; El Tiempo, November 2018, “[Los correos secretos del ‘controller’ Pizano](#)”; OCCRP, November 2018, “[Colombia Investigates Death of Whistleblower and Son](#)”

⁸⁷ El Pais, January 2019, “[Investigation on Merchán’s death was closed determining he committed suicide](#)”

channel runs in parallel with a channel that accepts allegations of corruption that concern the Superintendency officials. The Superintendency has undertaken efforts to raise awareness of the foreign bribery channel, including through national media, the website of the MFA, and the Circular to Colombian diplomatic missions. The awareness and effectiveness of the channel remain however, very limited. During the on-site visit, the very limited number of panellists who were aware of its existence reported concerns about its accessibility, including due to the highly specialised nature of the channel. The Superintendency has received one report as of today through the foreign bribery channel. Reports about foreign bribery may also be submitted to the PGO in-person, by telephone or email but no such reports have been received. Neither the Superintendency nor the PGO have the mandate or capacity to protect those who report foreign bribery through their channel unless they receive the status of a witness.

192. Circular 100-000003 of 2016 further calls on companies that are subject to Resolution No. 100-002657 of 2016 to set up confidential or anonymous internal channels for reporting foreign bribery, adopt measures to prevent retaliation, and provide remedies to those who have been retaliated against. In practice however, the concept of whistleblower protection remains unknown to the private sector. While most large companies that attended the panels have in place some sort of reporting channels, only one indicated that it considered providing protections to those who report. The Ministry of Finance reported similar statistics for the SOEs under its supervision. On the other hand, the level of implementation of the Circular by SMEs remains low on all three fronts. All panellists agreed that in the absence of an underlying legal framework for protecting whistleblowers, voluntary measures by companies to promote internal reporting will remain of limited impact.

Commentary

The lead examiners are seriously concerned about the absence of whistleblower protection and the circumstances faced by whistleblowers in Colombia. They consider that Colombia's current framework continues to provide inadequate protections to those who report foreign bribery, as already noted in Phase 2. They therefore reiterate the Working Group's recommendation by recommending that Colombia urgently adopt legislation that provides clear and comprehensive protections from retaliation to whistleblowers across the public and private sectors.

The lead examiners also recommend that Colombia promote further the awareness and effectiveness of public channels for reporting foreign bribery, including by increasing their visibility and accessibility.

2.11. Public advantages

(a) Public procurement

193. The Anti-Bribery Convention deals with public procurement mainly in one respect: whether a Party to the Convention disqualifies (i.e. debar) natural and legal persons that have committed foreign bribery from participating in public procurement as a form of civil or administrative sanction (Convention Article 3(4) and Commentary 24; 2009 Recommendation XI (i)). As discussed in Section 2.3, Colombia has taken all appropriate legislative measures to fully implement Phase 2 recommendations with regard to sanctions, including recommendation 13d. As a result, debarment from public procurement contracting for up to 20 years is now available for both natural and legal persons that have committed foreign bribery.

194. According to the Colombian authorities, convictions of natural persons and sanctions against legal persons for foreign bribery are registered in the single Information System of Ineligibility (*Sistema de Información y Registro de Inhabilidades*, or SIRI), which is managed by the Office of the Inspector General (*Procuraduría General de la Nación*). The responsibility to report convictions and sanctions to the Office of the Inspector General lies with the sanctioning authority. Accordingly, for sanctions in the *Water Utility Company case*, the Superintendency of Corporations should have notified the Office of the Inspector General. However, because there is no obligation for such reporting, Colombia indicates that

sanctions against the Water Utility Company have not been registered in SIRI. Natural and legal persons wishing to participate in competitions for public contracts must provide a certificate of eligibility issued by SIRI. Failing to produce this certificate results in ineligibility to participate in the tender. There have not yet been any cases of debarment of natural and legal persons due to involvement in foreign bribery.

195. *Compra Eficiente* is Colombia's public procurement authority. *Compra Eficiente* does not have central purchasing and contracting functions but its role is limited to structuring and concluding framework agreements for other contracting authorities, establishing policies for these authorities, and co-ordinating training for public officials in charge of public procurement. There is no indication that *Compra Eficiente* policies address foreign bribery. Accordingly, contracting authorities in Colombia do not check routinely the debarment lists of multilateral financial institutions in the context of public procurement contracting. Nor do they examine a legal person's anti-corruption compliance programme or offence prevention model, since procurement contracts do not require such a programme or model. *Compra Eficiente* indicated during the on-site visit that its officials would report allegations of corruption or foreign bribery to law enforcement authorities for investigation. The efficacy of this reporting, as well as the role of *Compra Eficiente* in promoting anti-bribery policies and measures, remain however, doubtful given the lack of awareness of the foreign bribery offence by the public procurement officials who attended the on-site visit, and the limited interest to either engage with the evaluation team during the on-site or to provide responses to the Phase 3 Questionnaire.

Commentary

The lead examiners recommend that Colombia target procurement officials as part of its efforts to raise awareness of foreign bribery. They also recommend that Colombia encourage public procurement authorities to (a) routinely check the debarment lists of multilateral financial institutions in the context of public procurement contracting, and (b) consider, as appropriate, the existence of anti-corruption internal controls, ethics and compliance programmes of companies seeking procurement contracts. Finally, the lead examiners recommend that all convictions and sanctions in foreign bribery cases are systematically reported and registered in SIRI.

(b) Export credits

(i) Application of the 2019 Export Credit Recommendation

196. Colombia has adhered to the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits (the Export Credit Recommendation) as part of its accession to the Anti-Bribery Convention. Colombia is also an adherent to the 2019 Export Credit Recommendation, which abrogates and replaces the 2006 Export Credits Recommendation. Colombia's Ministry of Trade, Industry and Tourism has delegated to the *Banco de Comercio Exterior de Colombia* (Bancóldex), Colombia's Development Bank, matters related to export credits within the OECD Working Party on Export Credits and Credit Guarantees (ECG), which is responsible for taking forward OECD work in the field of export credits and credit guarantees. Colombia has not participated in the work of the ECG, including in the review and update of the 2006 Export Credit Recommendation, at least since 2016.

