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Peru Phase 1 - Final Report

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A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

1. On 16 March 2009, the Government of Peru formally applied to the OECD Secretary-General to become a full participant in the OECD Working Group on Bribery in International Business Transactions (Working Group) and to accede to the [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions \(Anti-Bribery Convention\)](#). The OECD Council invited Peru to join the Working Group on 14 October 2016, and Peru accepted the invitation on the same day. Peru deposited its Instrument of Accession to the Convention with the OECD on 28 May 2018 and became a Party to the Convention on 27 July 2018. Peru also adhered to the [2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions](#).

The Convention and the Peruvian Legal System

2. Treaties that are formalised by the State and are in force form part of Peru's national law (Political Constitution of Peru Art. 55). The Peruvian Congress approved the Convention through Legislative Resolution 30 769 of 17 May 2018 which was ratified by the Government through Supreme Decree 011-2018-RE dated 19 May 2018. The Convention was published in the Official Gazette on 7 July 2018.

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

3. Art. 1 of Law 29 316 was enacted on 14 January 2009 and criminalised foreign bribery by adding Art. 397-A to Peru's Criminal Code (CC). The provision was subsequently amended on 22 October 2016 through Legislative Decree 1 243.

Article 397-A. Anyone who, under any form, offers, grants or promises directly or indirectly to an official or public servant of another State or official of an international public organization, a donation, promise, advantage or undue benefit that may be in his own interest or in that of another person, so that said server or public official performs or omits acts specific to his position or employment, in violation of his obligations or without breaching his obligation to obtain or retain a business or other undue advantage in the performance of international economic or commercial activities, shall be punished with deprivation of liberty not less than five years nor more than eight years; Disqualification, as applicable, in accordance with paragraphs 1, 2 and 8 of Article 36; and, with three hundred sixty-five to seven hundred thirty five-days.

1.1. The Elements of the Offence

1.1.1. any person

4. CC Art. 397-A applies to "anyone" and prohibits natural persons from bribing foreign public officials. The application of the offence to legal persons is considered at p. 10.

1.1.2. intentionally

5. Whether the *mens rea* element of CC Art. 397-A is sufficiently broad to implement the Convention should be further examined in Peru's Phase 2 evaluation. CC Art. 397-A applies to foreign bribery committed with "wilful intent" (CC Art. 12). According to Peru, this term covers an illegal and culpable act committed consciously and voluntarily.¹ It also covers acting while being aware of the result of one's actions.² This awareness of the result can be direct, eventual, or of necessary consequence.³ *Dolus eventualis* is apparently sufficient to meet the mental requirement, but recklessness or wilful blindness is not. Peru cited case law stating that "deliberate ignorance" and "blindness to the facts" lead to culpability.⁴ However, this case dealt not with bribery but the offence of reception of criminal goods (CC Art. 194). Whether the offence covers common *modus operandi* for committing foreign bribery, such as when a company pays an agent a large fee without questioning how the money is spent, should be more closely studied in Phase 2.

1.1.3. to offer, promise or give

6. CC Art. 397-A covers anyone who "offers, grants or promises" a bribe to a foreign public official. Peru states that an offer or promise of a bribe does not have to be carried out. Initially, it stated that the offence would be complete once the offer or promise is made. Case law adds that the offence is complete regardless of whether the offer is accepted by the public official or is subsequently carried out.⁵

7. However, two further statements by Peru raise concerns. First, Peru stated that the official must be aware of the offer or promise. An offer or promise that was made but not received by the official would appear not to constitute an offence. This is not consistent with the Convention. Second, Peru states that "it is an offence only if the undue advantage offered or promised to the foreign official is achievable or possible. The Convention prohibits the promise or offer of an advantage to a foreign public official regardless of whether the advantage can be realised. This issue should be followed up in Phase 2.

1.1.4. any undue pecuniary or other advantage

8. CC Art. 397-A covers a "donation, promise, advantage or undue benefit" (*donativo, promesa, ventaja o beneficio indebido*) given to a foreign public official. CC Art. 397-A does not expressly cover pecuniary and non-pecuniary advantages. Peru has provided case law on the coverage of non-pecuniary bribes in a domestic bribery case which uses similar language as the foreign bribery offence.⁶

9. The provision nevertheless raises one question. The word "undue" appears to modify "benefit" but not "donation", "promise" or "advantage", partly because the word

¹ *Sala Penal* (26 March 1998), *Expediente N° 455-97-Callao*.

² *Sala Penal Transitoria* (3 June 2004), *Recurso de Nulidad N° 517-2004-Arequipa*.

³ *Sala Penal* (3 June 1998), *Recurso de Nulidad N° 6293-97-Ancash*.

⁴ Exp. N° 00115-2012. Second Transitory Criminal Court, Superior Court of Justice of Lima

⁵ *Sala Penal de Apelaciones de la Corte Superior de Justicia de Lima* (12 April 2012), 005-2011-33-1826-JR-PE-03. This case interpreted the domestic bribery offence which has similar wording as the foreign bribery offence.

⁶ Supreme Court (10 May 2016), *Eloy Guillermo Orosco Vega* (14-2015 / N.C.P.P.)

“*indebido*” is singular and not plural. This leads to the question that the offence covers “due” or proper donations, promises and advantages given to a foreign public official. Entirely legitimate payments seeking proper official action are thus prohibited, which would be contrary to the Convention.⁷ Peru argues that the word “undue” also modifies “donation”, “promise” and “advantage”. Peru also states that the offence covers “criminal donations” but this language is not found in the statute or case law. These matters should be followed up in Phase 2.

1.1.5. whether directly or through intermediaries

10. CC Art. 397-A covers bribes given “directly or indirectly” to a foreign public official. The term “indirectly” includes bribes given through intermediaries.

1.1.6. to a foreign public official

11. Art. 1(4)(a) of the Convention defines a “foreign public official”:

“foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

12. Peru’s Criminal Code does not define a “foreign public official” but adopts the definition for the domestic bribery offence. The foreign bribery offence in CC Art. 397-A covers the bribery of “an official or public servant of another State or official of an international public organisation”. An “official or public servant” is defined in CC Art. 425:

Article 425. Public officials or servants are:

1. Those who are included in the administrative career.
2. Those who hold political positions or positions of trust, even if they result from a popular election.
3. Anyone who, regardless of the labour regime in which they find themselves, has a labour or contractual relationship of any kind with State entities or bodies, including State enterprises or mixed economy companies included in the State's business activities, and by virtue of this, it exercises functions in said entities or organisms.
4. Administrators and depositaries of funds seized or deposited by a competent authority, even if they belong to individuals.
5. Members of the Armed Forces and National Police.
6. Those designated, elected or proclaimed, by competent authority, to carry out activities or functions in the name or service of the State or its entities.
7. Others indicated by the Political Constitution and the law.

⁷ [Chile Phase 2](#), para. 143 and Recommendation 4(a)(ii).

13. Peru's definition of a foreign public official diverges from the Convention's in at least the following respects:

- **Persons holding administrative office** are not mentioned but only those "included in the administrative career". This refers to Peruvian public officials, since the term "administrative career" is taken from Legislative Decree 276 which applies to the Peruvian civil service.
- **Persons holding legislative office** are not expressly covered in CC Art. 425. Peru states that this category is covered by "7. Others indicated by the Political Constitution and the law". But the term "Political Constitution" obviously refers to Peru's constitution, not other countries'. Other countries' constitutions may not necessarily define all legislative offices in the country, especially for governments at lower (*e.g.* municipal or local) levels. Some countries also may not have written constitutions.

Peru also argues that persons holding legislative office are covered by "2. Those who hold political positions or positions of trust, even if they result from a popular election". Although this may cover some holders of legislative office in a foreign country, the term "political position or position of trust" is somewhat vague and open to argument regarding its scope. Rule-making in some countries may also be delegated to bureaucrats and are not necessarily performed by persons in political positions.

- **Persons holding judicial office** are not expressly covered in CC Art. 425. Peru states that this category is also covered by "7. Others indicated by the Political Constitution and the law". This is doubtful, for the reasons explained above. Moreover, Peru's Criminal Code contains a separate offence specifically covering the bribery of persons holding judicial office (Arts. 395 and 396). This raises an inference that the general bribery offence and the definition of an official or public servant do not address bribery of such persons.
- **Police officers** may not be fully covered. CC Art. 425(5) covers members of the "National Police". Again, the term clearly refers to Peru's National Police, and not police forces of other countries. Furthermore, it is debatable whether the term would cover police forces at the sub-national level (*e.g.* state, provincial or municipal) in foreign countries.
- **Persons exercising a public function for a foreign country** are also not fully covered. Peru refers to CC Art. 425(3), which covers persons who exercise functions in State entities or bodies. However, this provision only applies if the person has a labour or contractual relationship with the State entity or body. It would not cover a person performing a public function who is employed by a private company or an unpaid volunteer. Peru states that "a person not employed by the government cannot be considered a public official".
- Peru also argues that any shortcomings in these provisions are remedied by CC Art. 425(6) ("Those designated, elected or proclaimed, by competent authority, to carry out activities or functions in the name or service of the State or its entities"). Peru did not provide case law interpreting this provision. If this provision were indeed so broad, then it would beg the question of why the other provisions are necessary. Furthermore, it is debatable whether the phrase "designated, elected, or proclaimed" would cover persons who are employed or contracted by a foreign

state. The phrase “in the [...] service of the State” arguably covers even employees of companies hired to provide cleaning or mail delivery services for the government. This would go well beyond persons holding judicial, legislative, administrative and public functions as contemplated by the Convention.

14. Further issues concern the definition of a foreign country. Art. 1(4)(b) of the Convention states that the term “foreign country” includes all levels and subdivisions of government, from national to local. Commentary 18 adds that the term is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory. Peru’s foreign bribery offence applies to the bribery of officials and public servants of “another State” without defining the meaning of this term. Peru refers to its own Constitution Arts. 45 and 189 and argues that the notion of “State” is a “political concept that groups the territory, population and power” which is “the highest form of legal organisation of the individuals that are part of a society” and has both “political” and “organic” dimensions. This description of a “State” is too vague to ensure that all levels and subdivisions of government as well as any organised foreign area or entity are covered.

15. Peru also argues unconvincingly that the definition of a “foreign public official” and a “foreign country” in the Convention can be applied directly, since treaties that are in force form part of Peru’s national law (see para. 2). Peru states that while national legislation is needed to implement an offence, a definition can be imported from a convention. The argument is problematic because other international anti-corruption conventions to which Peru is Party do not have the same definition of a foreign public official.⁸ The terms used in Peru’s Criminal Code (“official or public servant” and “another State”) are also different from those in the Convention.

16. After reviewing a draft of this report, Peru concedes that the above observations “could be evaluated to formulate a reform to improve the definition of public official in relation to all the criminal modalities foreseen in the Peruvian Criminal Code.”

1.1.7. for that official or for a third party

17. CC Art. 397-A applies to anyone who offers, grants or promises to a foreign public official an advantage *etc.* “that may be in his/her own interest or in that of another person.” Peru states that this language covers not only the corrupt official but also a person close to him/her or a third party who may not necessarily be another public official or have any qualified characteristic. It also states that the third party can be a legal person.

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

18. The Convention Art. 1(1) covers bribery “in order that the official act or refrain from acting in relation to the performance of official duties”. This phrase includes “any use of the public official’s position, whether or not within the official’s authorised competence” (Art. 1(4)(c)). This would cover a case where “an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company” (Commentary 19).

⁸ See Inter-American Convention against Corruption, Arts. I and VIII; UN Convention against Corruption, Art. 2(c).

19. Peru's foreign bribery offence does not clearly cover the range of scenarios contemplated by the Convention. CC Art. 397-A covers bribery of a foreign public official so that the official "performs or omits acts specific to his/her position or employment, in violation of his/her obligations or without breaching his/her obligation". Peru states that this "contemplates an active behaviour by officials where an action related to the performance of their functions is carried out, or a behaviour of omission where they refrain from performing such functions". Peru confirms that CC Art. 397-A would not include the use of an official's position outside his/her authorised competence. Conduct of this nature is covered by a different offence of "incompatible negotiation or illegal sponsorship" which applies to domestic but not foreign public officials.

1.1.9. / 1.1.10. in order to obtain or retain business or other improper advantage in the conduct of international business

20. CC Art. 397-A covers bribery "to obtain or retain a business or other undue advantage in the performance of international economic or commercial activities". This is largely similar to the language in the Convention Art. 1(1).

1.2. Complicity

21. Art. 1(2) of the Convention requires Parties to establish as a criminal offence "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official."

22. Peru states that its foreign bribery offence covers all forms of complicity required by the Convention. CC Art. 24 covers incitement by imposing liability on someone who "determines another to commit the punishable act". Aiding and abetting is covered by CC Art. 25. Persons who provide wilful assistance without which the commission of the offence would not have been possible are subject to the same punishment as the principal offender. Others who provide intentional assistance are subject to a "reasonably reduced sentence". The CC does not expressly address authorising a crime, including foreign bribery. Peru states that CC Arts. 23 and 25 cover this situation but there is no supporting case law. The issue should therefore be followed up in Phase 2.

1.3. Attempt and Conspiracy

23. Art. 1(2) of the Convention requires Parties to criminalise attempt and conspiracy to commit foreign bribery to the same extent as domestic bribery.

24. "Attempt" is defined in the general part of Peru's Criminal Code and thus applies equally to foreign and domestic bribery. CC Art. 16 penalises an attempt to commit foreign bribery with a "reasonably reduced sentence". An attempt to commit the impossible is not a crime (Art. 17). An attempt that is aborted voluntarily is also not a crime unless the acts already performed themselves constitute another crime (Art. 18).

25. The Working Group should examine more closely in Phase 2 the application in practice of attempts to commit foreign bribery. Peru states that such attempts are unlikely because a mere offer of a bribe constitutes the full foreign bribery offence. It is therefore unclear whether an attempt to commit foreign bribery would cover preparatory acts by the briber such as withdrawing the bribe money, or contacting the foreign official to arrange a meeting in which the bribe would be offered.

26. It is an offence under Peruvian law to conspire to commit murder-for-hire, drug trafficking, rebellion, sedition or riot, and terrorism, according to Peruvian authorities. Conspiracy to commit domestic or foreign bribery is not a crime.

1.4. Defences

27. Peruvian law does not prescribe specific defences for the crime of foreign bribery. However, two defences of general application are of interest.

28. First, CC Art. 15 sets out a defence of “culturally conditioned understanding error”. A person who is unable to understand the criminal nature of his/her act due to his/her culture or customs is exempted from liability. The factor may also mitigate sentence (CC Art. 21). Peru explains that the defence largely applies in rural and native communities. In its view, in foreign bribery cases the “cultural level and understanding” of an offender would not be so minimal or limited as to prevent him/her from understanding his/her actions. This implies that the provision is unlikely to apply to foreign bribery cases.

