

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

TENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This tenth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Portugal. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past two years, countries across the globe have continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

2020 saw French-headquartered Airbus SE reach a US\$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continued to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najib Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis still confronting us in the remainder of 2021 and into 2022, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of

corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Washington, DC

November 2021

CHILE

*Sebastián Doren and Juan Ignacio Donoso*¹

I INTRODUCTION

2020 will be considered the landmark year in the enforcement of corruption in Chile. During the past 20 years Chile has made significant efforts to strengthen its anti-corruption legal system. During this period, several laws were enacted (e.g., Laws Nos. 19,645 in 1999, 18,829 in 2002, 20,393 in 2009 and 21,112 in 2018) in order to fill legal voids in anti-corruption regulation, increase sanctions against such practices, or both, but enforcement has not been very successful. Although in these years there were several investigations for bribery and other corruption practices, in some the criminal prosecutors failed to obtain a conviction and in others they were not able to obtain significant penalties.

The *Corpesca* case, decided in December 2020, is the first mayor corruption conviction in the country (see Section III.vi). In this case, the fish extraction company Corpesca and two former member of the Chilean Congress, Jaime Orpis, a former senator, and Marta Isasi, a former congresswoman, were convicted of bribery, and the former was sentenced to five years' imprisonment.

This case is the first of other high-profile public corruption scandals that have received broad coverage in the media, owing to the rank of the individuals involved, that have resulted in a significant conviction. Other cases, mainly the *Caval* case (were the son of former president Bachelet and his spouse were investigated), the *SQM* case and the *Penta* case (in both several politicians were investigated), did not end in convictions of the main beneficiary of the conduct, or they were not significant. These cases led to public perception that corruption and white-collar crimes are not properly enforced and vigorously punished in Chile. This situation lead to a Bill, currently under discussion in Congress (Docket 13.205-07), which aims to establish a separate system to determine penalties and alternatives to imprisonment, in order to prevent probation and suspension of sentences that have created the sensation of immunity in the country. This Bill adds to the enactment in November 2018 of Law No. 21,121, which considerably increased the punishment of bribery and other similar crimes and incorporated the offences of commercial bribery and unlawful administration. The consequences of this law are just coming to fruition, with a recent first indictment for commercial bribery, and the existence of several pending investigations for unlawful administration, including the indictment of Francisco Frei, the brother of the former President of the Republic, Eduardo Frei, for mismanaging the business of the former president for personal gain.

¹ Sebastián Doren and Juan Ignacio Donoso are senior associates at Baker McKenzie.

Currently there are other cases under investigation, including the prosecution of a former Commander and Chief of the Army, and of a former Director General of the Investigation Police. So, hopefully the *Corpesca* case will not be an outlier, but instead mark the beginning of the fight against corruption in the country.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Bribery in Chile is considered a criminal offence, sanctioned with imprisonment and fines. Public officers, private individuals, and legal entities can be held criminally liable for corruption crimes.

Only public officials can be subject to administrative liability. According to Law 18,575, public officials should act with administrative probity, which consists of having irreproachable public conduct and a loyal and honest performance of his duty, with pre-eminence of the general interest over the personal one. This law considers a contravention to the administrative probity principle the request or acceptance of advantages or privileges of any nature either for themselves or for third parties. The violation of this principle may eventually lead to the removal of the public official from office.

In addition, any individual affected by a bribe can bring a civil action against the individuals involved in it, to obtain the reparation for all damage caused by the wrongdoing.

i Bribery of domestic officials

The Chilean Criminal Code has provided for bribery of public officials since its first enactment in 1874.² The provision has been modified on several occasions. In November 2018, Law No. 21,121 substantially broadened the scope of sanctions for this crime.

This offence can be committed by both public officials, who solicit, receive or consent to receive a bribe, and by private individuals, who offer, pay or consent to pay a bribe to a public official. The offence encompasses bribes of an economic or any other nature, and it can be for the public official's benefit or a third party's benefit.