197. Colombia does not currently provide officially supported export credits. This is due (a) to the ownership structure and operation mechanism of Bancóldex, whereby the government of Colombia does not carry the risk of the financial products provided by Bancóldex; and (b) the fact that the financial products are not considered officially supported export credits under the exchange regime established by Colombia's Central Bank. Indeed, Bancóldex has traditionally provided its products and services as a second-tier bank in the form of on-lending to private financial institutions, instead of direct financing to companies. Accordingly, Bancóldex exercises due diligence only with regard to its direct clients, i.e. the

private financial institutions, and delegates intermediary banks to verify whether exporters have engaged in bribery or whether they have implemented anti-corruption control systems. In this context, the Working Group expressed concerns during Phase 2 with regard to the level of Colombia's implementation of the 2006 Export Credit Recommendation and made six recommendations to Colombia with regard to officially supported export credits (Phase 2 recommendations 3a-f). At the time of the Phase 2 Written Follow-Up Report, the Working Group found that the situation in Colombia with regard to exports credits remains unchanged and that Colombia had not implemented recommendations 3a, b, c, e, and f and partially implemented recommendation 3d.

198. In Phase 3, Colombia continues to maintain that it does not provide officially supported export credits. Nevertheless, in discussions leading up to the adoption of the present Phase 3 report, Bancóldex conceded that it could indeed play a role in the prevention, detection and sanctioning of foreign bribery, which marks a positive and significant change in the position of Bancóldex.

(ii) Measures to prevent, detect and sanction foreign bribery

199. An immediate consequence of the change of Bancóldex's position vis-à-vis the 2019 Export Credit Recommendation was the decision to take measures to address pending Phase 2 recommendations. Bancóldex notified the evaluation team of these measures in December 2019, just before the discussion on the present report by the Working Group. Since most of these measures are expected to take effect after the adoption of the present report, their content and effectiveness in practice could not yet be assessed. The section below details Bancóldex's current measures with regard to foreign bribery and additional measures that Bancóldex intends to take to implement the Export Credit Recommendation.

200. Since Phase 2, Bancóldex has put in place a fraud and corruption risk assessment and prevention programme, which covers also foreign bribery. The programme, articulates in broad lines the prevention, detection and sanction functions that Bancóldex should develop with the view to identifying, monitoring and managing the fraud and corruption risks that it is exposed to. Although Bancóldex has incorporated some of the elements of the 2019 Export Credit Recommendation into this programme, other important elements are missing. For example, Bancóldex does not require from the intermediary banks or other clients to declare that neither they, nor anyone acting on their behalf, have engaged or will engage in bribery, or are currently under charge or have been convicted for foreign bribery. Bancóldex provides that as of 31 January 2020, it will obtain relevant declarations through the Wolfsberg Questionnaire and, in addition, will require declarations from the intermediary banks that they are not listed in the debarment lists of the Inter-American Development Bank and World Bank.

201. At the time of the on-site visit in June 2019, Bancóldex did not have a process in place to verify the debarment lists of international financial institutions, nor did Bancóldex undertake enhanced due diligence if there is credible evidence that bribery was involved in the award or execution of the export contract. Bancóldex representatives at the on-site visit confirmed that they do consult regularly the Information System of Ineligibility (SIRI). In December 2019, Bancóldex explained it would start verifying the debarment list of international financial institutions for its customers, credit beneficiaries, providers and employees. Where red flags are detected, this would trigger enhanced due diligence measures. In any event, given their very recent adoption, the effectiveness of these measures will need to be tested in practice once they have entered into force.

202. Bancóldex has developed a standard default clause, which is included in all promissory notes with intermediary banks. The clause allows for the unilateral termination or suspension of financing and the recovery of all funds in cases where the recipient is listed in the sanctions list of the United Nations Security Council, the Office of Foreign Assets Control of the US Department of the Treasury or was convicted by any court or other governmental authority for violating anti-money laundering or financing of terrorism laws, and/or anti-bribery and corruption laws. The clause does not apply however, to recipients listed on the debarment lists of international financial institutions nor is it included in export credit

contracts concluded by intermediary banks. Bancóldex asserts that a new default clause, which will be effective as of 31 January 2020, will address both deficiencies.

203. Bancóldex staff are public officials. However, because of its mixed-capital character, Bancóldex staff are not subject to the reporting obligations under article 417 PC and article 34 of the Single Disciplinary Code. Bancóldex representatives indicated at the on-site visit that they are nevertheless encouraged to report allegations of foreign bribery to competent law enforcement authorities if they have reasons to believe that bribery was involved in a transaction. Bancóldex has also in place an internal reporting mechanism, which allows its staff and any interested person to report potential irregularities and suspicions of wrongdoing, including foreign bribery, with regard to the bank, intermediary banks, clients and third parties. The report can be made confidentially or anonymously. According to Bancóldex, no reports regarding foreign bribery have been made to date either to law enforcement or internally. Bancóldex's annual training programme to prevent and detect risks of fraud and corruption does not address foreign bribery. Bancóldex provides that as of 31 March 2020, it will make reasonable efforts to develop training programmes for the financial intermediaries on foreign bribery, will circulate a relevant newsletter to its customers and will include foreign bribery as part of the annual training programme to its staff.

