

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

COLOMBIA

María Carolina Pardo Cuéllar and Luis Alberto Castell¹

I INTRODUCTION

In the past decade, Colombia has introduced several legislative measures against corruption. In 2011, Congress enacted the Anti-Corruption Statute, which amended the Criminal Code, introduced harsh sanctions against corrupt individuals and increased the term of debarment preventing former public officers from interacting with state-owned entities. In 2013, Colombia joined the OECD Anti-Bribery Convention. In 2016, Congress enacted one of the most recent legislative efforts against corruption, which included the recommendations from the OECD on corporate responsibility and effective prosecution against legal entities, leniency programmes and the obligation to adopt compliance programmes. Yet corruption levels have not appeared to decrease.

After completing the negotiations that resulted in the peace process in Colombia, there was an expectation that the Colombian government would focus on increasing and enhancing measures to combat corruption. Unfortunately, these efforts have not achieved these goals. A report from 2016 concluded that in at least 43 per cent of the cases, participants in public bids in Colombia lost against unethical companies according to circumstantial evidence. This is 10 points higher than the global average.² This scenario, coupled with recent corruption scandals in institutions such as the national police, former presidents and the High Courts, has reduced the expectations of a dramatic change in the corruption perception for the country.

Many claim that the problem is not the legislation – as it exists in abundance – but the lack of effective enforcement. Some officers consider that implementing successful measures against corruption requires a multinational cooperation effort.

In Colombia, the laws assign responsibility for enforcement related to compliance matters to different authorities. The General Prosecutor's Office (GPO) is in charge of criminal anti-money laundering and anti-corruption investigations against individuals, and the Superintendence of Companies is in charge of investigations against legal entities. The Superintendence of Industry and Commerce (SIC) is responsible for the administrative prosecution of cartels, and can impose significant fines against individuals and legal entities.

1 María Carolina Pardo Cuéllar is a principal and Luis Alberto Castell is an associate at Baker McKenzie.

2 See International Business Attitudes to Corruption – a Report from Control Risk (2015–2016) www.controlrisks.com/-/media/corporate/files/our-services/creating-a-compliant-organisation/ethics-and-compliance-consulting/15-16-control-risks-corruption-survey-2015.pdf.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Criminal law

Criminal liability

In Colombia, legal entities cannot be direct subjects under criminal investigations. Only individuals are subject to such procedures. However, a legal entity could be held jointly and severally liable for any damage caused by its employees and executives, duly demonstrated during the criminal process followed against such individuals.³ This includes those cases in which an employee or executive is tied to the criminal process for having committed public or private corruption offences.

As a result, employees or executives as individuals have direct criminal liability. Legal entities for which those individuals work, have accessory civil liability. This civil liability is part of the criminal process and it is accessory because it depends on the judgment against the employee or executive.

Bribery of domestic officials offences

In Colombia, criminal liability for domestic bribery is set forth in the Colombian Criminal Code for multiple acts.

Bribe solicitation⁴ takes place when a public official abuses his or her position, constraining or inducing someone to give, or promise to give, money or other undue profit.

Bribery⁵ takes place when a public official receives, directly or indirectly, money or other undue profit, or the simple acceptance of its promise, to delay or avoid an official act.

Indirect bribery⁶ takes place when a public official receives, directly or indirectly, money or other undue profit, or the simple acceptance of its promise, to perform an official act.

Giving or offering a bribe⁷ is when any person gives or offers money or other profit to a public official.

Definition of domestic public official

The Criminal Code defines 'public official' as any person currently employed by the government, judiciary, legislature, police and military forces, as well as certain officers of government-owned companies and individuals exercising public duties or administering public funds.⁸

Gifts, gratuities, travel, meals and entertainment

The Criminal Code does not provide quantitative or qualitative limitations on hospitality expenses; in fact, a textual interpretation suggests that none is permitted to government employees. However, considering the broad definition of bribery, hospitality could produce a bribery effect when it has the potential to influence a public official in any way with respect to a decision that he or she would need to make as part of his or her duties.

3 Article 96 of the Colombian Criminal Code (Law 599 of 2000).

4 Article 404 of the Colombian Criminal Code.

5 Article 405 of the Colombian Criminal Code.

6 Article 406 of the Colombian Criminal Code.

7 Article 407 of the Colombian Criminal Code.

8 Article 20 of the Colombian Criminal Code.

The possibility of giving public officials hospitality of low value is based on the rulings of the Colombian courts that have considered that hospitality that does not have the potential of influencing the decision of the officer that receives it, is innocuous. However, such rulings do not provide for a minimum or maximum amount for this hospitality. In general, the maximum amount will depend on the hierarchy of the public officer that receives the hospitality. A normal business occasion for a high-ranking officer would not be considered lavish or excessive if the price is not high under regular business custom.