29. Nevertheless, the Working Group should explore the contours of this provision in Phase 2. Under the Convention (Commentary 7), foreign bribery is an offence irrespective of the perceptions of local custom and the tolerance of such payments by local authorities. If bribery is widespread and tolerated in a foreign country, then a person from that country working for a Peruvian company could conceivably argue that his/her culture and custom prevents him/her from understanding that such practices are illegal in Peru.

30. Second, CC Art. 20(9) exempts an individual from criminal liability if he/she acts “by order of a competent authority issued in the exercise of his functions.” The Peruvian Constitutional Court has stated that the exemption does not apply to “illicit orders”.⁹ The defence therefore would not apply if officials in a Peruvian state-owned or controlled enterprise (SOE) orders an employee to commit foreign bribery, according to Peruvian authorities. This issue should be examined more closely during Phase 2.

2. Article 2: Responsibility of Legal Persons

31. Art. 2 of the Convention requires each Party to “take such measures as may be necessary [...] to establish the liability of legal persons for the bribery of a foreign public official.” To implement this provision, Peru enacted the Corporate Liability Law 30 424 (CLL) on 17 March 2016 which was subsequently amended by Legislative Decree 1 352 on 7 January 2017 and by Law 30 835 on 2 August 2018. The CLL creates administrative liability for foreign bribery, domestic bribery, money laundering and other offences. Peru states that the liability is administrative because of the nature of the sanctions available. Proceedings against legal persons follow the general criminal procedure, however. The Law entered into force on 1 January 2018.

2.1. Legal Entities Subject to Liability

32. The CLL applies to legal entities which are defined as “private law entities, as well as associations, foundations, non-governmental organisations and non-registered committees, irregular companies, entities that administer an autonomous patrimony and

⁹ Case No. 2446-2003-AA/TC.

companies of the Peruvian State or companies of mixed economy” (CLL Art. 2). This definition appears wide enough to cover all types of legal persons including SOEs.

2.1.1. Successor Liability

33. CLL Art. 2 provides for successor liability. Any “change of name, denomination or corporate name, corporate re-organisation, transformation, split (spin-off), merger, dissolution, liquidation or any act that may affect the legal entity does not prevent the attribution of responsibility to it”. This would appear to capture all likely forms of corporate re-organisation.

34. Two additional rules apply to mergers and splits. First, a fine is the only sanction that can be imposed against a merged or spun-off entity for foreign bribery committed before the re-organisation. However, if the re-organisation was performed to avoid liability, then other sanctions (*e.g.* dissolution) are also available. In practice, it may be difficult to prove that a re-organisation was conducted for this purpose as opposed to other sound business reasons. It is also unclear whether avoiding liability must be the sole reason for the re-organisation.

35. Second, the merged or spun-off entity escapes liability if adequate due diligence had been conducted before the corporate re-organisation. Due diligence is considered adequate if there is “the adoption of reasonable actions aimed at verifying that the merged or spun-off entity had not committed [foreign bribery]”. On its face, the provision arguably does not exclude the defence even if the due diligence uncovers foreign bribery. It is also unclear whether the defence would apply in a case where a company knows it has committed foreign bribery and reveals the crime during the due diligence process. If the defence applies in such a case, then the crime would also not lead to any consequences for any of the legal persons in fines or a reduced price for the corporate merger or spin-off. Peru argues that the defence would not apply if due diligence uncovers foreign bribery but this is not stipulated in the statute. The merits of this defence and its application should be further considered in Phase 2.

2.2. Standard of Liability

2.2.1. Level of Authority of the Natural Person

36. Parties to the Convention are required to meet the standard of corporate liability for foreign bribery specified in the 2009 Anti-Bribery Recommendation Annex I.B. Two alternative approaches are prescribed:

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

- a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or
- b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

- A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;

- A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and
- A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

37. Peru has taken the second approach under the Recommendation. Under CLL Art. 3, the liability of a legal person is triggered when a partner, director, *de facto* or legal administrator, or representative of the legal entity, or its subsidiaries:

- (a) Commits the offence;
- (b) Orders or authorises another person under his/her authority and control to commit the offence; or
- (c) Does not fulfil his/her duties of supervision, surveillance or control which results in another person committing the offence.

38. One discrepancy is that the CLL Art. 3(b) imposes liability for foreign bribery committed by a person “under the authority and control” of a senior corporate officer. The 2009 Recommendation, however, requires liability for foreign bribery committed by any “lower level person”. This issue should be followed up in Phase 2.

39. Peru adds that corporate liability arises only if the natural person commits foreign bribery “within the framework of the functions entrusted to them in the legal entity or within the scope of the representation granted by the legal person.” This supposedly includes acts that fall within the “material scope” of a natural person’s functions that are “oriented to the aims, directives or policies of the legal entity.”

2.2.2. “In Their Name or on Their Behalf and for Their Benefit, Directly or Indirectly”

40. The first paragraph of CLL Art. 3 states that legal persons are liable only if foreign bribery is committed “in their name or on their behalf and for their benefit, directly or indirectly”. The last paragraph of the same provision adds that there is no liability when natural persons commit foreign bribery “exclusively for their own benefit or in favour of a third party other than the legal entity”. Peru states that “benefits” may be of an economic or other nature.¹⁰

41. Peru explains that the term “on behalf of” means that the natural person “acts in accordance with the direct will of the legal entity, appearing for it as their representative or legal representative”.

42. An ambiguity arises when bribery benefits both the natural and legal persons. This could occur if an employee bribes a foreign public official and wins a contract for his/her company, but his/her main motivation for committing the crime is to obtain a personal bonus or commission. The wording of the statute is unclear on whether this situation results in liability. CLL Art. 3 states that there is no corporate liability when a natural person commits foreign bribery “exclusively” for his/her benefit. It is silent on bribery that benefits both the natural and legal persons. Peru states that the legal person would be liable in such cases (assuming other requirements for liability are met). But it also states that there is no

¹⁰ Bill 04054-2013-PE and Decision of Congressional Commission on Justice and Human Rights.

liability “if it is established that [the natural person] committed the crime for his/her own benefit [...]”. Peru later adds that the legal person would also be liable because it failed to take necessary precautions to avoid the offence. This, however, confuses the issue of “benefit” with the prevention model defence (see Section 2.2.4 at p. 13).

43. Another point of uncertainty is whether the benefit to the legal person need only be intended by the natural person or whether it must also materialise. The language in the provision suggests the test is intention. Peru added that “it must be determined that in effect the reason for the bribery is not *intended* to generate a benefit to the legal entity”. But Peru also stated that a legal person would be liable if, among other things, “it *has benefited* from the criminal behaviour carried out by its employee”.

2.2.3. Bribery through Intermediaries

44. Annex I.C to the 2009 Recommendation states that a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to commit foreign bribery.

45. There are doubts that the CLL meets this requirement. CLL Art. 3 expressly states that parent companies will be liable and sanctioned whenever they order, authorise or consent to foreign bribery committed by natural persons of their subsidiaries (and the subsidiaries of subsidiaries). CLL Art. 3(a) adds that a legal person is liable for foreign bribery committed by an executive of a subsidiary. But Peru later states that it is “not foreseen normatively that foreign bribery carried out by an intermediary may entail responsibility of the parent company and/or the subsidiary”.

46. Two further issues are unclear and may also need to be remedied. First, as described in the previous section, whether bribery by an intermediary benefits the subsidiary or the parent may also affect liability. Second, the offence must be committed “in their name or on their behalf” of the legal person. This requirement arguably could allow a legal entity to avoid liability by making a payment to an intermediary to assist in obtaining a contract and then “turning a blind eye” to what the intermediary does with the payment.

2.2.4. “Prevention Model” Defence

2.2.4.1. Defence to Foreign Bribery Committed by Senior Corporate Officers

47. As mentioned above, Annex I of the 2009 Recommendation states that a legal person should be liable when individuals with the highest level of managerial authority in the company fail to prevent individuals in the lower levels from committing the crime. But when high-level managers themselves commit, direct or authorise foreign bribery, then the legal person should be liable directly. Whether company management failed to prevent itself from committing the offence is tautological and hence immaterial.

48. Peru provides a “prevention model” defence which is not consistent with the 2009 Recommendation. Under CLL Art. 17, a legal person is not liable if, before the crime is committed, it adopted and implemented a prevention model that is “appropriate to its nature, risks, needs and characteristics, consisting of adequate surveillance and control measures” to prevent or significantly reduce the risk of the offence. The defence, however, is available even when foreign bribery is committed, authorised or directed by senior

company management. The Working Group has stated that such an approach is inconsistent with Annex I of the 2009 Recommendation.¹¹

49. An additional provision - CLL Art. 3(c) - appears to provide a similar defence but raises additional concerns. A legal person is not liable for foreign bribery committed by lower-level staff if company management had fulfilled its “duties of supervision, surveillance and control over the activity entrusted, in response to the specific situation of the case.” However, Peru states that whether this test is met is “regulated by the legal entity itself when defining the duties, responsibilities and functions of high-level executives”. This gives a company significant ability to dictate its own standards of behaviour.

2.2.4.2. Elements of a Prevention Model

50. CLL Art. 17(2) sets out the minimum elements that a prevention model must have for the defence to succeed. The legal person must:

- (a) Appoint a person to be in charge of offence prevention (essentially a compliance officer);
- (b) Identify, evaluate and mitigate risks to prevent the commission of offences through the legal entity;
- (c) Implement complaint procedures;
- (d) Disseminate and periodically train individuals on the prevention model; and
- (e) Evaluate and continuously monitor the prevention model.

51. Peruvian authorities have issued a Regulation to provide further guidance on the appropriate elements of a prevention model.¹² The Regulation does not appear to be binding.¹³ Art. 33 of the Regulation restates the minimum elements for a prevention model in CLL Art. 17(2) and then adds several elements that are apparently optional:

Article 33.- Minimum elements

[...]

Being the principle of self-regulation referred to in article 31, legal persons can complement the prevention model with the following elements:

6. Policies for specific risk areas;
7. Record of activities and internal controls;
8. The integration of the prevention model in the commercial processes of the legal entity;
9. Appointment of a person or internal audit body;

¹¹ [Chile Phase 4](#), paras. 154-156.

¹² Supreme Decree 002-2019-JUS (8 January 2019).

¹³ The First Complementary Provision of the Regulation states that companies that implement a prevention model “may choose to build” the model according to the Regulation’s provisions. They may also rely on “any international instrument that guides these good practices, as long as it ensures adequate implementation and effectiveness”.

10. The implementation of procedures that guarantee the interruption or quick and opportune remediation of risks; and,

11. Continuous improvement of the prevention model.

52. These provisions raise three issues. First, the list of minimum elements for a prevention model in CLL Art. 17(2) is too short. Put differently, some of the optional elements should be compulsory. For example, the identification, evaluation and mitigation of risks is a mandatory element. But if residual risks remain, then policies for addressing them should not be merely optional. Procedures for remediating risks and non-compliance should also be required of all companies.

53. Second, Art. 33 of the Regulation states that “legal persons can complement the prevention models” with the listed elements. This suggests that the listed elements are optional for **all** companies. In reality, some companies may have features and risk profiles that would require some or all of these elements to be included in their compliance programmes.

54. Third, the CLL and Regulation omit some elements and do not go far enough on others. Mechanisms to protect whistleblowers are only optional (Regulation Art. 39(2)(c)), and there is no explicit prohibition of retaliation against whistleblowers. Codes of conduct and ethics receive just two passing mentions (Regulation Arts. 32(c) and 37(1)). Policies on charitable donations, sponsorships, solicitation and extortion are not mentioned at all. In sum, the CLL and Regulation should be more closely aligned with the Working Group’s Good Practice Guidance on Internal Controls, Ethics, and Compliance in Annex II to the 2009 Recommendation.

2.2.4.3. Prevention Models for Micro, Small and Medium-Sized Enterprises

55. The requirements of a prevention model are reduced for micro, small or medium-sized enterprises (SMEs), which according to Peru constitute 99.5% of formal enterprises in its economy. The definition of SMEs is based solely on a company’s revenues.¹⁴ The prevention models for these companies are only required to have “some of” the minimum elements set out in CLL Art. 17(2). Furthermore, an SME’s board member can serve as the company’s “prevention” (*i.e.* compliance) officer, which significantly diminishes the independence of the position. Further guidance and “Prevention Model formats” for SMEs are expected but have yet to be issued.¹⁵

56. The reduced requirements for SMEs raise several concerns. As the Working Group has noted,¹⁶ it is not unreasonable to allow SMEs to have less elaborate compliance programmes because of their more limited resources. But the size of the company’s revenues should not be determinative. Instead, an effective compliance programme must also take into account the company’s risk profile. For SMEs that are at a high risk of committing foreign bribery, a bare-bones compliance programme may not be appropriate. Peru states that the Regulation indeed takes this more flexible approach. Unfortunately, it

¹⁴ A micro-enterprise is one with gross annual revenues of up to UTI 150 (PEN 622 500 or USD 186 000), a small enterprise UTI 150-1 700 (PEN 7.055 million or USD 2.17 million) and a medium enterprise UTI 1 700-2 300 (PEN 9.545 million or USD 2.864 million).

¹⁵ Supreme Decree 002-2019-JUS, Art. 45 and Fourth Complementary Provision.

¹⁶ Chile [Phase 3](#), para. 51 and Recommendation 1(b); and [Phase 4](#), para. 165-167 and Recommendation 6(c).

is the CLL – not the Regulation – that is legally binding. Furthermore, the CLL requires the prevention models for SMEs to have “some of” the minimum elements in Art. 17(2). Which ones are required is wholly unclear.

2.2.4.4. Burden of Proving Prevention Model Defence

57. Peru states that the defence has the onus of proving that a legal person’s prevention model had the requisite elements and was effectively implemented. Under Peruvian law, the prosecutor generally has the burden of proving all elements of the offence. However, where the defence asserts a fact which would lead to a defence, it has the burden of proof, according to the Supreme Court.¹⁷ Peru states that, in the current context, the legal person would have to prove at trial that its prevention model was adequate and implemented. This matter will be followed up in Phase 2.

2.2.2.5. SMV Investigative Powers

58. During the investigation, the prosecutor is required to obtain a technical report from the Superintendence of the Securities Market (SMV) on the implementation and operation of the legal person’s prevention model. Art. 18 CLL states that a report that finds the model adequate and implemented is binding on the prosecutor who must then terminate the case. If this is accurate, then the responsibility of determining guilt or innocence would essentially be delegated at least in part from the judge and prosecutor to the SMV. However, Peru stated that the prosecution retains discretion to override the report. This matter will also be followed up in Phase 2.