Commentary

The lead examiners welcome the recent shift in Bancóldex's position vis-a-vis the Export Credit Recommendation and its intention to undertake efforts and adopt measures to adequately safeguard its operations against the risk of foreign bribery. The lead examiners therefore recommend that Bancóldex adopt without further delay the measures announced to the evaluation team just before the Phase 3 evaluation, notably to:

- (i) Raise awareness of the foreign bribery offence among its staff as well as among intermediary banks, and other clients as appropriate, and inform them about the legal consequences of bribery in international business transactions under Colombia's legal system;*
- (ii) Require intermediary banks, and other clients as appropriate, to undertake that neither they, nor anyone acting on their behalf have engaged or will engage in bribery, and disclose whether they or anyone acting on their behalf in connection with the transaction are currently under charge or, within a five-year period preceding the application, have been convicted for foreign bribery;*
- (iii) Verify routinely the debarment lists of international financial institutions;*
- (iv) Undertake enhanced due diligence in cases where intermediary banks, and other clients as appropriate, are currently under charge or, within a five-year period preceding the application, have been convicted for foreign bribery, are listed in the debarment lists of international financial institutions, or there are reasons to believe that bribery may be involved in the transaction;*
- (v) Include the standard default clause in all promissory notes concluded by Bancóldex as well as in export credit contracts concluded by intermediary banks.*

(c) Official Development Assistance

204. Colombia adhered to the Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption in 2016. Unlike most adherents to the 2016 Recommendation, Colombia is a recipient and not a provider of international official development assistance (ODA) as defined by the OECD Development Assistance Committee. However, it plays an active role in other forms

of development co-operation. Colombia participates in South-South and triangular co-operation in Latin America and the Caribbean, which refers to the sharing of knowledge, skills and expertise between middle-income and developing countries with the aim of building capacity and advancing development. From 2012 to 2019, Colombia's contribution to South-South and triangular co-operation amounted to USD 35 million; 70% was for technical co-operation and 30% was for post-disaster international assistance. The average annual budget was USD 4 million.⁸⁸

205. The *Agencia de Cooperación Internacional de Colombia* (APC-Colombia) is the responsible agency within Colombia for the management of the ODA that the country receives and, in general, of development co-operation. As in Phase 2, APC-Colombia indicates that it does not grant funds nor carry out projects in foreign countries as part of its development co-operation programme.

206. In 2018, as part of its accession process to the OECD, Colombia submitted its position with respect to the 2016 Recommendation. In its position, Colombia indicated that, as part of its management of the ODA that the country receives, APC-Colombia uses internal and external audit to prevent and mitigate corruption risks in development co-operation activities. APC-Colombia was also in the process of developing a comprehensive system to prevent and manage such risks for all disbursements that involve government funds, including those used for South-South Co-operation. This risk prevention and management system would include the requirement that partners demonstrate "clean legal background" and commitment to enhance their anti-corruption mechanisms if risks are identified either within their own organisations or with subcontracted partners. Colombia also emphasised that all contracts concluded by APC-Colombia include anti-corruption clauses, which allow for the suspension or termination of a contract if corruption is identified.

207. Nevertheless, Colombia's responses to the Phase 3 Questionnaire and during the on-site visit emphasise that APC-Colombia does not have control over the management of the ODA it receives. The terms of the ODA agreements, including those relevant to anti-corruption, are determined by the donors' policies by which APC-Colombia has to abide. APC-Colombia provides a channel to report corruption allegations but the channel is limited to allegations that concern its officials. APC-Colombia staff are public officials and therefore, are subject to the reporting obligations under article 417 PC and article 34 of the Single Disciplinary Code. It is unclear whether those who report are entitled to appropriate protections in line with the 2016 Recommendation (III.7). According to APC-Colombia representatives at the on-site visit, no reports regarding foreign bribery have been made to date either to law enforcement authorities or within APC-Colombia.

Commentary

The lead examiners recommend that the Working Group follow-up whether Colombia engages in the future in the provision of official development assistance (ODA). If such engagement materialises, Colombia should adopt measures to prevent, detect, report and sanction foreign bribery in line with the 2016 Recommendation.

⁸⁸ OECD, Development Co-operation Profiles 2019 – Other official providers not reporting to the OECD, <https://doi.org/10.1787/2dcf1367-en>

3. Recommendations and issues for follow-up

208. The Working Group welcomes efforts by Colombia to enforce its foreign bribery offence, as reflected in particular in the high number of investigations opened concerning legal persons, and will carefully follow up in the coming years to see how these investigations unfold, as well as to review whether sanctions are sufficiently effective, proportionate and dissuasive. The Working Group considers that detection could be improved through the adoption of whistleblower protection legislation, as well as enhanced awareness-raising, training, reporting mechanisms and increased engagement with relevant public agencies and the private sector.

209. Regarding outstanding Phase 2 recommendations at the time of Colombia's December 2017 two-year written follow-up report (as set out in Annex 2), the Working Group concludes that recommendation 6b has been fully implemented and recommendation 7h is converted to a follow-up issue. All other Phase 2 recommendations remain outstanding, and are reiterated below by the Working Group.

210. In conclusion, based on the findings in this report on Colombia's implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group invites Colombia to submit an oral report to the Working Group within one year (i.e. by December 2020) on progress made to adopt whistleblower protection legislation (recommendation 9), and a written follow-up report within two years on its implementation of all recommendations and follow-up issues (i.e. by December 2021). Colombia is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits this report.