Penalties

Sanctions or legal consequences of domestic bribery in Colombia for legal entities are:

- a* civil liability (torts) – the legal entity responds to all damages caused by the punishable act once the sentence is final;⁹
- b* piercing the corporate veil – this measure seeks to identify the individuals who own a legal entity and can thus be direct subjects of the criminal action. This measure is taken by the Attorney General of the Nation at the beginning of the investigation or at any stage of the process;
- c* suspension and cancellation of legal status – at any stage of the criminal process and before indictment, the prosecutor may request the suspension as a preliminary measure, generating the temporary closure of commercial establishments when it is proven that the offence was committed through the legal entity;¹⁰ and
- d* debarment of the legal entity (including its parent company, subsidiaries and affiliates) from contracting with the state¹¹ when one of its administrators, legal representatives, members of the board of directors or of the controlling shareholdings has been convicted of public corruption, private corruption, unfair administration, misuse of privileged information and transnational bribery, among others. This debarment is not given as a penalty in the criminal process but is a general debarment for the legal entity on state procurement.¹²

Commercial bribery offences

Private-to-private corruption is a crime in Colombia, and is included in the Anti-Corruption Statute. It can manifest as two different criminal offences. The first is disloyal administration, which occurs when the manager, employee, shareholder or adviser of an established company or of a project, acting in his or her own benefit or that of a third party, disposes of the assets of the entity or assumes obligations that cause detriment to the company or its shareholders as a result of the abuse of the perpetrator's functions.¹³

The second criminal offence is private corruption, which is committed when someone gives or offers money or other profit to a director, manager, adviser or employee of a legal entity, or when these request or receive so, to benefit himself or herself or any third party at the expenses of the legal entity.¹⁴

9 Article 107 of the Colombian Criminal Procedural Code: (Law 906 of 2004).

10 Article 91 of the Colombian Criminal Procedural Code: (Law 906 of 2004).

11 Previous debarment time of 20 years was modified by Article 2 of Law 2014 of 2019.

12 Article 8(j) of the Public Procurement Law (Law 80 of 1993), included by Article 1 of the Colombian Anti-Corruption Statute.

13 Article 250-B of the Colombian Criminal Code.

14 Article 250-A of the Colombian Criminal Code.

ii Administrative law

Bribery of domestic officials offences

In Colombia, non-public officials are not liable for domestic bribery under administrative law. Public officials are responsible for criminal behaviour under the Disciplinary Code (Law 734 of 2012).¹⁵

Penalties

Penalties for legal entities include fines, publication of the sanction in the media, being prevented from receiving government subsidies and administrative disciplinary sanctions.

Fines derive from the existence of an enforceable final judgment issued against the legal representative or administrator of the legal entity when they have been convicted of receiving or giving a bribe. The Superintendence of Companies may impose fines of up to 200,000 times the legal minimum wage if the legal entity benefited from the commission of that offence.¹⁶ In certain cases, the Colombian Antitrust Authority could see bribery as anti-competitive conduct in the public procurement context. If this is the case, the Superintendence of Industry and Commerce may impose fines of up to 100,000 times the minimum monthly wage on the legal entity involved in the anti-competitive conduct.¹⁷ The Superintendence of Industry and Commerce may also impose fines on the individuals involved in the anti-competitive conduct of up to 2,000 times the minimum monthly wage.¹⁸

Publication of the sanction on media – this reputational penalty consists of the publication of an extract from the decision of the Superintendence of Companies in widely circulated media and on the website of the legal entity for a period of one year.¹⁹

The prohibition on receiving governmental subsidies lasts for five years.²⁰

Public officials are subject to administrative disciplinary sanctions based on the Disciplinary Code.

Commercial bribery

There are no provisions regarding private-to-private corruption under administrative law.

Public officials' participation in commercial activities

Public officials can participate in commercial activities or in any other activities while serving as public officials, as long as their position does not represent a conflict of interest. The conflict of interest prohibition lasts up to two years after the individual leaves his or her position as a public official.²¹

15 The former Colombian Disciplinary Code was replaced by the New Colombian Disciplinary Code (Law 1952 of 2019) from 1 July 2021.

16 Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.

17 Article 25 of the Law 1340 of 2009.

18 Article 26 of the Law 1340 of 2009.

19 Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.

20 Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.

21 Article 8 literal (f) of the Public Procurements Law.

Political contributions by foreign citizens or companies

According to the Colombian Anti-Corruption Statute, any entity that makes a contribution to the political campaign of a candidate to the Colombian presidency, governors or mayors, exceeding 2 per cent of the maximum threshold for investment of the candidates in such campaigns, will be debarred or banned from entering into contracts with public entities of the respective administrative circumscription for which the candidate is elected. The prohibition on contracting with the entity will last for as long as the candidate is in office.²²

No political party, movement, significant group of citizens, candidate or campaign will be able to collect contributions and individual donations exceeding 10 per cent of the total value of the expenses that can be made in the respective campaign.²³ These values are set forth before the respective election.

The law also prohibits political parties, political movements, and political campaigns from receiving financing with resources that come, directly or indirectly, from foreign governments, or foreign persons. The only exception to this is when such funds are not for political campaigns and are provided as technical cooperation.²⁴

Administrative and criminal enforcement

In Colombia, different regulators and authorities are in charge of enforcing anti-bribery regulations; their competence depends on the matter. In the case of criminal enforcement, the GPO is in charge of criminal investigations against individuals. In the case of administrative investigations, the Superintendence of Companies is in charge of the enforcement of administrative anti-bribery measures. In some cases the Superintendence of Industry and Commerce could investigate bribery as part of anti-competitive behaviour in the public procurement context.