59. The SMV has been given some powers for preparing these reports to prosecutors. The prosecuted legal person and its business partners are required to produce information and documentation requested by SMV. The SMV may make “unannounced and opinionated inspection visits”. It may interview and take statements from the legal person’s staff and from individuals involved in the implementation and proper functioning of the prevention model. The legal person must also “provide all necessary facilities to SMV for the purposes of compliance with the issuance of the technical report.”¹⁸

60. These provisions may nevertheless be insufficient. As a technical body, the SMV does not have the same powers as prosecuting authorities. Peru states that a company will always co-operate with the authorities and provide information, as it is in the company’s interests to do so. However, there is no provision that allows the SMV to search and seize evidence from third parties outside the company. Peru’s Phase 2 evaluation should also examine practice-related issues including whether the SMV has appropriate resources and expertise to produce these reports, particularly regarding privately-owned companies; the SMV’s interpretation of the requirements of a prevention model in individual cases; and whether the SMV applies the requirements consistently.

2.2.5. Defence of “Fraudulently Eluding”

61. Under CLL Art. 17(4), a legal person also escapes liability when a natural person commits foreign bribery by fraudulently eluding a duly implemented prevention model. Peru explains that this defence is an example of the prevention model defence in Art. 17(1)

¹⁷ Transitory Criminal Chamber of the Supreme Court, September 8 2014 RN No. 125-2014 Lima-Norte.

¹⁸ Supreme Decree 002-2019-JUS, Art. 47.

CLL succeeding, and not a separate defence. This explanation is not consistent with the statute which states that it also provides a defence. Peru should amend its legislation to eliminate this inconsistency.

62. Absent such an amendment, the provisions suggest two separate defences, and so the legislation may be overbroad. Peru states that the prevention model could be “circumvented through the identification of a control vacuum” in a new part of the “company that has not yet been included in the prevention model”. However, this should not be a reason for a company to escape liability. Any part of a company, whether it is new or not, that is not covered by the company’s compliance programme should not be allowed to operate.

2.3. Proceedings against Legal Persons

63. Parties to the Convention are required to ensure that the conviction or prosecution of a natural person is not a pre-condition to the liability of a legal person for foreign bribery (2009 Recommendation Annex I.B).

64. Peru complies with this requirement when the liability of the natural person has been “extinguished”. CLL Art. 4 states that administrative responsibility of the legal entity is “autonomous of the criminal responsibility of the natural person. The causes for extinguishing of criminal action against a natural person do not affect the administrative responsibility of the legal person.” Proceedings against natural persons can be extinguished by death, amnesty, pardon, *res judicata*, and statute of limitations, among other things (CC Arts. 78 and 85).

65. Much more problematic is the case when the natural person proceedings have not been extinguished. In these cases, Peru states that it is “required that the physical person responsible be prosecuted and finally sentenced to attribute liability to the legal entity”. It is unclear whether a conviction of the natural person in a foreign state instead of Peru is sufficient. In any event, this requirement contravenes the 2009 Recommendation, which states that corporate liability should not be contingent on not only the conviction but also the prosecution of the natural person. Moreover, Peru states that a legal person also avoids liability if the natural person cannot be prosecuted because he/she is unidentified or has absconded, or avoids prosecution by co-operating with the authorities (see Section 5.2 at p. 27). Corporate proceedings will also need to await the final sentence of a natural person which could cause significant delay.

66. At a later stage, Peru indicated that the position stated above needed clarification. It states that there is a “connection fact” between a legal and natural person, and it is “necessary to know” what acts the natural person performed. But the legal person is autonomously liable and it is not necessary for the natural person to be convicted and sentenced. This position should be closely evaluated in Phase 2.

67. The procedure for corporate investigations and prosecutions is further described in Section 5.1 at p. 25.

2.4. Liability under the Criminal Code

68. Although the CLL specifically mentions foreign bribery, CC Art. 105 provides for sanctions to be imposed on legal persons for all crimes other than those provided by specific legislation. This provides for liability, and mandatory criminal sanctions, if an offence “was committed in the exercise of activity of any legal entity” or the entity was used to favour

or conceal the offence. A “prevention model” is not a defence. Peru states that, under its general principles of criminal law, a company can be prosecuted for foreign bribery only under the CLL and not CC Art. 105.

3. Article 3: Sanctions

3.1. Principal Penalties for Bribery of a Domestic and Foreign Public Official

69. This section considers whether foreign bribery in Peru is punishable by “effective, proportionate and dissuasive” penalties that are comparable to those applicable to domestic bribery. Confiscation is considered in Section 3.4.2 at p. 22.

3.1.1. Penalties for Natural Persons

70. Active foreign bribery (*i.e.* giving a bribe to a foreign official) is punishable by 5-8 years’ imprisonment and 365-730 fine-days (CC Art. 397-A). Additional administrative sanctions are described in Section 3.5 at p. 23 below. The same maximum punishment applies to passive foreign bribery (*i.e.* taking of a bribe by a foreign official) (CC Art. 393-A).

71. The penalties for active foreign bribery are comparable to or exceed those for active domestic bribery.

Table 1. Comparison of Maximum Sanctions for Active Domestic and Foreign Bribery

	Domestic Official	Foreign Official
Active Bribery (General)	3-6 Years’ Imprisonment 365-730 Fine-Days (Art. 397)	5-8 Years’ Imprisonment 365-730 Fine-Days (Art. 397-A)
Active Bribery Judicial Officials, Court Staff and Lawyers	4-8 Years’ Imprisonment 365-730 Fine-Days (Art. 398)	
Active Bribery Police	3-8 Years’ Imprisonment (Art. 398-A)	

Note: Disqualification from holding office or engaging in other activities under CC Art. 36 is also available.

72. In Peru, active and passive foreign bribery are subject to the same maximum, but are lower than some forms of passive domestic bribery:

Table 2. Comparison of Maximum Sanctions between Active Foreign Bribery and Passive Domestic Bribery

Domestic Passive Bribery Offences	Maximum Sanctions for Domestic Passive Bribery Offences	Maximum Sanctions for Active & Passive Foreign Bribery (Art. 397-A)
Passive Domestic Bribery (General) (Arts. 393(1)-(2) & 394)	5-8 Years’ Imprisonment 180-730 Fine-Days	5-8 Years’ Imprisonment 365-730 Fine-Days
Passive Domestic Bribery Judicial Officials (Art. 395)	6-15 Years’ Imprisonment 180-730 Fine-Days	
Passive Domestic Bribery Police (Art. 395-A & B)	4-12 Years’ Imprisonment	
Passive Domestic Bribery Court Staff (Art. 396)	5-8 Years’ Imprisonment 180-365 Fine-Days	

Note: Disqualification from holding office or engaging in other activities under CC Art. 36 is also available.

73. Within the stipulated range, a sentence is determined initially based on the characteristics of the offender (CC Art. 45) as well as the presence of aggravating and mitigating factors (CC Arts. 45 and 46). The combination of factors determines whether the starting point for the sentence is in the upper, middle or lower third of the permissible range (CC Art. 45-A).

74. A sentence may go beyond the statutory maximum or minimum in certain circumstances:

- (a) If the offender **voluntarily confesses** to the crime, then the penalty imposed may be reduced by up to one-third below the minimum (Criminal Procedure Code (CPC) Art. 161). The confession must meet the requirements in CPC Art. 160.
- (b) If the offenders agrees to an **early termination of the proceedings**, then the sentence may be reduced by one-sixth. The reduction is in addition to a reduction for a voluntary confession (if any) except for recidivists or habitual offenders (CPC Art. 471). This reduction does not apply in organised crime cases.
- (c) If the offender provides “**effective collaboration**”, then the sentence may be reduced (CPC Art. 475(2)-(7)). Peru states that the reduction may take the sentence below the statutory minimum.
- (d) CC Art. 20 enumerates 11 grounds for **exemption from liability**, *e.g.* mental disorder, defence of legal rights, defence against physical danger. Where an accused only meets one of these grounds partially, then the sentence may be reduced to below the minimum (CC Art. 21).
- (e) The sentence may also be increased to over the maximum in some cases, *e.g.* for recidivists, habitual offenders, and public officials (CC Arts. 46-A to D).

Early termination and effective collaboration are forms of non-trial resolution of criminal proceedings. Both are further explained below in Section 5.2 at p. 27.

75. Imprisonment may be converted into non-custodial sentences:

- A sentence of imprisonment of four years or less may be substituted with community service or “limitation of free days” (*i.e.* participation in education, psychological, occupational or cultural programmes during weekends and holidays) (CC Arts. 32-35 and 52). Alternatively, the sentence may be suspended with conditions for one to three years if the offender is not a recidivist or habitual offender, and is unlikely to commit another crime. Breach of the conditions results in an admonishment, or an extension or revocation of the suspension (CC Arts. 57-61).
- A sentence of imprisonment of two years or less may be replaced by a fine (CC Art. 52).

These provisions can be applied in foreign bribery cases because sentences below the statutory minimum of five years’ imprisonment can be imposed, as described above.

76. As mentioned above, active foreign bribery is also punishable by, among other things, a fine of 365-730 fine-days. Each fine-day is equal to the offender’s average daily income and is determined based on his/her assets, income, remuneration, expenses and other indicators of wealth (CC Art. 41). Peru states that the actual fine that is imposed within the allowable range depends on “the devalue of the action, the devalue of the result

and the culpability of the author.¹⁹ When evaluating other countries with similar systems, the Working Group has questioned whether the fines imposed in practice are adequate, how the fines compare to the value of the bribe and benefit gained by the briber, and whether fines can be imposed against an offender who does not have any income.²⁰ These matters should be examined in Peru's Phase 2 evaluation, including by considering the sanctions imposed in domestic corruption cases.

3.1.2. Penalties for Legal Persons

77. Art. 3(2) of the Convention requires that, in the event that criminal responsibility does not apply to legal persons, legal persons must be subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”.

78. Peru may impose the following sanctions against legal persons for foreign bribery: fines, dissolution, prohibition on certain business activities, debarment from public contracting, enforced closure of business premises, and deprivation of rights (CLL Art. 5).

79. The calculation of the applicable fine raises several questions. Where the value of the benefit obtained or expected to be obtained from the offence can be determined, then the fine must be between two to six times the benefit (CLL Art. 5(a)). It is not clear whether “benefit” equates to the revenue or profits from a contract, or merely the value of the bribe. This question, and whether the resulting fines are an effective, proportionate and dissuasive penalty, should be explored further in Phase 2, including by considering domestic corruption cases.

80. If the company obtains a benefit whose value cannot be determined, then the fine is based on the company's annual revenues at time of the offence (CLL Art. 7). The resulting fine could in theory be just a small fraction of the company's annual revenues:

- For entities with annual revenues of up to 150 tax units (UIT),²¹ a fine of UIT 10-50 (PEN 41 500-207 500 or USD 12 450-62 250) must be imposed. The fine may therefore be as low as one-fifteenth (6.7%) of the entity's annual revenues.
- For entities with revenues of UIT 150-1 700, the fine is UIT 50-500 (PEN 207 500-2.075 million or USD 62 250-622 500). In theory, the fine could be as low as 2.9% of the entity's annual revenues.
- For entities with revenues above UIT 1 700, the fine is 500-10 000 tax units (PEN 2.075-12.45 million or USD 622 500-3.735 million). There is a cap on the fine but not on the annual revenues of the companies that fall into this category. The fine relative to the annual revenues could therefore in theory approach zero.

81. These fines for cases with benefits of an indeterminate value raise at least three further questions. First, companies are known to bribe to gain entry into a new market or to increase their reputation. These benefits can be substantial for large companies but may not be readily quantifiable with certainty. A maximum possible fine of just UIT 10 000 (PEN 12.45 million or USD 3.735 million) in these cases could therefore be inadequate. Second, the fine is a function of the company's annual revenues at the time of the offence.

¹⁹ Criminal Court of Appeals for Summary Proceedings with Free Prisoners of the Superior Court of Justice of Lima (6 August 1998), Exp.263-98-Lima.

²⁰ For instance, see [Mexico Phase 2](#) (para. 71) and [Phase 3](#) (para. 31-32).

²¹ UITs are set annually by [SUNAT](#). In 2018, UIT 1 equals PEN 4 150 (approx. USD 1 245).

By the time of sentencing, those revenues may have grown dramatically, not least because of business won through bribery. The fine may then be too small to be effective or dissuasive. Third, the system can create a perverse incentive to bribe. Companies with little or no revenues (*e.g.* start-ups) can bribe knowing that if caught the resulting fines would be minimal.

82. As with natural persons, the presence of mitigating and/or aggravating factors determines whether the sentence falls in the lower, middle or upper third of the permissible range (CLL Arts. 12-15). Mitigating features include the existence of a prevention model with some but not all required elements at the time of the offence, and the implementation of an adequate model after the offence. The appropriateness and application of this provision should be followed up in Phase 2. Certain factors can also lead to a sentence outside the range prescribed in the statute:

- The minimum fine can be reduced by one-third if a legal person makes a duly corroborated **confession** before the preparatory investigation commences, except in cases of recidivism, “flagrancy”, or where a confession is irrelevant to the charges (CLL Art. 12).
- The maximum fine can be increased by up to one-half where the legal entity commits a **second offence** within five years of a previous penalty for an earlier offence (CLL Art. 13).
- Factors that allow a penalty beyond the statutory minimum and maximum against **natural persons** (see Section 3.1.1 at p. 18) also apply to legal persons, with such modifications as necessary (CLL Art. 15).

83. A penalty that falls below the statutory minimum can be further suspended “exceptionally” for six months to two years (CLL Art. 16). During the suspension, if the legal person pays “total compensation” and implements a prevention model, then the sanction is annulled and the case is dismissed. Unlike during a prosecution, however, the SMV is not required to assess the adequacy of the model (see para. 57). Confiscation may also be imposed. If the legal entity does not comply with the conditions, then the suspension can be extended or revoked. The suspension is also revoked if new proceedings are brought against the legal person during the suspension. In practice, this could be unlikely to occur given the relatively short period, the nature of the foreign bribery offence, and the uncertainty over the need to convict the natural person before corporate proceedings can begin (see para. 65). In Phase 2, the Working Group should examine the use of suspensions in practice and whether they result in effective, proportionate and dissuasive sanctions for foreign bribery.

84. A final issue concerns the record of corporate convictions. The CLL’s 5th Supplementary Provision contemplates a public registry that would record each convicted legal person and the sanction imposed. However, the entry is deleted five years after the sanction is executed (*e.g.* the fine is paid) unless the sanction is permanent. Peru states that a separate database would maintain a permanent record of corporate convictions. This matter should be revisited in Phase 2.

3.2. / 3.3. Penalties and Mutual Legal Assistance / Penalties and Extradition

85. Convention Art. 3(1) states that sanctions for natural persons must include deprivation of liberty sufficient to enable mutual legal assistance and extradition. Peru can seek extradition for offences punishable by imprisonment of at least two years

(CPC Art. 525(2)). The threshold for seeking MLA is one year (CPC Art. 528(2)). Foreign bribery is punishable by a minimum of five years' imprisonment and therefore meets these requirements. Peru points out that an applicable treaty may impose different requirements.

3.4. Seizure and Confiscation

86. Convention Art. 3(3) requires each Party to take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

3.4.1. Seizure

87. Two sets of provisions permit seizure in foreign bribery cases:

- (a) CPC Arts. 218-223 provide for the seizure of the body of a crime, things related to a crime, or things that are necessary for an investigation.
- (b) CPC Arts. 316-320 provide for the seizure of the effects, instruments and objects of a crime.