3.1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. Regarding the **liability of legal persons**, the Working Group recommends that Colombia clarify that self-reporting (i) is possible only prior to the discovery of the misconduct, by providing original information to the Superintendency of Corporations and (ii) should be accompanied by appropriate remedial action by the legal person. [Convention, Article 2].
2. Regarding **sanctions and confiscation**, the Working Group recommends that Colombia:
 - a) Ensure that sanctions imposed in practice against legal persons for foreign bribery are effective, proportionate and dissuasive [Convention Article 3]; and
 - b) Introduce the necessary legislation to allow the Superintendency of Corporations to request the forfeiture of the bribe and proceeds of foreign bribery, or property the value of which corresponds to that of such proceeds, or introduce monetary sanctions of comparable effect against legal persons, even in the absence of prosecution or conviction of a natural person [Convention Article 3.3].
3. Regarding the **investigation and prosecution of foreign bribery and related offences**, the Working Group recommends that Colombia:
 - a) Establish appropriate mechanisms for cooperation and coordination between the Superintendency of Corporations and Colombia's financial intelligence unit (the UIAF) to ensure all suspicions of foreign bribery or related offences can be effectively investigated by the Superintendency [Convention, Articles 2 and 5];

- b) Provide training to investigators and prosecutors on the specificities of the foreign bribery offence [Convention Article 5 and Commentary 27; 2009 Recommendation II, III(i), V and Annex I.D];
 - c) Take further steps to ensure that the PGO and the Superintendency of Corporations effectively and proactively exchange information in foreign bribery cases [Convention Article 5 and Commentary 27; 2009 Recommendation II, III(i), V and Annex I.D];
 - d) Adequately address foreign bribery issues in law enforcement authorities' anti-corruption policy and strategy documents [Convention Article 5 and Commentary 27; 2009 Recommendation II, III(i), V and Annex I.D]; and
 - e) Establish clear safeguards against any political interference in foreign bribery cases, with a view to ensuring that foreign bribery investigations and prosecutions cannot be influenced by considerations prohibited under Article 5 of the Convention [Convention Article 5 and Commentary 27; 2009 Recommendation II, III(i), V and Annex I.D].
4. Regarding **statistics**, the Working Group recommends that Colombia:
- a) Maintain detailed statistics on the criminal, civil and administrative sanctions imposed for domestic and foreign bribery against natural and legal persons in order to assess whether they are sufficiently effective, proportionate and dissuasive [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D];
 - b) Maintain detailed statistics on the use of confiscation against natural and legal persons [Convention Articles 3 and 5 and Commentary 27; 2009 Recommendation V and Annex I.D];
 - c) Maintain detailed statistics on sanctions imposed for foreign bribery-related money laundering [Convention Article 7];
 - d) Maintain detailed statistics on the enforcement of the provisions against false accounting, including sanctions imposed [Convention Article 8]; and
 - e) Collect comprehensive data on MLA, including in relation to foreign bribery cases [Convention Article 9].

Recommendations for ensuring effective prevention, detection and reporting of foreign bribery

5. Regarding **money laundering**, the Working Group recommends that Colombia:
- a) Align the scope of professionals covered by AML preventive measures, as well as customer due diligence obligations, including in relation to PEPs and beneficial owners, with the Financial Action Task Force Recommendations [Convention Article 7; 2009 Recommendation III(ii)]; and
 - b) Provide adequate guidance and training to reporting entities on identifying and reporting active (foreign) bribery [Convention Article 7; 2009 Recommendation III(ii)].
6. Regarding **accounting requirements, external audit and internal company controls**, the Working Group recommends that Colombia:
- a) Ensure that all omissions and falsifications listed in Article 8.1 of the Convention are subject to effective, proportionate and dissuasive sanctions, including for legal persons [Convention Article 8];
 - b) Ensure that auditors making reports under article 32 of Law 1778 of 2016 are protected from legal actions by companies [2009 Recommendation III(v) and X.B]; and

-
- c) Clarify and promote the reporting role and obligations of auditors, including through training on the detection of foreign bribery red flags [2009 Recommendation III(v), IX and X.B].
7. Regarding **tax measures for combating bribery**, the Working Group recommends that Colombia:
- a) Sufficiently extend the statutory time during which a tax return may be re-examined to effectively determine whether bribes have been deducted;
 - b) Put in place the necessary mechanisms to inform promptly DIAN of foreign bribery-related convictions so that DIAN may verify whether bribes were impermissibly deducted;
 - c) Resume efforts to provide training to DIAN officials with a view to enhancing their capacity to detect foreign bribery red flags; and
 - d) Ensure that mechanisms are in place for the effective sharing of information between the tax and law enforcement authorities, to ensure that both the PGO and Superintendency of Corporations (i) receive timely and relevant reports from DIAN concerning suspected foreign bribery, and (ii) are able to request information from DIAN in the context of their foreign bribery investigations into natural and legal persons [2009 Recommendation VIII and 2009 Tax Recommendation].
8. Regarding **awareness-raising and the reporting of foreign bribery**, the Working Group recommends that Colombia:
- a) Remobilise key government agencies, in particular the Secretariat of Transparency and the Ministry of Foreign Affairs, and increase efforts to raise awareness within the public sector, in particular among officials in foreign embassies and those in contact with Colombian businesses operating abroad, as well as among the judiciary [2009 Recommendation III(i) and Annex I.A];
 - b) Ensure regular attendance at the meetings of the Working Group and engagement as appropriate in its work, including where foreign bribery enforcement is concerned [Convention Article 12; 2009 Recommendation XIV and XV];
 - c) Undertake targeted awareness-raising and training for relevant public sector officials and private sector professionals on foreign bribery red flags [2009 Recommendation III(i) and Annex I.A]; and
 - d) Promote the awareness and effectiveness of public channels for reporting foreign bribery, including by increasing their visibility and accessibility [2009 Recommendation III(i) and (iv) and Annex I.A].
9. Regarding **whistleblower protection**, the Working Group recommends that Colombia adopt urgently legislation that provides clear and comprehensive protections from retaliation to whistleblowers across the public and private sectors [2009 Recommendation III(iv) and IX(iii)].
10. Regarding **public advantages**, the Working Group recommends that Colombia:
- a) Encourage public procurement authorities to (i) routinely check the debarment lists of multilateral financial institutions in the context of public procurement contracting, and (ii) consider, as appropriate, the existence of anti-corruption internal controls, ethics and compliance programmes of companies seeking procurement contracts; and

- b) Take appropriate measure to ensure that all convictions and sanctions in foreign bribery cases are systematically reported and registered in the Single Information System of Ineligibility (SIRI) [Convention Article 3.4; 2009 Recommendation XI(i)].