The Criminal Code contains a general or basic provision against passive bribery that punishes the public official who solicits, receives or consents to receive a gift of any kind, for his, her or for a third party's benefit, to which he or she has no right.³ It also contains four aggravated circumstances of passive bribery:

- a* bribery to execute a proper due act of office for which no rights are contemplated;⁴
- b* bribery to omit or for having omitted a proper due act of office, or to perform or for having performed an act in violation of the duties of his or her office;⁵
- c* bribery to exercise influence on another public employee in order to obtain from it a decision that may generate a benefit for an interested third party;⁶ and
- d* to execute a criminal offence committed while carrying out his or her job.⁷

2 www.leychile.cl/Navegar?idNorma=1984&tipoVersion=0.

3 Article 248 Section 1 of the Criminal Code.

4 Article 248 Section 2 of the Criminal Code.

5 Article 248*bis* Section 1 of the Criminal Code.

6 Article 248 Section 2 of the Criminal Code.

7 Article 249 of the Criminal Code.

In addition, the Criminal Code contains a provision against active bribery that sanctions the private individual who offers, pays or consents to pay a bribe to a public official, to perform or to incur in any of the above-mentioned actions or omissions.⁸

Sanctions for bribery include up to 10 years' imprisonment and fines of up to four times the benefit offered, paid or accepted. The seriousness of the sanction will depend on the type of action requested of the public official, and the degree to which the offence is executed. Sanctions can also include temporal or permanent prohibition from holding public office.

ii Definition of domestic public official

Article 260 of the Chilean Criminal Code contains a broad definition of 'public official' for criminal purposes. It defines a public official as anyone who holds a position or a public duty, either in the central administration or in semi-public, municipal, autonomous institutions or companies or in organisms created by the state or that depend on the state, even if they are not appointed by the Head of the Republic and even if they do not receive remuneration from the state. Thus the definition is very broad and covers numerous employees who are not subject to administrative laws.

iii Gifts, gratuities, travel, meals and entertainment

Chilean law does not establish quantitative or qualitative limitations on gifts, gratuities and hospitality expenses. However, according to the general bribery provisions of Article 248 of the Chilean Criminal Code, any type of gift, gratuity, entertainment or invitation could potentially be considered as a bribe.

Law No. 18,575 considers as a breach to the public probity principle that every public official has to abide by, the request or acceptance of gifts, advantages or privileges of whichever nature either for themselves or for third parties. However, the law exempt official and protocol gifts as well as those gifts authorised by custom as a courtesy and polite expression.

Therefore, whether a gift, gratuity or hospitality expense should be considered bribery will need to be determined on a case-by-case basis, taking into account all the facts and circumstances surrounding the case.

iv Commercial bribery

Commercial bribery offences were recently incorporated in November 2018 in Law No. 21,121. Before that, commercial bribery was not a crime in Chile.

Articles 287*bis* and 287*ter* of the Criminal Code establish sanctions for private individuals and employees or agents who request or receive an economic benefit or another advantage to favour or for having favoured a certain party over another party for the execution of a contract with up to three years' imprisonment. The Law also punishes individuals who consent to the act of giving the employee or agent an economic benefit or another advantage with penalties of up to 540 days' imprisonment. In both cases, the crime also entails a fine of double the benefit requested or accepted, and up to US\$35,000 approximately, if the benefit is of a different nature.

8 Article 250 of the Criminal Code.

v Political contributions by foreign citizens or companies

Political contributions in Chile were significantly regulated in 2016 after several criminal investigations regarding irregular political financing (e.g., the *Caso Penta*, *Caso Corpesca* and *Caso SQM* cases), whereby it was discovered that several companies paid invoices issued by a close entourage of politicians for services that were not delivered.

Law No. 19,884, as amended by Law No. 20,900 of 2016, sets forth that only individuals can make political contributions. Under Law No. 20,900, legal entities, both foreign and Chilean, cannot make political contributions. In addition, the law sets out certain thresholds of the contributions that can be made, which depends on the authority being elected.