In both cases, the prior judicial authorisation is needed except when there are exigent circumstances, in which case authorisation must be obtained after the seizure. Law 30 077 Art. 17 also provides for seizure without prior prosecutorial or judicial authorisation in organised crime cases.

88. Additional provisions allow law enforcement to freeze funds (CPC Arts. 235(2) and 310). Peru's Financial Intelligence Unit (FIU) may also administratively freeze funds in cases of money laundering and terrorism financing.²²

3.4.2. Confiscation

89. CC Art. 102 provides for confiscation against natural persons. Peru states that confiscation is mandatory upon conviction. Property subject to confiscation includes the instruments of crime, unless they belong to a third party who did not consent to its use; the effects or gains of a crime, even if they have been transformed; and property that is "intrinsically criminal". If the illicit property subject to confiscation has been intermingled with lawful property, then confiscation applies to the estimated value of the illicit property, unless the lawful property was used to hide or convert the illicit property. If confiscation is not possible because the property in question has been concealed, destroyed, consumed or transferred, then property of equivalent value can be confiscated instead (value confiscation). Peru adds that the recent Legislative Decree 1 373 additionally provides for non-conviction-based confiscation.

90. Confiscation against legal persons is mainly covered by CLL Art. 11. A judge may order the confiscation of the instruments, objects, effects and proceeds of a crime for which a legal person is held liable. Confiscation is "in accordance with" CC Art. 102 described above. Presumably, this implies that measures in CC Art. 102 dealing with intermingled property and value confiscation also applies to confiscation against legal persons. In addition, CC Art. 104 also allows a court to confiscate the benefits of a crime from a legal person to satisfy civil liability arising from the offence.

²² Law 27 693 Arts. 1 and 3(11); Arts. 8-10 of Regulation of Law 27 693 in Decree 20-2017-JUS.

3.5. Additional Civil and Administrative Sanctions

91. Convention Art. 3(4) requires each Party to consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for foreign bribery.

92. In addition to fines and imprisonment, natural persons who commit foreign bribery are punishable by disqualification from holding certain positions and public office, and deprivation of degrees or titles associated with the position, profession or office used to commit the offence (CC Arts. 36 and 397-A). As well, individuals who have been convicted of corruption in Peru or abroad by means of a consensual or enforceable judgment are permanently debarred from participating in public procurement contracts, whether as bidders, contractors or sub-contractors. The same prohibition applies if the individual admits to having engaged in corruption to authorities in Peru or abroad (Public Procurement Law 30 225 (PPL) Art. 11.1(m)).

93. As described at para. 78, in addition to fines, under the CLL legal persons may be suspended; prohibited from engaging in activities that led to the crime; denied licences, concessions or other rights; forced to close their premises; or dissolved (Art. 5). Furthermore, a legal person may also be barred from contracting with the State. Debarment is definitive (*i.e.* permanent); temporary debarment does not appear to be available (Art. 5(b)(3)). Debarment is mandatory if the foreign bribery was committed in a public procurement context (Art. 8).

94. PPL Art. 11.1(n) contains similar and overlapping provisions. Legal persons whose legal representatives or related persons have been convicted of corruption in Peru or abroad by means of a consensual or enforceable judgment are also debarred from participating in public procurement contracts, whether as bidders, contractors or sub-contractors. The same prohibition applies if the legal person's representatives or related persons admit to having engaged in corruption to authorities in Peru or abroad. Debarment under these provisions is permanent. These provisions go beyond the CLL by covering not only convictions but also admissions of foreign bribery, and not only in Peru but also abroad.

95. Peru adds that a natural person and a legal person may be civilly and jointly liable for paying compensation to third parties in the criminal foreign bribery proceedings (CPC Art. 111).

4. Article 4: Jurisdiction

4.1. Territorial Jurisdiction

96. Convention Art. 4(1) requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.” Commentary 25 clarifies that “an extensive physical connection to the bribery act is not required.”

97. CC Art. 1 provides that Peru has jurisdiction over offences committed within its national territory; on public national aircraft and vessels; and on private aircraft and vessels in international airspace or waters if no other state exercises jurisdiction.

98. The extent to which Peru can exercise jurisdiction for offences committed *partly* on its territory should be explored further in Phase 2. CC Art. 5 states that an offence is committed at a place where the offender “has acted [...] or in which its effects take place”. It is not entirely clear whether this would apply if, for example, a briber while in Peru

contacts a foreign official and sets up a meeting abroad during which a bribe is paid, or if the money for a bribe is drawn from a bank account in Peru. It is also unclear whether advantages from a bribe flowing to a Peruvian company would be considered as “effects” sufficient to justify territorial jurisdiction.

4.2. Nationality Jurisdiction

99. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles (Convention Art. 4(2)).

100. CC Art. 2(4) provides Peru with jurisdiction over extraterritorial offences committed by Peruvian nationals. Three requirements must be met. Each raises issues:

- (a) The offence must be extraditable and also punishable in the State in which it was committed. There may therefore not be jurisdiction if a Peruvian bribes an official of Country A while in Country B, and Country B has not criminalised foreign bribery. The Working Group has recommended that other Parties to the Convention eliminate a similar dual criminality requirement.²³
- (b) The Peruvian national who committed the offence must “enter in any way into [Peruvian] territory”. Peru states that the entry into Peruvian territory must occur after the offence, but this is not explicitly stated in the provision. It is also unclear how the provision would be applied if the individual enters Peru after the offence but returns abroad before jurisdiction is exercised.
- (c) None of the three exceptions in CC Art. 4 applies, namely (i) *ne bis in idem* following proceedings abroad; (ii) the criminal action has been “extinguished”, e.g. by death of the accused, amnesty, pardon, *res judicata*, statute of limitations (CC Arts. 78 and 85); and (iii) the case involves “political crimes or related facts”. Whether this last exception permits the consideration of political and other factors prohibited by Art. 5 of the Convention should be explored in Phase 2.²⁴

4.3. Jurisdiction over Legal Persons

101. The CLL does not contain any explicit provisions on jurisdiction. Peru merely states that the investigation and prosecution of a legal person takes place within the framework of criminal proceedings set out in the CPC, and that the legal person enjoys all the rights and guarantees afforded to an accused under the Constitution and relevant laws. Peru later adds that the norms on jurisdiction in the Criminal Code (CC) also apply to legal persons.

102. Peru’s statements raise many questions. First, the CLL does not explicitly state that the CC’s jurisdictional rules apply to legal persons. It is not obvious that the rules on

²³ For instance, see [France Phase 3](#), paras. 24-26 and Recommendation 1(b); and [New Zealand Phase 3](#), paras. 19-20 and Recommendation 2(a).

²⁴ Art. 5 of the Convention states that “Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

criminal jurisdiction would or should apply to a scheme of *administrative* liability. Second, it is not clear the act to which the CC rules apply. For territorial jurisdiction to apply, must the act of foreign bribery occur in Peru? Or would it suffice if the failure of supervision, surveillance or control takes place in Peru? Third, the CC jurisdictional rules were designed for natural persons and are not necessarily transposable onto legal persons. For example, nationality jurisdiction over natural persons for foreign bribery arises if a Peruvian national who committed the offence enters into Peruvian territory (see para. 100). But it is not obvious what a legal person’s nationality is or how a legal person would “enter” Peru. Fourth, it is unclear whether and how the CC jurisdictional rules would allow Peru to exercise jurisdiction over a Peruvian company for foreign bribery committed extraterritorially by a *non-Peruvian* employee. Peru states that these problems do not exist because the test for jurisdiction is whether the company is registered in Peru. However, this is not supported by a clear statutory provision. This will be followed up in the Phase 2 evaluation.

4.4. Consultation Procedures

103. When more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution (Convention Art. 4(3)).

104. Peru does not have specific procedures to consult other Parties that have concurrent jurisdiction over a foreign bribery offence. A request to transfer a case from Peru is handled by the Central Authority under the general mutual legal assistance (MLA) and international co-operation procedures (see Sections 9 and 10 below at pp. 35 and 37).

105. The Peruvian Supreme Court has held in an extradition case that offences “can and should be judged where they are committed, especially where those responsible and victims are national and reside in the territory”.²⁵ Peru also confirms that it would transfer a case if required by an international treaty or instrument.

4.4. Review of Basis of Jurisdiction

106. Convention Art. 4(4) requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, to take remedial steps. Peru states that it has not conducted such a review because it has yet to prosecute a case of foreign bribery.

5. Article 5: Enforcement

107. Convention Art. 5 states that foreign bribery investigations and prosecutions must be “subject to the applicable rules and principles of each Party.”

5.1. Rules and Principles Regarding Investigations and Prosecutions

108. The Public Prosecutor’s Office (*Ministerio Público*, PPO) is responsible for leading criminal investigations.²⁶ Foreign bribery cases are handled by a special office on corruption and crimes by public officials (*Fiscalías Especializadas en Delitos de*

²⁵ [Supreme Court \(15 March 2012\), *Francisco Morales Bermúdez Case, Extradition 23-2012-Lima*](#).

²⁶ [Political Constitution of Peru](#) Art. 159; Code of Criminal Procedure, Preliminary Title, Art. IV.

Corrupción de Funcionarios). A second office specialises in money laundering cases and asset recovery (*Fiscalías Especializadas en delitos de Lavado de Activos y Pérdida de Dominio*). The National Police supports investigations and also has directorates specialising in corruption (*Dirección Contra la Corrupción*), money laundering, criminal intelligence, and high complexity investigations.²⁷ How these entities operate in a case involving multiple related offences (e.g. foreign bribery, money laundering and false accounting) should be further examined in Phase 2.

109. The Criminal Procedure Code (CPC) sets out the rules for investigating and prosecuting foreign bribery against natural and legal persons. Although the liability of legal persons is administrative in nature, the process takes place within criminal proceedings and follows the CPC. The main stages of a foreign bribery case are generally the preliminary proceedings, preparatory investigation, and trial.

110. The Public Prosecutor initiates “preliminary proceedings” (*diligencias preliminares*) when he/she learns of a suspicion that a crime has been committed. The prosecutor may make this decision *ex officio* or upon receiving a complaint (CPC Art. 329). Prosecutorial discretion to decline to investigate (opportunity principle) is not available because foreign bribery is punishable by more than four years’ imprisonment (CPC Art. 2(1)). During the preliminary proceedings, the prosecutor may conduct an investigation personally or enlist the support of the National Police. The purpose of the investigation is to determine whether a crime has taken place, the material elements of the crime, and the persons involved (CPC Art. 330).

111. At the end of the preliminary proceedings, the prosecutor will file the proceedings if the case is time barred, or if the denounced act does not constitute an offence or is not criminally punishable. If the perpetrator of the crime cannot be found, then the prosecutor will ask the police to identify and/or locate him/her (CPC Art. 334). Otherwise, the preliminary proceedings will be formalised as a preparatory investigation.

112. During the preparatory investigation (*investigación preparatoria*), the prosecutor files a document with a Preparatory Investigation Judge that sets out the name of the accused, facts of the case, and next stages of the proceedings. The accused is formally informed of the charges. The prosecutor cannot repeat investigative steps taken in the preliminary proceedings but may take additional measures.

113. The investigative measures that are available are found in the CPC. Measures that impinge on the rights of an individual must be proportional, necessary and be supported by “sufficient elements of conviction” (CPC Arts. 253(2) and 334-338). Such measures require the prior approval of the Preparatory Investigation Judge but, according to Peru, are nevertheless available during the preliminary proceedings even though the Judge is not involved in this stage. The measures available for investigating natural persons are also available for investigating legal persons.²⁸ Peru states that mutual legal assistance (MLA) may be sought during the preliminary proceedings, and exceptionally be sought again during the preparatory investigation if it is indispensable.

114. Strict deadlines that apply to the investigation raise concerns. The preliminary proceedings must be concluded within 60 days, though a prosecutor may set a different period due to the characteristics, complexity and circumstances of the case

²⁷ [Supreme Decree 026-2017-IN](#), Art. 100.

²⁸ CLC Final Supplementary Provision, Third Section.

(CPC Art. 334(2)). The preparatory investigation must generally be concluded within 120 days, extendable once by 60 days. If the prosecutor considers the case to be complex (based on listed factors such as multiple offences or a need for MLA), then he/she may extend the deadline to 8 months. A Preparatory Investigation Judge may further extend this period to 16 months. In cases involving organised crime, the deadline is extended to 36 months (CPC Art. 342). These short deadlines may be problematic since foreign bribery investigations are frequently lengthy and complex, especially when MLA is sought, as the Working Group has observed in other evaluations.²⁹

115. Upon the conclusion of the preparatory investigation, the prosecutor must decide whether there is sufficient evidence to take the matter to trial by making an accusation (*i.e.* indictment) within 15 days (30 in organised crime cases). Otherwise, the Prosecutor applies to the Preparatory Investigation Judge to dismiss the case. If the Judge disagrees, then a superior prosecutor reviews the case within 10 days. The superior prosecutor then either requires the Judge to dismiss the case or orders another prosecutor to make an accusation (CPC Arts. 344-349). Once the Judge's order of dismissal is final, *res judicata* applies and the case cannot be reopened, according to Peru.

5.2. Non-Trial Resolution of Foreign Bribery Cases

116. Several options are available for resolving foreign bribery cases without trial:

- (a) An **early termination of proceedings** (*terminación anticipada*) is akin to a plea agreement in other jurisdictions. Once the case has been formalised into a preparatory investigation, the accused or the prosecutor may ask the Preparatory Investigation Judge to hold a private hearing. During the hearing, the Judge urges the accused and the prosecutor to agree on the facts of the case and sentence to be imposed. If the case does not involve a criminal organisation, then the accused is entitled to a reduction of the sentence by one-sixth. The reduction is in addition to any for a voluntary confession (see para. 74) unless the accused is a recidivist or habitual offender. If the parties reach an agreement, then the Judge examines whether the facts are sufficient to support a conviction and the proposed penalty is within the statutory range. He/she rejects the penalty only if it is “manifestly disproportionate”. Otherwise, a conviction is entered.³⁰
- (b) An **early conclusion to a trial** (*conclusión anticipada del juicio*) is similar to an early termination but occurs at a later stage of the proceedings. At the beginning of a trial, the Trial Judge asks the accused to enter a plea. Before responding, the accused may request a private meeting with the prosecutor to seek an agreement on the penalty. If the accused admits responsibility, then the Judge imposes sentence. The sentence follows an agreement, if any, between the accused and the prosecutor unless the Judge decides that the facts of the case do not constitute an offence or that the facts manifestly exempt or mitigate liability (CPC Art. 372). Peruvian authorities state that in practice the Judge verifies that the offender freely consents to the agreement, knows the nature of the accusation, and understands the consequences of the agreement.

²⁹ For example, see [Chile Phase 2](#) (paras. 162-165), [Phase 3](#) (paras. 84-86) and [Phase 4](#) (paras. 83-87).