11. Regarding **officially supported export credits**, the Working Group recommends that Bancóldex adopt without further delay the measures announced, notably:

- (i) Raise awareness of the foreign bribery offence among its staff as well as among intermediary banks, and other clients as appropriate, and inform them about the legal consequences of bribery in international business transactions under Colombia's legal system;
- (ii) Require intermediary banks, and other clients as appropriate, to undertake that neither they, nor anyone acting on their behalf have engaged or will engage in bribery, and disclose whether they or anyone acting on their behalf in connection with the transaction are currently under charge or, within a five-year period preceding the application, have been convicted for foreign bribery;
- (iii) Verify routinely the debarment lists of international financial institutions;
- (iv) Undertake enhanced due diligence in cases where intermediary banks, and other clients as appropriate, are currently under charge or, within a five-year period preceding the application, have been convicted for foreign bribery, are listed in the debarment lists of international financial institutions, or there are reasons to believe that bribery may be involved in the transaction; and
- (v) Include the standard default clause in all promissory notes concluded by Bancóldex as well as in export credit contracts concluded by intermediary banks [2009 Recommendation XII and 2019 Export Credit Recommendation].

3.2. Follow-up by the Working Group

12. The Working Group will follow up the issues below as case law, practice and legislation develops:

- a) The application in practice of article 433 PC to ensure that an offer that does not reach the intended public official amounts to a foreign bribery offence under Colombian law [Convention, Article 1];
- b) The application in practice of the benefits of collaboration in foreign bribery cases to ensure that they result in effective, proportionate and dissuasive sanctions [Convention Articles 2 and 3];
- c) The application of Law 1778 of 2016 to ensure that a legal person cannot avoid responsibility for foreign bribery by using related legal persons [Convention Article 2 and 2009 Recommendation, Annex I.C];
- d) The effective, proportionate and dissuasive nature of sanctions imposed against natural persons [Convention Articles 1 and 3];
- e) Whether access to the necessary financial information is possible in the context of foreign bribery investigations concerning legal persons, even in the absence of prosecution of a natural person [Convention Articles 2 and 5];
- f) The independence of the Superintendency of Corporations to ensure it cannot be subject to improper influence by concerns of a political nature and factors prohibited by Article 5 of the Convention [Convention Articles 2 and 5];

- g) The effectiveness in practice of the agreement concluded between the Superintendency of Corporations and DIAN to ensure it allows for the necessary sharing of information in relation to foreign bribery cases [Convention Articles 2 and 5; 2009 Tax Recommendation];
- h) Efforts to raise awareness of sanctions imposed in foreign bribery cases [Convention Article 3; 2009 Recommendation III(i)];
- i) The PGO's capacity to ensure clear and stable arrangements for the allocation of foreign bribery cases, so that expertise can be built in relation to such cases [Convention Article 5; 2009 Recommendation III(ii), V and Annex I.D];
- j) The application of the principle of opportunity (article 324(18) CPC) to ensure it does not hinder the enforcement of the foreign bribery offence [Convention Article 5; 2009 Recommendation III(ii), V and Annex I.D];
- k) Whether foreign bribery cases are preserved from undue influence and large-scale corruption in the judicial police [Convention Article 5; 2009 Recommendation III(ii), V and Annex I.D];
- l) The existence of delays in the administration of criminal justice in complex cases and the appropriateness of time limits for prosecution, to ensure they do not impede the effective enforcement of the foreign bribery and related offences [Convention Article 5; 2009 Recommendation III(ii), V and Annex I.D];
- m) The PGO's handling of foreign bribery components in larger money laundering cases, in particular to assess whether all persons responsible for foreign bribery are effectively prosecuted and sanctioned [Convention Articles 5 and 7; 2009 Recommendation III(ii), V and Annex I.D];
- n) The UIAF's capacity to proactively build solid cases for dissemination to the PGO, in particular where indications of foreign bribery have been identified [Convention Article 7; 2009 Recommendation III(iv)];
- o) Clarification of the central authority functions in Colombia for handling MLA in foreign bribery cases, and appropriate communication to the OECD and WGB [Convention Articles 9 and 11; 2009 Recommendation III(ix)];
- p) The capacity of the Superintendency of Corporations to effectively seek MLA in foreign bribery proceedings against legal persons (including in the absence of prosecution against a natural person), as well as the effectiveness of coordination and cooperation between the PGO and the Superintendency in seeking evidence from third countries where both institutions carry out parallel foreign bribery investigations [Convention Articles 2 and 9; 2009 Recommendation III(ix)];
- q) Efforts to promote the adoption of effective compliance programmes, notably by SMEs active in foreign markets [2009 Recommendation III(v), X.C and Annex II];
- r) The allocation of sufficient resources to the Superintendency of Corporations to allow it to effectively carry out preventive inspections as well as foreign bribery enforcement [Convention Article 2 and 2009 Recommendation III(v) and X.C]; and
- s) Whether Colombia engages in the future in the provision of official development assistance, and, if so, measures taken by Colombia to prevent, detect, report and sanction foreign bribery in line with the 2016 ODA Recommendation [2009 Recommendation XI(ii) and 2016 ODA Recommendation].