Foreign individuals domiciled abroad cannot make political contributions. Only foreigners who are legally authorised to vote in Chile can make political contributions.

vi Corporate criminal liability

In December 2009, Law No. 20,393 was enacted to establish corporate criminal liability for certain crimes, including bribery of Chilean and foreign public officials, money laundering and terrorism financing. The enactment of this law was influenced by Chile's accession to the Organisation for Economic Co-operation and Development (OECD), which requires parties to 'take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official', under its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Under Article 1 of Law No. 20,393, corporate criminal liability is limited to the following crimes:

- a* money laundering;⁹
- b* financing terrorism;¹⁰
- c* active bribery;¹¹
- d* active bribery of a foreign public official;¹²
- e* receiving stolen goods;¹³
- f* incompatible negotiation;¹⁴
- g* commercial bribery;¹⁵
- h* misappropriation;¹⁶
- i* unlawful administration;¹⁷
- j* illegal fishing;¹⁸ and
- k* non-observance of isolation or other preventive measure ordered by the health authority, in the event of epidemic or pandemic.¹⁹

9 Article 27 of Law No. 19,913.

10 Article 8 of Law No. 18,314.

11 Article 250 of the Criminal Code.

12 Article 251*bis* of the Criminal Code.

13 Article 456*bis* A of the Criminal Code.

14 Article 240 of the Criminal Code.

15 Articles 287*bis* and 287*ter* of the Criminal Code.

16 Article 470 No. 1 of the Criminal Code.

17 Article 470 No. 11 of the Criminal Code.

18 Articles 136, 139, 139*bis* and 139*ter* of Law No. 18,892.

19 Article 318*ter* of the Criminal Code.

The list of illegal acts for which a company may be held criminally liable has increased significantly since the enactment of the law in 2019, when the law applied only to money laundering, financing terrorism and bribery. Moreover, the list of crimes is expected to continue to grow in future. For example, a Bill introduced to Congress to criminalise offences against the environment includes criminal liability for legal entities. Also, the Bills that seek to modernise enforcement against economic crimes incorporate several offences in the list of acts for which companies will be criminally liable, such as insider trading and other offences related to specific industries (e.g., mining, forestry and banking).

Legal entities may be held responsible for these offences when:

- a* the offences are committed directly and immediately in their interest or for their benefit;
- b* the offences are committed by their owners, controllers, responsible officers, principal executives officers, representatives or those conducting activities of administration and supervision; and
- c* the commission of the offences results from the breach of the legal entity's direction and supervisory functions.

The burden of proof falls on the Public Prosecutor, who must prove the existence of each of these conditions for corporate criminal liability.

Sanctions that can be imposed on legal entities include:

- a* fines of up to 300,000 yearly tax units (approximately US\$20 million);
- b* the partial or total loss of state benefits (i.e., those granted by the state or its agencies without reciprocal provision of goods or services) or absolute prohibition on receiving them;
- c* temporary (up to five years) or permanent prohibition on participating in acts and contracts with the state and its organs; and
- d* the dissolution of the legal entity. This penalty can be imposed only when the company has been sanctioned in the previous five years for the same crime, or in the case of repeated crimes.

The law sets out that legal entities are not responsible if the individual has committed the offence exclusively in his advantage or in favour of a third party. In addition, the law requires that the offence is a consequence of the breach by the entity of its duties of direction and supervision. In this connection, the law considers that the functions of direction and supervision have been met if, before the commission of the offence, the legal entity adopted and implemented an organisation, administration and supervision model to prevent the commission of these offences. The case law has considered that the existence of a 'cosmetic' compliance programme is not sufficient to exempt a company from liability. As required by law, a compliance programme has to be implemented that encompasses, among other things:

- a* communication to employees and their training, in order to properly instruct them about the existence of the programme and the importance of complying with it;
- b* amendment of labour agreements to bind the employees to comply with the provisions of the programme; and
- c* the appointment of a compliance officer with the necessary powers, means and autonomy to properly administer the programme.

vii Defences

Defences may be made based on the lack of intent to bribe or the fact that the benefit corresponds to an official or protocol donation, or to a gift of low economic value authorised by convention as a show of courtesy.

From the legal entity's perspective, having implemented a crime prevention model that fulfils the requirements of Law No. 20,393 may result in complete exemption from criminal liability for the entity.

viii Plea bargaining

In Chile, a criminal proceeding may be suspended through a conditional suspension of the procedure (similar to a pretrial probation), if the indicted individual or entity agrees to comply with certain conditions (i.e., to be subject to the control of the Prosecutor's Office for a certain amount of time, or to pay an amount of money to the victim of the offence). To be eligible for a conditional suspension of the procedure, the offence must not be sanctioned with a penalty of over three years' imprisonment in the case of individuals and, in the case of legal entities, they cannot be reoffenders. As the penalties for bribery have considerably increased recently, it is unlikely that individuals will benefit from this kind of suspension in future.