³⁰ CPC Art. 468 and [Plenary Agreement 05-2009/CJ-116](#).

- (c) **Effective collaboration** (*colaboración eficaz*) is an arrangement in which the offender co-operates with the authorities in return for a more lenient sentence. A natural or legal person and a prosecutor may enter into an agreement for effective collaboration at any time before or during criminal proceedings. The individual or legal person must admit to and cease participation in criminal activities. They must also provide “effective” information that prevents or ends a crime or reduces its impact; identifies the circumstances of a crime and its perpetrators; or leads to the recovery of crime-related assets (CPC Arts. 474 and 475(1)).

If these conditions are met, then the individual may receive an exemption from liability or a remission of sentence if his/her co-operation prevents a serious crime, identifies the leaders of a criminal organisation, or uncovers a criminal organisation’s financing or assets. Otherwise, the individual may only receive a reduction or suspension of his/her sentence. In either case, the individual and the prosecutor sign a collaboration agreement and submit it for judicial approval. For legal persons, effective collaboration may lead to an exemption of liability, reduction of sentence below the statutory minimum, or remission of the sentence (CPC Arts. 475(2)-(7)).

117. These provisions raise two issues that should be followed up in Phase 2. First, the Working Group has stated that Parties to the Convention should make public, as necessary and in compliance with the relevant rules of procedure, the most important elements of non-trial resolutions of foreign bribery cases, in particular the main facts, the natural or legal persons sanctioned, and the sanctions.³¹ Peru states that Supreme Decree 21-2017-JUS requests courts to publish all of its decisions, but whether this results in the publication of all of the important elements of non-trial resolutions should be followed up. Second, the Working Group should examine in Phase 2 whether in practice non-trial resolutions result in sanctions that are effective, proportionate and dissuasive.

5.3. National Economic Interest, Potential Effect upon Relations with another State, and Identity of the Natural or Legal Person Involved

118. Art. 5 of the Convention also requires each Party to ensure that foreign bribery investigations and prosecutions are not influenced by “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

119. The Political Constitution of Peru provides for the independence of the judiciary and the Public Prosecutors’ Office (PPO). Art. 139(2) states that the judiciary is independent. No authority shall remove cases before the courts or interfere with the judiciary’s functions. The state guarantees judges’ independence (Art. 146). The Office of the Prosecutor General is also autonomous. Members of the Office enjoy the same rights and prerogatives as the judiciary (Art. 158). Similar provisions are found in the Organic Law of the Judiciary (Arts. 2 and 5).

120. Until recently, the National Council of Magistrates (*Consejo Nacional de la Magistratura*, CNM) appointed judges and prosecutors. The CNM was independent and consisted of members from the Supreme Court, Board of Supreme Prosecutors, National Bar Associations, and universities. The Constitution Arts. 150 and 154 stated that judicial

³¹ For example, see [Belgium Phase 3](#) (paras. 85-90); [Denmark Phase 3](#) (paras. 77-81); [UK Phase 3](#) (paras. 64-73); [US Phase 3](#) (paras. 108-117 and Commentary after para. 128).

and prosecutorial appointments were based on merit and personal evaluation, with the approval of two-thirds of CNM members. Judges and prosecutors must be ratified by the CNM every seven years. Further requirements for appointment of judges and prosecutors are specified in Law 29 227 on Judicial Career and Law 30 483 on Prosecutor Career. The CNM also played a role in disciplining and dismissing judges and prosecutors.³² The CNM's operational details were governed by its Organic Law 26 397.

121. This regime for appointing, disciplining and removing judges and prosecutors was recently thrown into turmoil. In July and August 2018, the Peruvian press published a series of recordings that alleged corruption committed by members of the CNM, judiciary and PPO. In response, Congress removed all seven CNM members from office on 20 July 2018. Four days later, Congress declared an emergency and suspended the CNM's operation (Law 30 833).

122. At the time of this report, Peru was in the early stages of replacing the CNM. A Constitutional amendment was approved by referendum in December 2018 and entered into force on 10 January 2019 (Law 30 904). The CNM was replaced with a new National Board of Justice (JNJ) whose seven members would be chosen through a public, merit-based competition. Members must be Peruvian lawyers who meet specified requirements, but positions are no longer reserved for the Supreme Court, Board of Supreme Prosecutors, National Bar Associations, or universities. Like its predecessor, the JNJ would be responsible for the appointment, dismissal and discipline of prosecutors and judges. However, transparency is meant to be increased for appointments through merit-based competitions, personal evaluations, as well as public and reasoned votes by JNJ members. It is unclear when the first JNJ would be constituted, or whether additional rules and subsidiary legislation on judicial and prosecutorial appointment, discipline and dismissal are expected.

123. A second recent controversy has raised additional concerns about prosecutorial independence. Since 2016-17, Peruvian authorities have been investigating allegations that a major foreign engineering company had engaged in widespread corruption implicating Peruvian officials at the highest level. The then Attorney-General (AG) created a special team for the investigation (Decree 52-1981, Art. 80). A plea agreement with the company was reportedly reached in early December 2018. But on 31 December 2018, the AG allegedly attempted to jeopardise the case by removing the two prosecutors who led the investigation. In response, the President threatened to declare an emergency in the PPO and to revamp the institution. After large-scale public protests, the AG reversed his decision and resigned shortly afterwards. His successor has also pledged to reform the PPO.³³

124. As the Working Group has noted in other evaluations, the composition, independence, and proper functioning of judicial councils and the prosecutor's office can

³² [Constitution](#) Art. 154(3); Law 29 227 on Judicial Career, Chapter V; and Law 30 483 on Prosecutor Career, Chapter V.

³³ See for example Reuters (2 January 2019), "[Peru attorney general reverses decision on graft probe](#)"; Bloomberg (8 January 2019), "[Outcry over Peru's vast graft probe prompts top lawyer to quit](#)" and Reuters (8 January 2019), "[Peru's new top prosecutor criticizes president's bill after taking office](#)".

influence a Party's implementation of the Convention.³⁴ The Working Group should therefore closely examine Peru's continuing reforms of the CNM and PPO in Phase 2.

6. Article 6: Statute of Limitations

125. Art. 6 of the Convention requires that any statute of limitations that applies to the foreign bribery offence must allow an adequate period of time for investigation and prosecution.

126. Foreign bribery cases are subject to an ordinary statute of limitations of 16 years. In Peru, an offence's limitation period is equal to its maximum sentence (CC Art. 80), which is eight years for foreign bribery (see para. 70). In 2017, Art 41 of the Constitution was amended to double the statute of limitations for "offences committed against the Public Administration". This provision applies to foreign bribery, according to Peru. The provision also states that the "most serious cases [of corruption]" are not subject to the statute of limitations at all. Peru states that the Criminal Code would have to be amended before this provision could apply to the foreign bribery offence.

127. Time begins to run when the bribe is offered, promised or given since foreign bribery is generally an "instant" offence (CC Art. 82). When a bribe is offered and then paid later, whether time begins to run at the time of the offer or payment depends on the charge laid by the prosecutor. When a series of payments are made by a briber to an official for the same purpose, then the bribery would be considered a "continuing" offence. The limitation period would begin to run when the last payment is made. Peru states that if a legal person authorises a bribe, then the period would begin to run when the bribe is actually offered, promised or given. It is unclear what happens if the bribe is authorised but not eventually offered *etc.*

128. The ordinary limitation period can be extended:

- (a) The period is suspended when preliminary proceedings are formalised and become a preparatory investigation (CPC Art. 339(1)). It is also suspended while the criminal proceedings are awaiting the outcome of related judicial proceedings (CC Art. 84).
- (b) The limitation period can also be interrupted (*i.e.* reset) if the offender commits another crime. It is also interrupted by "the actions of the Prosecutor's Office or the judicial authorities" (CC Art. 83). Peru states that such actions are wide-ranging, *e.g.* the prosecutor taking investigative measures, formalisation of the preparatory investigation, judicial arrest warrant, etc.

Peru explains that an outstanding mutual legal assistance request to a foreign country would not interrupt or suspend the statute of limitations.

129. Even with suspensions or interruptions, the ordinary limitation period can only be extended by up to one-half.³⁵ Foreign bribery cases are thus subject to an ultimate limitation period of 24 years. The same limitation periods apply to natural and legal persons

³⁴ For example, see [Argentina Phase 2](#) (paras. 152-156), [Phase 3](#) (paras. 119-126), and [Phase 3bis](#) (paras. 105-108); and [Lithuania Phase 2](#) (paras. 129-133).

³⁵ CC Art. 83; [Supreme Court Plenary Agreement 3-2012/CJ-116](#), affirmed on appeal [332-2015-SANTA \(March 2018\)](#).

(CLL Art. 4.) These periods appear adequate for investigating and prosecuting foreign bribery.

7. Article 7: Money Laundering

7.1. Money Laundering Offence

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

131. Peru's money laundering offence is in Legislative Decree 1106. Art. 10 specifies that eligible predicate offences include "crimes against public administration", which includes domestic and foreign bribery. Predicate offences also include any crime that has a capacity to generate illegal profits. A conviction for the predicate offence is not required for a money laundering conviction.

132. The Phase 2 evaluation should follow up whether the offence covers the laundering of the proceeds of foreign bribery that occurs abroad. The offence does not explicitly refer to foreign predicate offences. Peru first explains that the offence covers the laundering of proceeds of the bribery of domestic public officials regardless of whether the bribery takes place in Peru or abroad. This is because CC Art. 5 provides jurisdiction to prosecute Peruvian public officials for crimes (including bribe taking) that are committed extraterritorially. But because there is no similar jurisdiction to prosecute foreign public officials for extraterritorial crimes, the money laundering offence only covers the laundering of the proceeds of foreign bribery if the bribery had been committed in Peru. Peruvian authorities later retracted this position, stating that Peru's money laundering offence applies if the act generating the laundered proceeds is considered a crime at the place where the act occurred. Jurisprudence provided by Peru includes one case involving money laundering predicated on a foreign offence.³⁶ But the court did not specifically address the issue of foreign predicates. The accused in the case were acquitted because the assets in question did not have a criminal origin.

133. Legislative Decree 1106 provides three money laundering offences. Each requires the same mental element, namely that the individual "knows or must have presumed" the "illicit origin of the goods", though knowledge of the precise details of the predicate offence is not needed.³⁷ Under Art. 1, an individual commits an offence if he "converts or transfers" money, goods, effects or profits "in order to avoid the identification of its origin, its seizure or forfeiture". Art. 2 applies if a person "acquires, uses, possesses, keeps, administers, receives, conceals or keeps in his possession" money, goods, effects or profits. Finally Art. 3 criminalises the "transportation or transfer" in Peru, or the entry or exit of the country, of "cash or negotiable financial instruments" for the purpose of avoiding the confiscation, seizure, or identification of the origin of the assets.

134. All three offences carry the same penalty. A natural person faces imprisonment of 8-15 years; 120-350 fine-days; and deprivation of functional or political rights (Arts. 1-3). Where aggravating features are present (*e.g.* the amount laundered exceeds ITU 500

³⁶ [National Criminal Court \(2 February 2016\), Exp. No. 151-2010-0-5001-JR-PE-03 \(Lima\).](#)

³⁷ [Supreme Court of Justice \(25 October 2017\), Case 1-2017/CIJ-433.](#)

(USD 622 500), the penalties rise to 10-20 years' imprisonment; and 365-730 fine-days (Art. 4).³⁸ The penalties are reduced to 4-6 years' imprisonment and 80-110 fine-days for laundering less than ITU 5 (USD 6 225) or for those who co-operate with the authorities (Art. 4). Art. 9 allows for seizure and confiscation in accordance with CC Art. 102.

135. CLL Art. 1 provides for the administrative liability of legal persons for money laundering as defined under Decree 1 106. The penalties available are identical to those for foreign bribery (see Section 3.1.2 at p. 19). 7.2. Money Laundering Prevention, Detection and Reporting

136. Law 29 038 Art. 3.1 sets out the entities that are required to file suspicious transaction reports (STRs). These include banks; insurance and other entities in the financial system; lawyers; accountants and accounting firms that represent clients in real estate transactions; asset management; incorporation and management of legal entities *etc.*

137. Suspicious transactions are defined as those “that have a magnitude or unusual rotating speed, or unusual or unjustified complexity conditions, that is presumed to proceed from some illegal activity, or that, for any reason, do not have an economic or apparent legal basis” (Law 27 693 Art. 11.3(a)). Indicators of suspicion are set out in Annex 5 of Resolution 2 660/2015 of the Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS). Reporting entities are also required to maintain records of – but not to report – unusual transactions (Law 27 693 Art. 11.3(b); SBS Resolution 2 660/2015 Arts. 2(j) and 11(i)).

138. STRs must be made to Peru's Financial Intelligence Unit (UIF), which is a specialised unit in the SBS. The UIF is also responsible for “analysing, treating, evaluating and transmitting information” for the detection of money laundering and terrorist financing (Law 27 693 Arts. 1 and 3).

139. Legislative Decree 1 106 Art. 5 sets out the sanctions for failure to report. An individual who, in breach of his/her function or professional obligations, fails to report a suspicious transaction that has been detected is punishable by 4-8 years' imprisonment, 120-250 fine-days and 4-6 years' disqualification from certain activities or positions. Other omissions to report suspicious transactions are punishable by a fine of 80-150 fine-days and 1-3 years' disqualification. Fines are not available against legal persons for failure to report.

140. SBS Resolution 2 660/2015 sets out the requirements for financial institutions and other entities to perform customer due diligence. Arts. 30.1-2 specify the minimum information required from a customer. Reporting entities are required to manage the customer's risk profile, depending on which general, simplified or enhanced due diligence must be applied (Arts. 4 and 30-32). Enhanced due diligence applies to politically exposed persons (PEPs) and their spouse, close relatives, and legal entities in which they own 25% of shares (Art. 32(e)-(h)). PEPs are defined as “natural persons, national or foreign, who fulfil or in the last five years have fulfilled prominent public functions or functions in an international organisation, whether in Peru or abroad, and whose financial circumstances may be the subject of public interest” (Art. 2(1)).

³⁸ The aggravating features are (1) use of status as a public official or agent of the real estate, financial, banking or stock exchange sector, (2) the crime is committed as a member of a criminal organisation, and (3) the value of the money, goods, effects or profits is greater than ITU 500.