ANNEX 1 – List of Participants in the Phase 3 On-Site Visit to Colombia

Public Sector

- Agencia de Cooperación Internacional de Colombia (APC Colombia)
- Banco de Comercio Exterior de Colombia (Bancóldex)
- Circuit Judges from Bogota
- Colombia Compra Eficiente
- Consejo Superior de la Judicatura
- Prosecutor General's Office (PGO), including Department for Financial Crimes, Special Directorate for Financial Investigations (DEIF), Special Directorate for Foreign Affairs
- Ministry of Finance, including Directorate for SOE's
- Ministry of Foreign Affairs
- Ministry of Justice (MoJ), including Criminal Policy Division
- Ministry of Trade and Economy
- National Directorate for Taxes and Customs (DIAN)
- National Police, Directorate of Criminal Investigation and Interpol (DIJIN)
- ProColombia (Colombia's trade promotion agency)
- Secretaria de Transparencia
- Superintendency of Corporations, including Department for Economic and Accounting Affairs, Compliance and Corporate Best Practices Group
- Unidad de Información y Análisis Financiero (UIAF)

Private Sector and Civil Society

Private Enterprises

- Anglo Gold Ashanti (gold mining)
- Argos (construction and engineering)
- Avianca (airline)
- Bancolombia (bank)
- Drummond (coal mining)
- Grupo Nutresa (FMCG)
- Grand Colombia Gold (gold mining)
- Grupo Energía Bogotá (energy)

Business Associations

- ANDI - National Business Association of Colombia
- Bogota chamber of Commerce
- Competrol

Several Private Sector Lawyers and Academics

Accounting and Auditing Profession

- Instituto Nacional de Contadores
- KPMG Accounting Corp
- PWC
- EY
- Deloitte

Civil Society and International Organisations

- Transparency for Colombia
- UNODC

Media and Investigative Journalists

- El Colombiano
- El Tiempo

ANNEX 2 – Phase 2 recommendations to Colombia (2015) and assessment of implementation by the WGB (2018)

<i>Phase 3 Recommendations – 2015</i> ⁸⁹	<i>Written Follow-Up – 2018</i> ^{90 91}
<i>Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials</i>	
1. With respect to <u>prevention, awareness raising and training activities</u> , the Working Group recommends that Colombia:	
a Pursue more targeted training for relevant public sector officials, in particular those involved with Colombia companies operating abroad on foreign bribery and how to detect it; and	<i>FI</i>
b Develop awareness-raising and training targeting companies, including SMEs, operating in high-risk geographic regions and sensitive sectors. [2009 Recommendation, Section III(i) and (iv), and IX(ii)]	<i>FI</i>
2. Regarding <u>whistleblower protection</u> , the Working Group recommends that Colombia proceed as a matter of priority with its plan to adopt measures to protect from retaliatory or disciplinary action private and public sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery. [2009 Recommendation, Sections III(iv) and IX(iii)]	
3. With respect to <u>officially supported export credits</u> , the Working Group recommends that Colombia implement fully the provisions contained in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, and in particular that Bancóldex, its export credit agency:	
a Require exporters and/or applicants to provide a declaration that they have not engaged in bribery in the transaction and to disclose whether they have been convicted of bribery in the preceding five years, and encourage exporters and/or applicants to develop, apply and document appropriate management control systems that combat bribery;	<i>NI</i>
b Check whether exporters and/or applicants have are listed on International Financial Institutions’ debarment lists;	<i>NI</i>
c Require exporters and/or applicants to disclose upon demand (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons;	<i>NI</i>
d Raise awareness of the foreign bribery offence among Bancóldex staff as well as among financial intermediaries, and institute appropriate measures (such as by adapting its internal policies and procedures) to facilitate the detection and reporting of foreign bribery;	<i>PI</i>
e Establish formal, written policies for denying or withdrawing export credit support to legal and natural persons convicted of foreign bribery; and	<i>NI</i>
f Undertake enhanced due diligence if Bancóldex has reason to believe that bribery may be involved in a transaction. [2009 Recommendation, Section XII and 2006 Export Credit Recommendation]	<i>NI</i>

⁸⁹ This column sets out the recommendations of the WGB to Colombia in its [Phase 2 Report](#), as adopted in October 2015.

⁹⁰ This column sets out the findings of the WGB on Colombia’s [Phase 2 Written Follow-Up Report](#), as adopted by the Working Group in February 2018.

⁹¹ Key: FI: fully implemented; PI: partially implemented; and NI: not implemented.