In Chile, there is an 'abbreviated procedure', which is to some extent similar to plea bargaining, in which the accused individual or entity enters into negotiation with the Public Prosecutor, accepting the facts of the Prosecutor's accusation and the facts gathered in the investigation, and thus receives a reduced sanction. Most of the existing lawsuits have been subject to 'abbreviated procedures'.

III ENFORCEMENT: DOMESTIC BRIBERY

There have been numerous prosecutions for domestic bribery in recent years, some resulting in conviction of the individuals and companies accused.

i Ceresita

Industrias Ceresita SA was the first company indicted for bribery, under Law No. 20,393. The case was suspended with conditions, when on 30 April 2013, an agreement was reached with the Prosecutor's Office. Industrias Ceresita was accused of paying a bribe to the Municipal Public Works Director of the Municipality of Recoleta, in order to operate a warehouse in the municipality. The company had to compensate the residents of the municipality by building parks and infrastructure for an amount that exceeds US\$2.5 million, and was ordered to demolish all the warehouse facilities.

ii Salmones Colbún

In 2013, the related companies Salmones Colbún Ltda and Sociedad Agrícolas Mecanizado Ltda were the first companies convicted for bribery, albeit in a 'abbreviated procedure', whereby the company agreed to certain facts in order to obtain a lenient sentence. The companies paid bribes to a judicial clerk to obtain false sentences that granted them water use rights over a property they expected to sell. Salmones Colbún Ltda and Sociedad Agrícolas Mecanizado Ltda were convicted and fined approximately US\$35,000 and the loss of 40 per cent of tax benefits. The shareholders of the companies and the judicial clerk were sentenced to five years' imprisonment and a fine.

iii Aridos Maggi

Aridos Maggi was the second company convicted for bribery under Law No. 20,393, in 2014. The company was awarded a bid to provide materials for the construction of a road. When delivering the materials, the company paid a public inspector in order to deliver less of the material than the indicated in the waybills. The company was sentenced to two years' prohibition on participating in acts or contracts with the state and on receiving tax benefits. The individuals involved in the bribery did not receive prison sentences, but instead were sentenced to pay fines and to three years' disqualification from holding public office.

iv Constructora Pehuenche

In 2015 Constructora Pehuenche was sentenced to a four-year prohibition on participation in acts or contracts with the state and receiving tax benefits, and to pay a fine of 30 million Chilean pesos. The owner of Constructora Pehuenche was videotaped on three separate occasions paying bribes to a public officer of the Municipality of Santiago. The bribe was aimed at delaying the start date of the construction of a road, the contract for which had been awarded to the company, in order to prevent the imposition of fines for construction delays and the possible termination of the awarded contract. The owner of Constructora Pehuenche and the public official were sentenced to 818 and 541 days' imprisonment respectively.

v Comision Nacional de Acreditación

In 2016, the Universidad del Mar was sentenced to a fine of 2,000 monthly tax units (approximately US\$116,000) for paying bribes to the president of the National Accreditation Council (Comisión Nacional de Acreditación), in order to obtain the accreditation of the university. The universities Sek and Pedro de Valdivia were also indicted for bribery, but the case against them was suspended after both universities agreed to pay fines (of about US\$32,000 and US\$64,000 respectively) and to provide scholarships for students. The former president of the National Accreditation Council and the chancellor of the three universities were sentenced to up to five years' probation.

vi Corpesca

The recent *Corpesca* case is the first where the Public Prosecutor's Office secured a conviction for bribery in a full trial. Jaime Orpis, a former senator, Marta Isasi, a former congresswoman, and the company Corpesca were convicted.