8. Article 8: Accounting and Auditing

8.1. Accounting and Auditing Requirements / 8.2. Companies Subject to Requirements

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

142. The accounting standards in Peru are set out in several provisions. The Commercial Code 1902 Arts. 34-49 specify the books and records that merchants are required to accurately maintain. These documents must be kept during the operation of a merchant and its successor plus a further five years thereafter. The General Company Law 26887 (GCL) Arts. 221-223 require companies to prepare annual financial statements and other documents that accurately state the company's financial and economic situation, the state of its business, and its results. Financial statements must be prepared and presented based on generally accepted accounting principles. The Accounting Standards Council (*Consejo Normativo de Contabilidad, CNC*) sets accounting standards for the private sector and listed companies. CNC has endorsed the International Financial Reporting Standards (IFRS) as the generally accepted accounting principles in the GCL.³⁹ Non-listed, listed and financial companies are required to use IFRS to prepare their financial statements.⁴⁰ Peru adds that IFRS (para. OB4) emphasises the importance that a company complies with legislation. Tax legislation imposes further requirements, such as books that must be kept for tax purposes, requirements for supporting documentation, and the "legalisation" of documents by notaries or judges.⁴¹

143. Peruvian authorities state that a breach of accounting requirements may result in various forms of liability against natural persons:

- (a) Individuals responsible for a company's administration who falsify certain books and records are punishable by imprisonment of one to four years (CC Arts. 198 and 198-A).
- (b) Maintaining parallel accounts to obtain an undue advantage is punishable by imprisonment of up to one year and 60-90 fine-days (CC Art. 199). (See para. 76 for the conversion of fine-days into monetary amounts.)
- (c) A company's managers and directors may be civilly liable to the company, shareholders, creditors and other third parties (GCL Arts. 177, 181 and 191).

³⁹ Legislative Decree 1438 Art. 6; Resolution CNC 013-98-EF / 93.01. Peru states that it plans to improve the mandatory nature of this Resolution and GCL Art. 223.

⁴⁰ [CNC Resolution 013-98-EF/93.10](#); *Superintendencia del Mercado de Valores (SMV) Resolution 11/2012*; [Superintendencia de Banca, Seguros y AFP \(SBS\) Resolution 7036-2012](#).

⁴¹ Tax Code, Supreme Decree 133-2013-EF; *Superintendencia Nacional de Aduanas y de Administración Tributaria (SUNAT) Resolutions 234-2006 and 286-2009*.

- (d) Breaches of books and accounting requirements under tax laws are punishable by imprisonment of two to five years and 180-365 fine-days (Criminal Tax Law (Legislative Decree 813) Art. 5 and Tax Code Art. 16).

144. Corporate liability for false accounting is provided in CC Arts. 105 and 105-A, not the Corporate Liability Law 30 424. If false accounting is committed in the exercise of a legal person's activity or a legal person is used to assist or conceal the crime, then the legal person may be subject to a fine of 5 to 500 tax units (UITs) (PEN 20 750-2.075 million or USD 6 225-622 500); suspension of the legal person from operation for up to two years; prohibition from engaging in the activities that resulted in the crime permanently or up to five years; closing of the legal person's premises; or dissolution of the legal person. The maximum fines do not appear to be effective, proportionate and dissuasive. Also, the benefits of the crime can only be confiscated to satisfy civil liability arising from the offence (CC Art. 104).

8.3. External Auditing and Internal Company Controls

145. The 2009 Anti-Bribery Recommendation X recommends Parties to take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to external audits, and internal controls, ethics and compliance are fully used to prevent and detect foreign bribery, according to their jurisdictional and other basic legal principles.

146. The International Standards on Auditing (ISAs) apply in Peru. Law 28 951 gives the 24 Departmental Associations of Public Accountants the power to set auditing standards. In practice, the Associations adopt auditing standards issued by their umbrella organisation, the *Junta de Decanos de Colegios de Contadores Públicos de Perú* (JDCCPP) established by Law 25 892. The JDCCPP has adopted the ISAs.

147. The following companies in Peru must be externally audited annually (SBS Resolution 17 026-2010):

- (a) Listed companies (CONASEV Resolution 0103-1999-EF/94.01); and
- (b) Stock companies (*sociedad anónima*) where 10% or more of its shareholders request an external audit (GCL Arts. 226-227). Closed companies (*sociedad anónima cerrada*) and open companies (*sociedad anónima abierta*) may also be subject to annual external audits under certain circumstances (GCL Arts. 242 and 260).

Financial and insurance companies are to be externally audited as required by SBS (General Law 26 702 on Financial Systems, Art. 180). In addition, Law 29 720 Art. 5 previously required all corporations with annual revenues or assets of UIT 3 000 or more to present their audited financial statements to the SMV. In April 2016, the courts found that this provision as applied to companies not regulated by the SMV to be unconstitutional.

148. State-owned enterprises (SOEs) must also be audited by independent external auditors using international standards. Audit results are submitted to FONAFE, the state entity responsible for overseeing SOEs.⁴²

149. Further provisions concern the appointment and independence of auditors. The general meeting of shareholders appoints the external auditor of a private company (GCL Art. 114(4)). For SOEs, the Comptroller General (*Contraloría General de la República*, CGR) selects the auditors through a request for proposal process. Additional provisions address the independence of external auditors, such as on the provision of non-audit services; scenarios that could give rise to a conflict of interest with the audited company; ownership in the audited company; and good character of the auditor.⁴³

150. External auditors who discover foreign bribery are required to report the matter to the audited company. External auditors and external audit firms are required to detect material misstatements in a company's financial statements that are caused by fraud (ISA 240) or non-compliance with laws (ISA 250). Peruvian authorities state that external auditors must report such anomalies to the management of the audited company. When such anomalies are reported, Peru states that the external auditor cannot provide the audited company with the standard auditor statement or opinion.

151. Auditors are required to report suspected money laundering to competent authorities⁴⁴ but there is no similar obligation to report foreign bribery. ISAs 240 and 250 require external auditors to report fraud and non-compliance with laws to external authorities only if they are required to do so by local law. No such law exists in Peru. The CGR, however, is required to report to law enforcement if informed of foreign bribery by an external auditor of an SOE (Law 22785 Art. 11).

152. Peruvian authorities state that corporate internal controls are more developed in the public than the private sector. Controls in the public sector are subject to a range of laws and regulations.⁴⁵ In the private sector, promotion of internal controls only began with Law 30 424 which entered into force in January 2018, and the January 2019 Regulation under the Law that provides the private sector with guidance on designing and implementing prevention models (see para. 51) GCL Art. 190, which was enacted in 1997, stipulates that a company's manager is responsible for establishing and maintaining an accounting system and internal controls to protect the company's assets.

9. Article 9: Mutual Legal Assistance (MLA)

153. Art. 9 of the Convention requires each Party, to the fullest extent possible under its laws and relevant treaties and arrangements, to provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings

⁴² OECD (2014), [Transparency and Accountability Frameworks for Latin American State-Owned Enterprises](#), p. 26; World Bank (2014), [Corporate Governance of State-Owned Enterprises in Latin America](#), pp. 119-120).

⁴³ For private companies, see Regulation of External Audit, SBS Resolution 17026-2010, Art. 3. For SOEs, see Directive 012-2015-CG, approved by CGR Resolution 314-2015-CG, Section 6.6.

⁴⁴ Legislative Decree 1 249.

⁴⁵ Law 27 785; Law 28 716 as amended by Law 29743; *Resoluciones de Contraloría* [320-2006-CG](#), [458-2008-CG](#) and [119-2012-CG](#).

brought by a Party concerning offences within the Convention, and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person.

9.1. Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1. Criminal Matters

154. Peru can seek and provide mutual legal assistance (MLA) in criminal matters through a treaty or the principle of reciprocity (CPC Art. 508(1)). Peru has concluded bilateral MLA treaties with 20 countries, of which 10 are Parties to the Convention.⁴⁶ Multilateral treaties through which MLA can be requested in a foreign bribery case include the OECD Anti-Bribery Convention, United Nations Convention against Corruption (UNCAC), Inter-American Convention against Corruption (IACAC), and Inter-American Convention on Mutual Assistance in Criminal Matters.

155. In the absence of a treaty, CPC Arts. 508-512 and 528-537 apply. The offence underlying the request must be punishable by at least one year's imprisonment in the requesting state, and not be subject exclusively to military legislation. The types of available assistance include witness notifications, transfer of judicial documents, submissions of documents and reports, conducting of enquiries or inspections, and examination of objects and places. More invasive investigative measures such as search and seizure are available but require dual criminality (see Section 9.2 at p. 37 below). Additional grounds for denying MLA include *non bis in idem*; persecution based on sex, race, religion, nationality, ideology or social condition; requests by temporary tribunals; requests that affect public order, sovereignty, security or fundamental interests; and fiscal offences.

156. Peru's Public Prosecutor's Office (PPO) is the central authority for MLA requests and is supported by the Ministry for Foreign Affairs where appropriate (CPC Art. 512). The PPO communicates with foreign authorities directly, unless a treaty provides otherwise. It sends incoming MLA requests to a Preparatory Investigation Judge at the location where the investigative measure must take place for execution. The Judge then decides on the "admissibility" of the request within two days. Outgoing requests are sent by the judge or prosecutor who has conduct of the case to foreign authorities through the PPO (CPC Art. 536(3)).

9.1.2. Non-Criminal Matters

157. Peru's ability to seek and provide MLA in foreign bribery cases against legal persons raises one issue. Liability for legal persons in Peru is administrative - not criminal - in nature, even though the process takes place within criminal proceedings. For MLA involving a Party to the Convention, Peru states that Art. 9 of the Convention provides a legal basis for MLA, since the provision covers MLA in "non-criminal proceedings within the scope of this Convention brought by a Party against a legal person". For non-Parties, Peru states that corporate liability for foreign bribery is always linked to a natural person who commits the crime. The investigation of the natural person can hence form the basis for MLA in proceedings against the legal person. While this may be true in most foreign bribery cases, it may not provide a basis for MLA in cases where Peru has jurisdiction over the legal but not the natural person, *e.g.* when a non-Peruvian employee

⁴⁶ The 10 Parties are Argentina, Brazil, Canada, Colombia, France, Italy, Korea, Mexico, Spain and Switzerland.

of a Peruvian company commits extraterritorial foreign bribery (see para. 101). Nevertheless, Peru believes that it can seek MLA in these cases, including under the MLA provisions of the UN Convention against Corruption.

9.2. Dual Criminality for MLA

158. Art. 9(2) of the Convention states that, where a Party makes MLA conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of the Convention.

159. Peru requires dual criminality only for incoming MLA requests that seek more intrusive types of assistance. These include asset tracing; freezing and seizure of bank accounts and criminal assets; search and seizure; interception of communications; and other measures that “limit [individual] rights” (CPC Arts. 511(1)(h) and 529(2)). The definition of dual criminality is conduct-based, *i.e.* the act underpinning the request must be “punishable” in both the requesting and requested states.

160. Where a requesting state has administrative and not criminal liability of legal persons, Peru states that it can nevertheless provide MLA in such proceedings. If the requesting state is a Party to the Convention, then Art. 9(2) provides that “dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention”. For non-Parties, as explained at para. 157, Peru states that the proceedings against a natural person can be the basis for providing MLA against a legal person in the same case. Peru also believes that MLA is available even if the requesting state has jurisdiction over the legal but not the natural person. Peru also undertakes to provide MLA in these cases under the UN Convention against Corruption.

9.3. Bank Secrecy

161. Art. 9(3) of the Convention states that a Party shall not decline to render MLA for criminal matters within the scope of the Convention on the ground of bank secrecy.

162. Peru states it would not deny MLA requests in foreign bribery cases on grounds of bank secrecy. Art. 9(3) of the Convention has been incorporated into national law and thus prohibits such a denial. Furthermore, the Constitution Art. 2(5) provides for the lifting of bank secrecy. Law 26 702 Art. 143(1) provides that judges and courts may lift bank secrecy against a person who is party to court proceedings. Whether and how bank secrecy is lifted against someone who is not party to court proceedings should be explored in Phase 2. Lifting bank secrecy in Peru’s own foreign bribery investigations is governed by a different provision, CPC Art. 235. The FIU can also access information covered by bank secrecy (Law 27 693 Art. 3-A).

10. Article 10: Extradition

163. Art. 10(1) of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Art. 10(2) states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

10.1. Extradition for Bribery of a Foreign Public Official / 10.2. Legal Basis for Extradition

164. Peru may seek and provide extradition with or without a treaty (CPC Art. 513(2)). Bilateral extradition treaties are in force between Peru and 26 countries, 14 of which are Parties to the Convention.⁴⁷ In addition, Peru is Party to multilateral treaties that could provide extradition in foreign bribery cases, including the OECD Anti-Bribery Convention, UNCAC, IACAC, Treaty on International Criminal Law 1889, and Agreement on Extradition 1915.

165. In the absence of a treaty, extradition is available based on reciprocity (CPC Art. 513). Peru states in these cases the Convention would be “an element to be taken into account”. Extradition is available if the conduct underlying the request is punishable by at least two years’ imprisonment in Peru and the foreign state (CPC Art. 517(1)). The requesting state must present sufficient evidence of the commission of the criminal act and the participation of the person sought (CPC Art. 518). Peru will deny extradition due to, among other things, a lack of a fair administration of justice or due process in the foreign state; *res judicata*; *non bis in idem*; expiry of the statute of limitations in Peru or the foreign state; requests by temporary tribunals; political or fiscal offence; persecution based on race, religion, nationality or political opinions; sovereignty, security, public order or essential interests; and absence of assurances that the death penalty would be applied (CPC Arts. 516-517 and Constitution Art. 37).

166. The Executive branch and the judiciary play a role in extradition to and from Peru. Upon the receipt of an extradition request and supporting information from a foreign state, the Criminal Chamber of the Supreme Court conducts an extradition hearing within 15 days. An opinion by the Supreme Court against extradition is binding. If the Court is in favour of extradition, then the Executive Government decides whether to surrender the person sought. This process can be avoided if the person sought consents to extradition (CPC Arts. 514-514 and 521-523-A; Constitution Art. 37). For outgoing extradition requests, the Supreme Court reviews the request before the Executive Government decides whether to send the request to the foreign state (CPC Arts. 525-527).

10.3. Extradition of Nationals

167. Art. 10(3) of the Convention requires each Party to take any measures necessary to ensure either that it can extradite its nationals or that it can prosecute its nationals for the offence of foreign bribery. A Party that declines a request to extradite a person for foreign bribery solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution (*aut dedere aut judicare*).

168. Peru does not deny extradition on the basis of nationality *per se* but may do so due to territorial jurisdiction. The Constitution and the CPC do not prohibit the extradition of Peruvian nationals. However, as mentioned above the Supreme Court has held in an extradition case that offences “can and should be judged where they are committed, especially where those responsible and victims are national and reside in the territory”.⁴⁸ Peruvian authorities add that “if the act of bribery directly or indirectly affects the interests

⁴⁷ The 14 Parties are Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica, France, Italy, Korea, Mexico, Netherlands, Spain, UK and US.

⁴⁸ [Supreme Court \(15 March 2012\), *Francisco Morales Bermúdez Case, Extradition 23-2012-Lima*](#).

of the Peruvian State, the principle of territoriality must prevail and, therefore, the application of Peruvian criminal law. However, if the bribery only transgresses the operation of the foreign public administration, it would be possible to accept a possible request for extradition, regardless of the nationality of the extraditable person.”