<i>Phase 3 Recommendations – 2015</i>	<i>Written Follow-Up – 2018</i>
4. Regarding taxation, the Working Group recommends that Colombia:	
a Extend the statutory time during which a tax return may be re-examined to determine whether bribes have been deducted; and	<i>PI</i>
b Allow tax authorities to share information, both spontaneously and on request, with the administrative authorities in charge of proceedings against legal persons for foreign bribery. [2009 Recommendation, Sections III(iii) and VIII, and 2009 Tax Recommendation]	<i>FI</i>
5. Regarding <u>accounting and auditing</u> , the Working Group recommends that Colombia:	
a Encourage the detection and reporting of suspected foreign bribery by the accounting and auditing profession, in particular through guidelines and training for these professionals, and through raising the awareness of the management and supervisory boards of companies about these issues;	<i>PI</i>
b Encourage Colombian companies, including SOEs, to: (i) continue to develop and adopt adequate internal controls, ethics and compliance measures for preventing and detecting foreign bribery; and (ii) adopt and develop efficient internal audit procedures, including through corporate monitoring bodies, such as audit committees;	<i>FI</i>
c Develop and implement more stringent auditing requirements consistent with international standards in order to effectively ensure the independence of external auditors and provide adequate education and training of <i>revisores fiscales</i> ; and	<i>PI</i>
d Consider introducing a clear duty for auditors to report suspicions of foreign bribery, such as the one envisaged under Bill 159; and, if such a reporting obligation is put in place, ensure that auditors making such reports reasonably and in good faith are protected from legal action. [2009 Recommendation, Sections III(i), (iv) and (v), X, and Annex II]	<i>FI</i>
6. With regard to <u>money laundering</u> and foreign bribery, the Working Group recommends that Colombia increase its capacity to detect foreign bribery through its anti-money laundering regime, and in particular:	
a Provide training or clarification to the UIAF with respect to the identification of the underlying predicate offence, in line with FATF recommendation 29, with a view to detecting instances of foreign bribery;	<i>FI</i>
b Maintain statistics on predicate offences;	<i>PI</i>
c Continue to develop the concept of PEPs in Colombian law;	<i>PI</i>
d Extend suspicious transaction reporting obligations to lawyers; and,	<i>PI</i>
e Issue appropriate directives and training materials (e.g. typologies) on the identification and reporting of active bribery, including on concealment of bribery and bribe proceeds. [2009 Recommendation, Sections III(i), (iv) and (vi)]	<i>NI</i>
<i>Recommendations for preventing and detecting bribery of foreign public officials</i>	
7. Regarding the <u>investigation and prosecution</u> of foreign bribery and related offences, the Working Group recommends that Colombia:	
a Emphasise the importance of pursuing foreign bribery and place greater priority on the detection and investigation of foreign bribery cases;	<i>FI</i>
b Take further steps to ensure that specialised expertise in foreign bribery investigations is available to PEF and any other relevant investigative bodies;	<i>FI</i>
c Ensure appropriate and specific foreign bribery training is developed for investigators and prosecutors, including on the particularities of foreign bribery investigations and prosecutions, and on the referral and coordination of cases of foreign bribery and related offences;	<i>FI</i>
d Ensure sufficient and adequate human and financial resources are provided to the PEF and the PGO for the effective investigation and prosecution of foreign bribery cases;	<i>FI</i>

<i>Phase 3 Recommendations – 2015</i>	<i>Written Follow-Up – 2018</i>
e Clarify the rules governing the allocation of foreign bribery cases within the Prosecutor General’s Office (PGO), and consider granting a greater coordinating role to the Unit specialised in crimes against corruption;	<i>FI</i>
f Strengthen the current framework to promote better coordination among law enforcement authorities, including within the PGO, between the PGO and the police, and especially between the PGO and the Superintendency of Corporations;	<i>FI</i>
g More proactively detect and investigate foreign bribery, including by encouraging law enforcement authorities to make full use of all available investigative methods, and to use incoming MLA requests as a potential source of information for initiating foreign bribery investigations in Colombia;	<i>FI</i>
h Take appropriate steps, such as providing guidance to prosecutors, to ensure that the application of article 324(18), which provides an exception to the legality principle in bribery cases for cooperating offenders, does not prevent in practice effective enforcement of the foreign bribery offence;	<i>NI</i>
i Ensure adequate and sufficient training, resources and expertise are available in the courts, and consider whether an integrated approach, for instance relying on specialised courts to deal with offences such as economic and financial crime, may be appropriate to ensure foreign bribery can be effectively sanctioned;	<i>FI</i>
8. Regarding the <u>foreign bribery offence</u> , the Working Group recommends that Colombia:	
a Amend its law to ensure that the definition of “foreign country” is not limited to States, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory, in conformity with commentary 18 to the Convention;	<i>FI</i>
b Take steps to ensure that its foreign bribery offence is sufficiently broad to cover employees of all public enterprises as defined by commentary 14, including all types of SOEs;	<i>FI</i>
c Promptly proceed with the adoption of foreseen legislation aiming to include “promise” to the foreign bribery offence; and	<i>FI</i>
d Clarify that an offer that does not reach the intended public official constitutes an offence under Colombian law. [Convention, Article 1]	<i>Converted to follow-up</i>
9. Regarding the legislation on <u>liability of legal persons</u> for foreign bribery, the Working Group recommends that Colombia:	
a Urgently amend its legislation to ensure that all legal persons, including listed entities, financial institutions, publicly-traded companies and non-profit entities, can be held liable for foreign bribery;	<i>FI</i>
b Take all necessary steps to ensure that proceedings against legal persons do not, in law or in practice, depend on the initiation of proceedings against a natural person;	<i>FI</i>
c Ensure that the statute of limitations and the investigation period allow adequate time for proceeding against legal persons for a foreign bribery offence;	<i>FI</i>
d Explicitly provide in legislation for nationality jurisdiction over Colombian legal persons for the foreign bribery offence; and	<i>FI</i>
e Clarify the application of benefits for collaboration envisaged under draft legislation, so that they do not prevent in practice the effective enforcement of the foreign bribery offence against legal persons [Convention, Article 2; 2009 Recommendation, Sections III(viii) and Annex I.B].	<i>PI</i>