In the proceedings it was determined that both congresswoman Isasi and senator Orpis received payments from Corpesca to favour the interests of the company in the performance of their duties as representative of Congress, during the discussion of a bill to regulate the fishing industry, enacted in 2013. In the proceedings it was determined that the senator had received, between 2009 and 2013, about 200 million Chilean pesos, while before 2012 the congresswoman had received 40 million Chilean pesos, which were delivered through the payment of invoices issued for services that were not provided. Senator Orpis was sentenced to five years' imprisonment and fined 109 million Chilean pesos, and congresswoman Isasi to 50 days' imprisonment and fined 20 million Chilean pesos. Corpesca was fined 10,000 monthly tax units (about US\$670,000), half of the maximum fine prescribed for the crime at the time of its occurrence. The five-year sentence for senator Orpis deprives him of the opportunity for parole and he will therefore have to serve the full term in prison. Senator Orpis and congresswoman Isasi have filed a nullity claim against the verdict, which is currently pending.

The *Corpesca* case is also notable since the court assessed the importance of a prevention programme within the company. Although Corpesca had designed a prevention model to comply with Law No. 20,393, this programme had not been implemented and therefore was not considered to extinguish or mitigate the company's criminal liability. In this connection, the court considered that the design of a prevention model and the nominal appointment of a compliance officer were not sufficient to fulfil the duties of supervision and direction in the prevention of crimes, since such a programme had to be implemented, administered and supervised, which Corpesca did not do.

vii Current investigations

There are several former high-rank military personnel under criminal investigation for corruption offences, some of them for bribery. In this regard, Juan Miguel Fuente-Alba, former commander-in-chief of the Chilean army, was detained for six months before he was released on bail. Mr Fuente-Alba is being investigated for numerous corruption offences.

In the waste management case (*Basura*) eight officials of the Municipality of Maipú, including the former mayor, Christian Vittori, are accused by the Prosecutor's Office of crimes of bribery for having agreed, between 2009 and 2011, to carry out actions to favour KDM in a bidding processes for the collection and disposal of household waste, in exchange for payment of approximately US\$201,000. Covid measures have prevented the holding of the trial, which began in August 2019, but was later suspended.

Another high-profile current investigation relates to bribery in several bids for municipal LED lighting. Executives of Itelecom, and of the municipalities of Chillán and Iquique have been detained for having favoured this company with contracts. The investigation also includes other municipalities where Itelecom was awarded contracts.

In addition, in November 2020, the first individual was indicted for commercial bribery. A former employee of the brewery AB Inbev was accused of receiving payments of around 14 million Chilean pesos between the 2017 and 2019 from a transport company, to favour it over its competitors. This case could lead to the first conviction of the crime incorporated into Chilean legislation in 2018.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Criminal liability

Article 251*bis* of the Chilean Criminal Code, as recently amended by Law 21,121, sets forth the provision against bribery of foreign officials. The criminal offence is committed by whoever, for the purpose of obtaining or maintaining for itself or for a third party any business or advantage in the field of any international transactions or of an economic activity performed abroad, offers, promises, gives or consents to give to a foreign public official an economic benefit or a benefit of another nature to this or a third party:

- a* due to the position of the official; or
- b* to omit or execute, or for having omitted or executed, an act proper to his or her position or in violation of the duties of his or her position.

ii Definition of foreign public official

Article 251*ter* of the Criminal Code contains the definition of ‘foreign official’. It defines foreign officials as persons who:

- a* hold a parliamentary, administrative or judicial position in a foreign state, whether appointed or elected;
- b* perform public duties or functions for a foreign state, whether in a public entity or a state-owned company; or
- c* are officials or agents of a public international organisation.

iii Gifts, gratuities, travel, meals and entertainment

Chilean criminal law does not provide guidance on gifts, hospitality and entertainment for the benefit of foreign public officials.

iv Penalties

Sanctions can include up to 10 years’ imprisonment; seven to 10 years’ debarment from holding public office; and a fine of between two and four times the benefit offered.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations

Chile lacks a section on financial record-keeping offences similar to the one in the FCPA. In Chile, the provisions of the Commercial Code,²⁰ the Tax Code²¹ and the Law of Corporations²² require the maintenance of accurate and complete corporate books and records. Similar to other jurisdictions, publicly traded or listed companies are also subject to laws regarding periodic financial reporting and disclosure, and avoidance of self-dealing and insider trading. Financial institutions are subject to additional laws regarding their fiduciary duties toward the parties whose assets they hold.

ii Money laundering laws and regulations

Anti-money laundering provisions are contained in Law No. 19,913 of 2003. This law sets out criminal offences that are sanctioned with five to 15 years’ imprisonment and fines of up to approximately US\$14 million.