169. Peru’s position raises at least two questions. First, the phrase “directly or indirectly affects the interests of the Peruvian State” is vague, and could give Peru wide discretion in denying extradition. Second, a foreign bribery case could conceivably affect the interests of both the Peruvian and a foreign state. Whether Peru would grant extradition in such a case is unclear. Peru states that CPC Art. 517(3)(b) (denial of extradition on grounds of nationality sovereignty, security or public order or other essential interests) applies to the extradition of Peruvian nationals and non-nationals. But it is unclear how this provision would clarify the above-mentioned questions.

10.4. Dual Criminality for Extradition

170. Art. 10(4) of the Convention states that extradition for foreign bribery is subject to the conditions set out in the domestic law, applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of foreign bribery offence defined in Art. 1 of the Convention.

171. As explained in para. 165, dual criminality is required. Peru will provide extradition only if the underlying conduct is punishable by at least two years’ imprisonment in Peru and the foreign state. According to Peru, dual criminality would also be satisfied if the requesting and requested states both have criminal offences that meet the requirements of Art. 1 of the Convention.

11. Article 11: Responsible Authorities

172. Art. 11 of the Convention requires Parties to notify the OECD Secretary-General of the authorities responsible for making and receiving requests for consultation (Art. 4(3)), extradition (Art. 9) and MLA (Art. 10), and which shall serve as the channel of communication for these matters.

173. Peru has designated as responsible authorities the Public Prosecutor’s Office (PPO) for Art. 4(3) consultations, and the PPO’s Mutual Legal Assistance and Extradition Unit for MLA (Art. 9) and extradition (Art. 10).

B. IMPLEMENTATION OF THE 2009 ANTI-BRIBERY RECOMMENDATION

174. Consistent with previous Working Group practice, this Phase 1 Report addresses only 2009 Anti-Bribery Recommendation VIII on the tax deductibility of bribes.

1. Tax Deductibility

175. The 2009 Anti-Bribery Recommendation VIII recommends “that Member countries explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner”, and that “in accordance with their legal systems” they “establish an effective legal and administrative framework and provide guidance to

facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities”.

176. Contrary to this Recommendation, Peru does not explicitly disallow the tax deduction of bribes to foreign public officials. The Income Tax Law Art. 37 permits the deduction of expenses that are necessary to produce income and hence could cover bribes paid to obtain or retain business.⁴⁹ Peru argues that bribes are never considered necessary to obtain or retain business and so would not be deductible.⁵⁰ This position is dubious since bribes are often paid to obtain contracts that otherwise would not have been won. The provision adds that a deduction is allowed only if it is not expressly prohibited in the Income Tax Law, which is indeed the case with the deduction of bribes. Peru argues that in practice bribes would not be deducted because expenses must be documented, *e.g.* with a receipt. But this requirement could be circumvented by hiding bribes as invoiced expenses such as consultancy fees or travel. A 2014 report by SUNAT (tax authorities) stated that a deduction is allowed “as long as the expense is not limited or prohibited by law”.⁵¹ However, this language is not in the Income Tax Law itself. Nor is the report legally binding.

⁴⁹ See also Official Letter No. 028- 2017-SUNAT.

⁵⁰ See also 003-2017-SUNAT.

⁵¹ [SUNAT Report 026-2014-SUNAT/5D0000](#).

EVALUATION OF PERU

General Comments

177. The Working Group commends the Peruvian authorities for their co-operation and openness during the evaluation process. The Group appreciates the feedback provided by the authorities during the drafting of the report to ensure a comprehensive and effective basis for the evaluation. The legislative framework for implementing the Convention in Peru consists principally of the foreign bribery offence in Section 397-A of Peru's Criminal Code (CC) and the Corporate Liability Law 30 424 (CLL). The Working Group considers that Peru's legislation largely conforms to the standards of the Convention, subject to the issues noted below which Peru should rectify as soon as possible. In addition, some aspects of the legislation should be followed up during Peru's Phase 2 evaluation.

Specific Issues

Foreign Bribery Offence

Intentionally

178. CC Art. 397-A applies to foreign bribery committed with "wilful intent". Whether the offence covers common *modus operandi* for committing foreign bribery, such as a company paying an agent a large fee without questioning how the money is spent, should be further examined in Phase 2.

Offer, Promise or Give

179. Peru stated that, to prove the foreign bribery offence, the official must be aware of the offer or promise. An offer or promise that was made but not received by the official does not constitute an offence. This is not consistent with the Convention and Peru should take steps to rectify this concern.

180. Peru also states that "it is an offence only if the undue advantage offered or promised to the foreign official is achievable or possible". The Convention prohibits the promise or offer of an advantage to a foreign public official regardless of whether the advantage can be realised. This matter should be followed up in Phase 2.

Any Undue Pecuniary or Other Advantage

181. In Article 397-A, the term "undue" appears to apply to "benefit" but not donations, promises and advantages. The Working Group will follow up in Phase 2 whether the provision thus prohibits legitimate payments to foreign public officials.

Definition of a Foreign Public Official

182. Peru's Criminal Code does not define a foreign public official. The Working Group recommends Peru urgently enact legislation defining a foreign public official in line with the Convention.

In Order that the Official Act or Refrain from Acting in Relation to the Performance of Official Duties

183. Peru confirms that its foreign bribery offence does not cover bribery in order that a foreign public official uses his/her position outside his/her authorised competence. The Working Group recommends that Peru amend its legislation to ensure that such actions are prohibited under Peruvian law.

Complicity, Attempt and Conspiracy

184. The Working Group will follow up in Phase 2 (a) whether the authorisation of foreign bribery is prohibited under the Peruvian Criminal Code; and (b) the application in practice of attempts to commit foreign bribery, particularly whether an attempt covers preparatory acts such as the withdrawal of bribe money or contacting a foreign official to arrange a meeting at which the bribe would be offered.

Defences

185. The Working Group will follow up in Phase 2 the application in practice of the defences of “culturally conditioned understanding error” and acting “by order of a competent authority issued in the exercise of his/her functions”.

Responsibility of Legal Persons

Successor Liability

186. The Phase 2 evaluation should consider successor liability for foreign bribery, including whether a company that uncovers foreign bribery during the due diligence process of acquiring or merging with another company could escape liability for any acts committed prior to the merger/acquisition by the acquired company.

Standard of Liability

187. The Working Group has several concerns about the standard of liability for foreign bribery in the Corporate Liability Law. It therefore recommends that Peru amend the Law to (a) ensure that a legal person is liable for foreign bribery that benefits both the legal person and the natural person who perpetrated the crime; (b) ensure that a legal person is liable for foreign bribery that is intended to benefit it, even if the benefit later does not materialise; and (c) ensure that legal persons cannot avoid liability for foreign bribery by using an intermediary to make bribe payments.

“Prevention Model” Defence

188. The Corporate Liability Law makes the prevention model defence available when senior management of a company commits, authorise or directs a crime of foreign bribery. This provision clearly contravenes the 2009 Recommendation. Peru should urgently amend the Law in this respect.

189. Furthermore, CLL Art. 3(c) provides that a legal person is not liable for foreign bribery committed by lower-level staff if company management had fulfilled its “duties of supervision, surveillance and control over the activity entrusted, in response to the specific situation of the case.” Whether this test is met is “regulated by the legal entity itself when defining the duties, responsibilities and functions of high-level executives”. This gives a

company significant ability to dictate its own standards of behaviour. The CLL should therefore also be amended to rectify this deficiency.

190. Regarding the appropriate elements of a prevention model, Peru should amend CLL Art. 17(2) and Art. 33 of the Regulation in Supreme Decree 002-2019-JUS to (a) expand the lists of mandatory and optional elements for a prevention model; (b) elaborate on certain existing elements, and (c) clarify that some of the elements listed in Art. 33 are mandatory for certain companies. Peru is encouraged to more closely align with the Working Group’s Good Practice Guidance on Internal Controls, Ethics and Compliance.

191. Further concerns are raised by the reduced requirements of a prevention model for SMEs. Peru should ensure that (a) the legally binding requirements for SMEs under the CLL take into account the companies’ risk profile and (b) clarify which of the minimum elements in CLL Art. 17(2) are required for these smaller companies.

192. The Working Group recommends that Peru ensure that the Superintendence of the Securities Market (SMV) has sufficient powers to adequately report on the implementation and operation of a legal person’s prevention model, particularly to gather evidence from third parties outside the prosecuted legal person. Peru’s Phase 2 evaluation should also examine practice-related issues such as whether the SMV has appropriate resources and expertise to produce reports, particularly regarding privately-owned companies; the SMV’s interpretation of the requirements of a prevention model in individual cases; whether the SMV applies the requirements consistently; the burden of proof where a prevention model defence is relied upon; and in what circumstances, if any, an SMV report binds a prosecutor.

Defence of “Fraudulently Eluding”

193. Art. 17(4) CLL states that where a natural person “fraudulently eludes” an implemented prevention model, the company also escapes liability. Peru explains that this provision is an example of when the prevention model defence in Art. 17(1) CLL succeeds and not a separate defence. However, this explanation is not consistent with the language in the statute. Furthermore, if Art. 17(4) CLL is a separate defence, then it appears overbroad. Peru should amend the CLL to ensure that Art. 17(4) cannot be interpreted as a separate defence.

Proceedings against Legal Persons

194. The Working Group will closely evaluate in Phase 2 whether prosecution of a legal person requires in practice that a natural person be prosecuted, convicted and/or sentenced.

Sanctions

Penalties for Natural Persons

195. The Working Group will examine in Phase 2, whether fines imposed in practice are adequate, how they compare to the value of the bribe and benefit, and whether fines can be imposed against an offender who does not have any income.

Penalties for Legal Persons

196. Where the value of the benefit generated by foreign bribery cannot be determined, the fine can in theory be a small fraction of the company’s annual revenues. The Working

Group recommends that Peru amend its legislation to increase these sanctions to a level that is effective, proportionate and dissuasive.

197. The Working Group should also examine in Phase 2 whether “benefit” equates to the revenue or profits from a contract, or merely the value of the bribe; the use of suspended penalties in practice; whether sanctions are effective, proportionate and dissuasive in practice, especially after the application of mitigating factors; and the operation of the proposed database of corporate convictions.

Jurisdiction

Territorial and Nationality Jurisdiction

198. Regarding nationality jurisdiction, the Working Group recommends that Peru (a) eliminate the requirement for dual criminality where foreign bribery offences are committed by Peruvian nationals abroad, and (b) clarify the timing of the individual entering “in any way into [Peruvian] territory”.

199. Furthermore, the Working Group will explore in Phase 2 (a) whether the reference in CLL Art. 4 to “political crimes or related facts” permits the consideration of political and other factors prohibited by Art. 5 of the Convention; and (b) the extent to which Peru can exercise jurisdiction for offences committed partly on its territory.

Jurisdiction over Legal Persons

200. The CLL does not explicitly state the jurisdictional rules that apply to legal persons. The Working Group recommends that Peru enact legislation to clarify territorial and nationality jurisdiction over legal persons for foreign bribery.

Enforcement

201. The Working Group is concerned that under the CPC preliminary proceedings must generally be concluded within 60 days. The preparatory investigation in complex cases must also be finished within 16 months. The Working Group recommends that Peru extend these deadlines for foreign bribery cases, given that such investigations are frequently lengthy and complex.

202. The Working Group will follow up in Phase 2 the enforcement of Peru’s foreign bribery laws, including issues such as co-ordination in cases involving multiple related offences; transparency and sanctions in cases of non-trial resolutions; and Peru’s reforms of the National Council of Magistrates (CNM) and Public Prosecutor’s Office (PPO).

Money Laundering

203. Peru’s Phase 2 evaluation will follow up whether the money laundering offence covers the laundering of foreign bribery that occurs abroad.

Accounting and Auditing

204. The maximum fines for false accounting for legal persons do not appear to be effective, proportionate and dissuasive. Peru is encouraged to increase these sanctions, and increase the scope of confiscation, which is currently only available to satisfy civil liability arising from the offence.

205. External auditors are required to report suspected money laundering to competent authorities. Peru should consider requiring the external auditor to also report suspected foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and ensure that auditors making such reports reasonably and in good faith are protected from legal action (2009 Anti-Bribery Recommendation X.B.v).

Mutual Legal Assistance (MLA) and Extradition

206. The Working Group will follow up in Phase 2 (a) Peru's ability to seek and provide MLA in foreign bribery cases against legal persons, including in cases where the liability against the legal person is not criminal in nature; (b) whether and how bank secrecy is lifted against someone who is not party to court proceedings; and (c) the granting of extradition in cases that "directly or indirectly affect the interests of the Peruvian State".

Tax Deductibility of Bribes

207. Peru does not explicitly disallow the tax deduction of bribes paid to foreign public officials. The Working Group recommends that Peru issue legally binding measures to ensure the non-deductibility of bribes, and that companies are not able to circumvent current requirements by hiding bribes as invoiced expenses.

ANNEX 1 LIST OF ABBREVIATIONS AND ACRONYMS

Art.	article	MLA	mutual legal assistance
CC	Criminal Code	PEN	Peruvian <i>sol</i>
CGR	<i>Contraloría General de la República</i>	PPL	Public Procurement Law 30 225
CLL	Corporate Liability Law 30 424	PPO	Public Prosecutor's Office (<i>Ministerio Público</i>)
CNC	Accounting Standards Council (<i>Consejo Normativo de Contabilidad</i>)	SBS	Superintendence of Banking, Insurance, and Pensions (<i>Superintendencia de Banca, Seguros y AFP</i>)
CNM	National Council of Magistrates (<i>Consejo Nacional de la Magistratura</i>)	SMEs	micro, small or medium-sized enterprises
CPC	Criminal Procedure Code	SMV	Superintendence of the Securities Market (<i>Superintendencia del Mercado de Valores</i>)
FIU	Financial Intelligence Unit	SOE	state-owned or controlled enterprise
FONAFE	<i>Fondo Nacional de Financiamiento de la Actividad Empresarial del Estado</i> (SOE regulator)	SUNAT	Superintendency of Tax Administration (<i>Superintendencia Nacional de Aduanas y de Administración Tributaria</i>)
GCL	General Company Law 26 887 (<i>Ley General de Sociedades</i>)	UNCAC	United Nations Convention against Corruption
IACAC	Inter-American Convention against Corruption	UIT	tax unit (<i>Unidad Impositiva Tributaria</i>)
IFRS	International Financial Reporting Standards	USD	US Dollar
ISA	International Standards on Auditing		
JDCCPP	<i>Junta de Decanos de Colegios de Contadores Públicos de Perú</i>		

ANNEX 2 EXCERPTS OF RELEVANT LEGISLATION

Foreign Bribery Offence

Criminal Code Article 397-A. Transnational Active Bribery

Anyone who, under any form, offers, grants or promises directly or indirectly to an official or public servant of another State or official of an international public organization, a donation, promise, advantage or undue benefit that may be in his own interest or in that of another person, so that said server or public official performs or omits acts specific to his position or employment, in violation of his obligations or without breaching his obligation to obtain or retain a business or other undue advantage in the performance of international economic or commercial activities, shall be punished with deprivation of liberty not less than five years nor more than eight years; Disqualification, as applicable, in accordance with paragraphs 1, 2 and 8 of Article 36; and, with three hundred sixty-five to seven hundred thirty fine-days.