<i>Phase 3 Recommendations – 2015</i>	<i>Written Follow-Up – 2018</i>
10. Regarding <u>administrative proceedings against legal persons</u> for foreign bribery, the Working Group recommends that Colombia:	
a Further strengthen safeguards for the independence of the Superintendency of Corporations ⁹² to ensure it cannot be subject to improper influence by concerns of a political nature or factors prohibited by Article 5 of the Convention;	FI + follow-up
b Provide appropriate training and awareness-raising specifically addressing foreign bribery among Superintendency officials, including in the regional offices;	FI
c Ensure that all necessary investigative means are available to the Superintendency for effectively carrying out foreign bribery investigations into legal persons;	PI
d Ensure the PGO and the relevant Superintendencies closely coordinate in foreign bribery cases and draw the attention of prosecutors to the importance of considering legal person liability; and	FI
e Establish appropriate mechanisms for cooperation and coordination between the Superintendency and other relevant agencies such as the anti-money laundering and tax authorities, to ensure all suspicions of foreign bribery involving legal persons can be effectively investigated by the Superintendency [Convention, Article 2; 2009 Recommendation, Sections III(viii) and Annex I.B]	PI
11. Regarding the <u>related money laundering offence</u> , the Working Group recommends that Colombia maintain detailed statistics on (i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and (ii) whether foreign bribery is the predicate offence. [Convention, Article 7]	PI
12. Regarding the <u>related false accounting offence</u> , the Working Group recommends that Colombia	
a Proceed with legislative developments intended to incorporate the IFRS into Colombian law; and	FI
b Maintain detailed statistics on enforcement of false accounting offences. [Convention, Article 8; 2009 Recommendation, Section X.A]	NI
13. Regarding <u>sanctions and confiscation</u> applicable to foreign bribery, the Working Group recommends that Colombia:	
a Introduce the sanction of deprivation of political rights and prohibition from exercising public functions for foreign bribery committed by a natural person, in line with the sanction applicable for active domestic bribery;	FI
b Promptly proceed with the adoption of legislation to increase financial sanctions applicable to legal persons, with a view to ensuring they are effective, proportionate and dissuasive;	FI
c Ensure that confiscation of the proceeds of foreign bribery, or property the value of which corresponds to that of such proceeds, can be enforced in practice against legal persons, even in the absence of criminal proceedings against a natural person, or that monetary sanctions of comparable effect are applicable; and	PI
d Consider extending the exclusion from public contracting already applicable to natural persons convicted of foreign bribery, and to legal persons controlled by such natural persons, to legal persons engaged in foreign bribery where appropriate. [Convention, Article 3]	FI

⁹² The WGB recommendations address the Superintendency of Corporations as the administrative authority in charge of foreign bribery enforcement against legal persons at the time of this review. If, as foreseen under Bill 159 currently before Parliament, the Superintendency of Finance is also endowed with authority over certain legal persons for the foreign bribery offence, these recommendations will also be applicable to it.

Follow-up by the Working Group

14. The Working Group will follow up on the issues below:

- a Legislative developments concerning the passing of Bill 159 and how they may affect Colombia's implementation of the Convention;
- b Whether foreign bribery cases are preserved from undue influence and large-scale corruption in the judiciary, as well as efforts made by Colombia to reform the judiciary and address its independence;
- c Colombia's capacity to efficiently and successfully investigate foreign bribery, including in the preliminary stages of the investigation;
- d The procedural timelines for law enforcement authorities, to ensure there is an adequate period of time for the investigation and prosecution of the foreign bribery offence;
- e The application of article 433 PC on the foreign bribery offence, as case law develops, to ensure it is interpreted in conformity with the Convention;
- f Colombia's ability to seek MLA in foreign bribery-related cases against a legal person;
- g Whether a legal person can be held liable for transnational bribery committed by lower level employees;
- h Whether a legal person can be held liable in practice for foreign bribery committed by related legal persons; and
- i The application of sanctions imposed on legal persons for the offence of money laundering.

ANNEX 3 – Abbreviations and Acronyms

AML	Anti-Money Laundering	GAAP	Generally Accepted Accounting Principles
ANDI	National Business Association of Colombia – <i>Asociación Nacional de Empresarios de Colombia</i>	GAFILAT	Financial Action Task Force of Latin America
APC-Colombia	Agencia de Cooperación Internacional de Colombia	GDP	Gross Domestic Product
Bancóldex	Colombia’s export credit agency and development bank – <i>Banco de Comercio Exterior de Colombia</i>	IFRS	International Financial Reporting Standards
BIC	Collective Benefit and Interest – <i>Beneficio e Interés Colectivo</i>	ISA	International Standards on Auditing
CAN	Andean Community	MLA	Mutual Legal Assistance
CARRICOM	Caribbean Community	MFA	Ministry of Foreign Affairs
CPC	Criminal Procedure Code	MoJ	Ministry of Justice
CTCP	Technical Council for Public Accounting – <i>Consejo Técnico de la Contaduría Pública</i>	MoU	Memorandum of Understanding
CPI	Corruption Perception Index	NRA	National Risk Assessment
CTI	Corps of Technical Investigation – <i>Cuerpo Técnico de Investigación</i>	ODA	Official Development Assistance
CoC	Code of Commerce	OECD	Organisation for Economic Co-operation and Development
DAC	Development and Assistance Committee	PC	Penal Code
DECLA	Specialised Directorate against Money Laundering – <i>Dirección Especializada contra el Lavado de Activos</i>	PEP	Politically exposed person
DEIF	Special directorate for Financial investigations – <i>Dirección Especializada de Investigaciones Financieras</i>	PGO	Prosecutor General’s Office – <i>Fiscalía General de la Nación</i>
DIAN	National Directorate for Taxes and Customs - <i>Dirección de Impuestos y Aduanas Nacionales</i>	ROSC	Reports on the Observance of Standards and Codes
DIJIN	Directorate of Criminal Investigation and Interpol – <i>Dirección de Investigación Criminal e Interpol</i>	SAR	Suspicious Activities Reports
EAA	Active Companies in Anti-Corruption – <i>Empresas Activas Anticorrupción</i>	SIRI	Information System of Ineligibility – <i>Sistema de Información y registro de Inhabilidades</i>
ECG	Export Credits and Credit Guarantees	SME	Small- and Medium-sized Enterprise - <i>Pyme</i>
EFTA	European Free Trade Association	SOE	State-Owned Enterprise
EUR	Euro	TI	Transparency International
FIU	Financial Intelligence Unit (in Colombia, the UIAF)	UIAF	<i>Unidad de Información y Análisis Financiero</i> (Colombia’s FIU)
FDI	Foreign Direct Investment	UK	United Kingdom
		UN	United Nations
		UNCAC	United Nations Convention against Corruption
		US	United States
		USD	U.S. dollar
		WGB	Working Group on Bribery in International Business Transactions