The Law also created an independent public entity, the Financial Intelligence Unit (UAF), to prevent and avoid the use of the financial system and other sectors of economic activity for money laundering.

The UAF has the function of requesting, verifying and examining the information of several institutions subject to Law No. 19,913, and to send such records to the criminal prosecutor when there are indications that money laundering has been committed.

20 Commercial Code, Article 25 and 31.

21 Tax Code, Article 35.

22 Law No. 18,046, Article 73.

Law No. 19,913 applies to a wide range of institutions, including banks and financial institutions; factoring companies; leasing companies; securitisation companies; exchange houses; stock exchanges; insurance companies; casinos and racetracks; customs agents; property brokers; and notaries.

The UAF has the power to give binding instructions to entities subject to Law No. 19,913 for adequate compliance with the obligations to prevent money laundering offences.

iii Prosecution

The criminal prosecutor exclusively prosecutes anti-money laundering criminal offences. The UAF is obliged to give the prosecutor any indicia of money laundering.

The criminal prosecutor can also request the UAF to provide information in its possession that is necessary for money laundering investigations.

The UAF can also impose administrative sanctions for violations of Law No. 19,913 or its instructions.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There have been only a few cases regarding foreign bribery.

In *Asfaltos Chilenos*, Asfaltos Chilenos SA was prosecuted for violations of Law No. 20,393 in connection with bribes paid in Bolivia. In 2010, Asfaltos Chilenos SA granted a power of attorney to a Bolivian citizen to offer its products in Bolivia. This woman appeared before the Bolivian Highway Agency and offered asphalt for the preparation of the roads, but also offered a public officer a percentage of the profit for each ton of the product purchased. The woman was arrested and convicted for bribery in Bolivia. However, it was unclear what the role of the Chilean company had been. Although the investigation could not determine whether Asfaltos Chilenos SA had been directly related to the bribery attempt, it determined that the company did not have the control mechanisms to prevent this situation from happening. The prosecution reached a conditional suspension of the procedure and the following conditions were imposed on the company so that it could avoid a criminal trial:

- a the company was obliged to implement a crime prevention system pursuant to Law No. 20,393; and
- b to donate computer equipment worth approximately US\$16,000 to an educational institution.

In 2016, in the *Serlog* or *Fragata* case, a former army general was sanctioned with 205 days' imprisonment as well as a fine for bribing an adviser to the attaché of the Ministry of Defence of the Korean Embassy in Chile, in exchange for being introduced to Korean companies that were seeking contracts from the Chilean military and to act as representatives of those Korean companies, accordingly. This was the first conviction for foreign bribery in Chile.

Regarding money laundering, as at December 2020, 183 final convictions have been obtained for money laundering in the country, of which 43 convictions were for crimes related to corruption, while the remaining were mainly for drug trafficking and, to a lesser extent, for economic crimes, smuggling, illicit association, human trafficking and arms trafficking.²³

23 Joint report by the UAF and the criminal prosecutor on National Anti-Money Laundering Day, held on 18 December 2020.

Currently Hector Espinoza, a former Director General of the Investigation Police, is being investigated for misappropriation and money laundering since it was determined that his banks accounts had various and large cash deposits made without justification.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Chile is a member of the OECD, the United Nations and the Organization of American States. Chile is a signatory to the OECD Anti-Bribery Convention, the United Nations Convention against Corruption and the Inter-American Convention against Corruption.