Liability of Legal Persons

CLL Article 2. Subjective Scope of Application

For the purposes of this Law, legal entities are private law entities, as well as associations, foundations, non-governmental organizations and non-registered committees, irregular companies, entities that administer an autonomous patrimony and companies of the Peruvian State or companies of mixed economy.

The change of name, denomination or corporate name, corporate reorganization, transformation, split, merger, dissolution, liquidation or any act that may affect the legal status of the entity does not prevent the attribution of responsibility to it.

In the case of a merger or spin-off, the absorbing legal entity: (i) can only be sanctioned with the payment of a fine, which is calculated taking into account the rules established in articles 5 or 7, as appropriate, and in function transferred assets, provided that the offense was committed before the merger or split, unless the legal entities involved have used these forms of corporate reorganization for the purpose of avoiding any administrative liability of the merged or divided corporate entity, in which case does not operate this assumption; and, (ii) it does not incur administrative responsibility when it has performed an adequate process of due diligence, prior to the merger or spin-off process. It is understood that due diligence is fulfilled when verifying the adoption of reasonable actions aimed at verifying that the merged or split corporate entity has not incurred the commission of any of the offenses set forth in article 1.

CLL Article 3. Administrative Responsibility of Legal Entities

Legal entities are administratively responsible for the crimes indicated in article 1, when these have been committed in their name or on their behalf and for their benefit, directly or indirectly, by:

- a. Your partners, directors, de facto or legal administrators, legal representatives or attorneys-in-fact of the legal entity, or its subsidiaries or subsidiaries.
- b. The natural person who, being subject to the authority and control of the persons mentioned in the preceding paragraph, committed the offense under their orders or authorization.
- c. The natural person indicated in the preceding paragraph, when the commission of the crime was possible because the persons mentioned in literal a. they have not fulfilled their duties of supervision, surveillance and control over the activity entrusted, in response to the specific situation of the case.

Legal entities that have the status of parent companies will be liable and sanctioned whenever the natural persons of their subsidiaries or subsidiaries, who commit any of the conducts indicated in the first paragraph, have acted under their orders, authorization or with their consent.

Legal persons are not liable in cases in which the natural persons indicated in the first paragraph, had committed the offenses set forth in article 1, exclusively for their own benefit or in favor of a third party other than the legal entity.

CLL Article 4. Autonomy of the Administrative Responsibility of the Legal Entity and Termination of the Action against the Legal Entity

The administrative responsibility of the legal entity is autonomous of the criminal responsibility of the natural person. The causes that extinguish the criminal action against the natural person do not enervate the administrative responsibility of the legal entities.

The action against the legal entity is extinguished by prescription or res judicata.

The action against the legal entity prescribes in the same time as that provided for the natural person, in accordance with the first paragraph of article 80 of the Criminal Code, being applicable also, as appropriate, articles 82, 83 and 84 of the Criminal Code.

CLL Article 17. Exempt for implementation of prevention model

17.1. The legal entity is exempt from liability for the commission of the crimes included in article 1, if it adopts and implements in its organization, prior to committing the crime, a prevention model appropriate to its nature, risks, needs and characteristics, consisting of adequate surveillance and control measures to prevent the aforementioned crimes or to significantly reduce the risk of their commission.

17.2. The prevention model must have the following minimum elements:

17.2.1. A person in charge of prevention, appointed by the highest administrative body of the legal entity or who acts as appropriate, who must exercise his function autonomously. In the case of micro, small and medium enterprises, the role of prevention manager can be assumed directly by the administrative body.

17.2.2. Identification, evaluation and mitigation of risks to prevent the commission of the crimes foreseen in article 1 through the legal entity.

17.2.3. Implementation of complaint procedures.

17.2.4. Dissemination and periodic training of the prevention model.

17.2.5. Evaluation and continuous monitoring of the prevention model.

The content of the prevention model, taking into account the characteristics of the legal entity, is developed in the Regulation of this Law. In the case of micro, small and medium enterprises, the prevention model will be limited to its nature and characteristics and only must have some of the minimum elements mentioned above.

17.3. In the case of state companies or mixed economy companies, the prevention model is exercised without prejudice to the powers and powers that correspond to the institutional control bodies and all the bodies that make up the National Control System.

17.4. It also excludes the liability of the legal entity, when any of the natural persons indicated in article 3 commits the offense fraudulently eluding the prevention model duly implemented.

Sanctions

CLL Article 5. Applicable administrative measures

The judge, at the request of the Public Prosecutor's Office, may order, as appropriate, the following administrative measures against legal entities that are responsible for the commission of the offenses set forth in Article 1:

- a. Fine not less than double nor more than six times the benefit obtained or expected to be obtained with the commission of the offense, without prejudice to the provisions of article 7.
- b. Disability, in any of the following modalities:
 1. Suspension of their social activities for a period of not less than six months nor more than two years.

2. Prohibition to carry out in the future activities of the same class or nature of those in whose accomplishment the crime has been committed, favored or covered up. The prohibition may be temporary or definitive. The temporary prohibition shall not be less than one year nor more than five years.
 3. To contract with the State of a definitive nature.
- c. Cancellation of licenses, concessions, rights and other administrative or municipal authorizations.
 - d. Closing of their premises or establishments, temporarily or permanently. The temporary closure is not less than one year nor more than five years.
 - e. Dissolution.

CLL Article 7. Fine

When it is not possible to determine the amount of the benefit obtained or expected to be obtained with the commission of the offenses set forth in article 1, the value of the fine is established according to the following criteria:

- a) When the annual income of the legal entity at the time of commission of the crime amounts to one hundred and fifty (150) tax units, the fine is not less than ten (10) nor more than fifty (50) tax units.
- b) When the annual income of the legal entity at the time of commission of the crime is greater than one hundred fifty (150) tax units and less than one thousand seven hundred (1700) tax units, the fine is not less than fifty (50) nor more than five hundred (500) tax tax units (UIT).
- c) When the annual income of the legal entity at the time of commission of the crime is greater than one thousand seven hundred (1700) tax units, the fine is not less than five hundred (500) nor more than ten thousand (10000) tax units (ITU).

The fine must be paid within ten business days of the judgment that has the quality of consent or enforcement. At the request of the legal entity and when the payment of the amount of the fine could jeopardize its continuity or the maintenance of the jobs or when it is advisable for the general interest, the judge authorizes the payment to be made in monthly installments, within a limit not exceeding thirty-six months.

In case the legal entity does not comply with the payment of the fine imposed, it can be executed on its assets or converted, following a judicial request, to the extent of definitively prohibiting activities, foreseen in numeral 2 of section b) of article 5.

CC Article 102. Seizure of property from crime

The judge, whenever the autonomous process of extinction of ownership does not proceed, resolves the seizure of the instruments with which the crime was executed, even when they belong to third parties, except when they have not given their consent for its use . The objects of the crime are confiscated when, according to their nature, their delivery or return does not correspond. Likewise, it provides for the seizure of the effects or gains of the crime, whatever the transformations they may have experienced. The confiscation determines the transfer of said assets to the sphere of ownership of the State.

The judge also provides for the seizure of intrinsically criminal assets, which will be destroyed.

When the effects or gains of the crime have been mixed with goods of lawful origin, confiscation proceeds to the estimated value of the illicit mixed goods, unless the former had been used as means or instruments to hide or convert the goods of illicit origin, in which case the confiscation of both types of goods will proceed.

If forfeiture of the effects or gains of the offense is not possible because they have been concealed, destroyed, consumed, transferred to a third party in good faith and for consideration or for any other analogous reason, the judge orders the confiscation of the assets or assets of ownership. of the responsible or eventual third party for an amount equivalent to the value of said effects and profits.

CC Article 104. Deprivation of benefits obtained for criminal offenses against legal entities

The judge will also decree the deprivation of the benefits obtained by legal entities as a consequence of the criminal offense committed in the exercise of their activity by their officers or dependents, as necessary to cover pecuniary responsibility of a nature civil of those, if their assets were insufficient.

CC Article 105. Measures applicable to Legal Entities [Unofficial Translation]

If the punishable act was committed in the exercise of the activity of any legal entity or using your organization to favour or conceal it, the Judge must apply all or some of the following measures:

1. Closing of your premises or establishments, temporarily or permanently. The temporary closure shall not exceed five years.
2. Dissolution and liquidation of the company, association, foundation, cooperative or committee.
3. Suspension of the activities of the company, association, foundation, cooperative or committee for a period not exceeding two years.
4. Prohibition to the society, foundation, association, cooperative or committee to carry out in the future activities, of the kind of those in whose exercise the crime has been committed, favoured or covered up.

The prohibition may be temporary or definitive. The temporary prohibition will not be greater than five years.

5. Fine not less than five nor more than five hundred tax units.

When any of these measures is applied, the Judge will order the competent authority to order the intervention of the legal entity to safeguard the rights of the workers and the creditors of the legal entity for a period of two years.

The change of the corporate name, legal status or corporate reorganization, will not prevent the application of these measures.

Jurisdiction**CC Article 1. Principle of Territoriality**

The Peruvian Criminal Law applies to anyone who commits a punishable act in the territory of the Republic, except for the exceptions contained in International Law.

It also applies to punishable acts committed in:

1. Public national aircraft or aircraft, where they are located; and,
2. Private national aircraft or ships, which are on the high seas or in airspace where no State exercises sovereignty.

CC Article 2. Principle of Extraterritoriality, Real or Defence Principle and Active and Passive Personality Principle

The Peruvian Criminal Law applies to all crimes committed abroad, when:

[...]

4. It is perpetrated against a Peruvian or by a Peruvian and the crime is foreseen as susceptible to extradition according to Peruvian Law, provided that it is also punishable in the State in which it was committed and the agent enters in any way into the territory of the Republic;

CC Article 4. Exceptions to the Principle of Extraterritoriality

The provisions contained in Article 2, paragraphs 2, 3, 4 and 5, do not apply:

1. When the criminal action has been extinguished according to one or another legislation;
2. When it comes to political crimes or related facts with them; and,
3. When the defendant has been acquitted abroad or the convicted person has served the sentence or it is prescribed or remitted.

If the agent has not fully complied with the sentence imposed, the process may be renewed before the courts of the Republic, but the part of the penalty served will be computed.

Time Limits for Prosecution

CPC Article 334 (2). Qualification

2. The term of the preliminary proceedings, according to article 3, is sixty days, unless a person is detained. However, the public prosecutor may set a different period depending on the characteristics, complexity and circumstances of the events under investigation. Anyone who considers himself affected by an excessive duration of the preliminary proceedings, will request the prosecutor to give him a term and dictate the corresponding disposition. If the prosecutor does not accept the request of the affected party or sets an unreasonable term, the latter may go to the judge of the preparatory investigation within five days urging his pronouncement. The judge will decide after a hearing, with the participation of the prosecutor and the applicant.

CPC Article 342. Term

1. The term of the Preparatory Investigation is one hundred and twenty calendar days. Only for justified reasons, by issuing the corresponding Provision, the Prosecutor may extend it for a single time up to a maximum of sixty calendar days.

2. In the case of complex investigations, the term of the Preparatory Investigation is eight months. In the case of investigation of crimes perpetrated by imputed members of criminal organizations, persons linked to it or acting on behalf of it, the term of the preparatory investigation is thirty-six months. The extension for the same term must be granted by the Judge of the Preparatory Investigation.

3. The Prosecutor is responsible for issuing the provision that declares the process complex when: a) it requires the performance of a significant number of investigative acts; b) understand the investigation of numerous crimes; c) involves a significant number of accused or aggrieved; d) demand the realization of skills that involve the revision of a large documentation or complicated technical analysis; e) it needs to carry out procedures of a procedural nature outside the country; f) involves carrying out proceedings in several judicial districts; g) reviews the management of legal entities or entities of the State; or h) include the investigation of crimes perpetrated by members of a criminal organization, persons linked to it or acting on behalf of it.

CPC Article 344. Decision of the Public Ministry

1. Having prepared the conclusion of the Preparatory Investigation, in accordance with numeral 1) of article 343, the Prosecutor shall decide within fifteen days whether to make an accusation, provided that there is sufficient basis for this, or if it requires the dismissal of the case. In complex cases and organized crime, the Prosecutor decides within thirty days, under responsibility.

Money Laundering

Decree 1106 – Articles 1-3

Article 1.- Acts of conversion and transfer

Whoever converts or transfers money, goods, effects or profits whose illicit origin he knows or must have presumed, in order to avoid the identification of his origin, his seizure or forfeiture, will be repressed with deprivation of liberty of not less than eight nor greater of fifteen years and with one hundred twenty to three hundred fifty days fine and disqualification in accordance with subparagraphs 1), 2) and 8) of article 36 of the Criminal Code.

Article 2.- Acts of concealment and possession

Whoever acquires, uses, possesses, keeps, administers, receives, receives, conceals or keeps in his possession money, property, effects or profits, whose illicit origin he knows or must have presumed, shall be punished by deprivation of liberty of not less than eight nor more than fifteen years and with one hundred and twenty three hundred and fifty days fine and disqualification in accordance with subparagraphs 1), 2) and 8) of article 36 of the Criminal Code.

Article 3.- Transportation, transfer, entry or exit through national territory of money or securities of illicit origin

Whoever transports or transports with him or by any means within the national territory money in cash or negotiable financial instruments issued "to the bearer" whose illicit origin he knows or must presume, with the purpose of avoiding the identification of his origin, his seizure or confiscation; or enter or leave the country with or by any means such property, whose illicit origin is known or presumed, with the same purpose, shall be punished with imprisonment of not less than eight nor more than fifteen years and one hundred twenty to three hundred fifty days fine and disqualification in accordance with subparagraphs 1), 2) and 8) of article 36 of the Criminal Code.

Article 4.- Aggravating and mitigating circumstances

The penalty shall be deprivation of liberty not less than ten nor more than twenty years and three hundred sixty-five to seven hundred thirty days fine, when:

1. The agent uses or makes use of his status as a public official or agent of the real estate, financial, banking or stock exchange sector.
2. The agent commits the crime as a member of a criminal organization.
3. The value of the money, goods, effects or profits involved is greater than the equivalent of five hundred (500) Tax Units.

The penalty shall be deprivation of liberty not less than twenty-five years when the money, goods, effects or profits come from illegal mining, illicit drug trafficking, terrorism, kidnapping, extortion or trafficking in persons.

The penalty shall be deprivation of freedom not less than four nor more than six years and eighty to one hundred ten days fine, when the value of money, goods, effects or profits involved is not greater than the equivalent of five (5) Tax Units. The same penalty shall apply to anyone who provides the authorities with effective information to prevent the consummation of the crime, identify and capture the perpetrators or participants, as well as detect or seize the assets subject to the acts described in articles 1, 2 and 3 of the present Legislative Decree.