VIII LEGISLATIVE DEVELOPMENTS

Not diminishing the importance of the new development in June 2020, where a felony concerning disobedience during the covid-19 pandemic was added, the most relevant legislative development is the enactment in November 2018 of Law No. 21,121, which:

- a* defined a new criminal sanction to punish certain types of corruption offences, consisting of the absolute, permanent and temporary debarment from holding positions, jobs, trades or professions in companies that contract with government agencies or companies or with companies or associations in which the state has a majority participation; or in companies that participate in concessions granted by the state or which purpose is the provision of public utility services;
- b* incorporated new legal figures of corruption offences in the private sphere;
- c* modified the bribery offence by substantially expanding the scope of sanctions and also reformulated the criminal offence of bribery to foreign public officials, established in Article 251*bis* of the Chilean Criminal Code, and increased the penalties of this crime;
- d* introduced amendments to corporate criminal liability law (Law No. 20,393):
 - first, it incorporated new criminal offences for which legal persons may be held criminally liable, incorporating into the catalogue of offences established in Law No. 20,393 the offences of incompatible negotiation by directors or managers of a corporation, bribery between private parties, misappropriation and unfair administration;
 - second, the Law broadened sanctions that include debarment from contracting with any state agencies, including state-owned companies and majority state-owned companies or associations, and from awarding any state concession;
 - third, fines increased to up US\$24 million approximately;
 - fourth, the concept of confiscation was extended to encompass all gains obtained through the commission of the offence;
 - fifth, the Law included the dissolution of the infringing company, if the company has been convicted, within the previous five years, for the same offence and there is no mitigating circumstance; and
 - sixth, the Law set out that if the legal representative of a company under investigation is formalised in an investigation for the same punishable act by which the criminal responsibility of the legal entity is investigated, its representation will cease. In this case, the court will order a new representative to be appointed within a certain period of time, and if the appointed representative does not make the appointed nomination, the court will appoint a professional to represent it.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

We anticipate that amendments to the Chilean Data Privacy Act will aid, to some extent, the fight against corruption. In addition, a Bill under discussion in the Chilean Congress will materially modify the structure of the criminal system in connection with economic offences and criminal liability of legal entities.²⁴

X COMPLIANCE

As mentioned, Law No. 20,393 sets out an exemption of corporate liability if the company had adopted and implemented, before the commission of the offence, a compliance programme to prevent its commission. This law provides for an exemption of criminal liability since it assumes that the functions of direction and supervision have been met.

Law No. 20,393 sets out the minimum legal standard of a prevention model for the exemption of corporate liability to apply, which includes:

- a the appointment of a prevention supervisor with sufficient means, powers and independence for performing its duties;
- b the establishment of a crime prevention system that identifies the entity's risks of the offences been committed, establishes specific protocols, rules and procedures to prevent the commission of said offences, identifies procedures for administrating and auditing the financial resources of the entity, and includes internal administrative sanctions, as well as procedures for reporting the wrongdoing; and
- c the establishment of methods for the effective application of the prevention model and its supervision, so as to detect and correct its failures and to update it according to the change of circumstances of the legal entity.

The Public Prosecutor has been very clear that the pure formal implementation of a crime prevention model by itself is not enough to determine that the direction and supervision obligations of the company have been satisfied. In this regard, there are precedents in Chile, for instance, in the recent *Corpesca* case, where the company was convicted of bribery regardless of having a crime prevention system, as it was deemed to be merely perfunctory and was not implemented and administrated. Therefore a merely formal prevention model will not exempt a company from corporate criminal liability. Accordingly, the prevention model must be effective and properly implemented (i.e., the prevention model must be tailor-made to the company and the activities it carries out, and must be an integral part of the business structure and operations).²⁵

XI OUTLOOK AND CONCLUSIONS

Regardless of the fact that there remains much to be done, Chile has implemented some strong measures in the fight against corruption. As mentioned, Laws Nos. 20,393 and 21,121 are clear examples of these efforts. In the near future, we can expect further regulation and

24 Docket 13.205-07.

25 Practical Guide Good Investigation Practices Criminal Liability of Legal Persons, www.fiscaliadechile.cl/Fiscalia/archivo?id=24164&pid=190&tid=1&d=1, accessed 22 August 2019.

stronger enforcement of bribery and corruption offences from the Public Prosecutor's Office. The recent conviction in the *Corpesca* case, and several current high-profile investigations for corruption point to increased enforcement against this conduct in Chile.

Furthermore, in criminal cases, cosmetic crime prevention programmes have not been accepted by the Public Prosecutor's Office as effective defences to exclude the investigated companies from criminal liability. In this regard, companies that have not already implemented a crime prevention system should not delay doing so.

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