Companies that have appointed a statutory auditor are subject to special supervision. Statutory auditors have the legal duty to report to the authority any corrupt practices that they detect in the activity of the companies. They must make these reports within the six months following the day on which the auditor became aware of the corrupt conduct.

Defences

Since bribery entails the violation of a public official's independence by offering or delivering something of value, said offering or delivery must have the capacity to corrupt the public official. This implies that the conduct must be materially unlawful, that is, that the offering or delivery must have a real capacity to modify the conduct of the public official.²⁵ This implies that the gift or promise must be sufficiently significant as to serve as a motive for the improper behaviour. Gifts or promises of nominal value, although formally constituting a criminal offence according to the legal definition, should not be considered bribery.²⁶

22 Colombian Anti-Corruption Statute, Law 1474.

23 Article 23 of Law 1476 of 2011.

24 Article 27 of the Law 1476 of 2011.

25 Article 11 Colombian Criminal Code.

26 Supreme Court, Criminal Section, Court Order (auto) of 18 January 1979. Judge: Romero Soto.

Plea agreements

Legal entities are not subject to criminal liability, as mentioned above. However, employees or executives under a criminal investigation may use various mechanisms to achieve an early termination of a criminal proceeding, such as:

- a a guilty plea with the GPO. In this case, the defendants accept the commission of the crime, and their penalty is reduced to half or one-third of the legal penalty. Because of the guilty plea, convictions will be declared against them;
- b a settlement agreement with the victim. In this case, there is no conviction but a decision in which the principle of discretionary prosecution is approved. If the individuals persist in this crime, this benefit will not be granted and a conviction will proceed; or
- c a non-prosecution agreement.

III ENFORCEMENT: DOMESTIC BRIBERY

Year after year, new corruption scandals are unveiled in Colombia.²⁷ In 2019, the country faced corruption scandals within the military forces, where several generals and individuals in high command have been dismissed for bid rigging in public procurement.²⁸ Likewise, acts of corruption to manipulate the records of entry into the army were found in a plan to obtain early pensions.

Not even the special justice of the peace, created as a transitional justice tribunal after the peace process with FARC, is excluded from this phenomenon. A former prosecutor of this tribunal, along with some other individuals, is being prosecuted for corruption and influence peddling.²⁹

Government supervision agencies, including the GPO and the Comptroller General Office, have initiated multiple preliminary inquiries and some formal investigations against public officials and private individuals for irregularities in contracts entered into by public entities in the context of the covid-19 pandemic.³⁰

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Criminal law

Bribery of foreign officials offences

Transnational bribery is a criminal offence in Colombia. The Transnational Bribery Law modified this criminal offence to meet the commitments to be met by Colombia under the OECD Anti-Bribery Convention.³¹ This Law sets forth that transnational bribery takes place when someone gives, promises or offers money or anything of value to a foreign public official, in exchange for an omission or delay of any act of that official, and in relation to international business transactions.

27 www.rcnradio.com/colombia/segun-estudio-mas-de-320-casos-de-corrupcion-se-registraron-en-colombia-entre-2016-y-2018.

28 www.wradio.com.co/noticias/actualidad/llaman-a-calificar-servicios-a-4-generales-por-hechos-de-corrupcion/20190718/nota/3929024.aspx.

29 https://caracol.com.co/radio/2019/07/29/judicial/1564356972_606121.html.

30 www.eltiempo.com/justicia/investigacion/coronavirus-contraloria-abre-proceso-fiscal-contra-gobernadores-del-tolima-y-guainia-por-contratos-507904.

31 www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

Definition of foreign public official

The Colombian Transnational Bribery Law defines ‘foreign government officials’ as any individual that:

- a* holds a legislative, administrative or judicial position in a government, its political subdivisions or local authorities in a foreign jurisdiction, regardless of whether the individual was appointed or elected;
- b* performs a public function for the state, its political subdivisions or local authorities in a foreign jurisdiction or within a public body;
- c* is part of a state enterprise or an entity whose decision-making power is subject to the will of the state, its political subdivisions or local authorities, in a foreign jurisdiction; or
- d* is an officer or agent of an international public organisation.³²

Penalties

Penalties are defined as follows:

- a* Civil liability (torts) – the legal entity responds to all damages caused by the punishable act once the sentence is final.³³
- b* Piercing the corporate veil – this measure seeks to identify the individuals who own a legal entity and can thus be direct subjects of the criminal action. This measure is taken by the Attorney General at the beginning of the investigation or at any stage of the process.
- c* Suspension and cancellation of legal status – at any stage of the criminal process and before indictment, the prosecutor may request the suspension as a preliminary measure, generating the temporary closure of commercial establishments when it is proven that the offence was committed through the legal entity.³⁴ The legal entity (including its parent company, subsidiaries and affiliates) is permanently³⁵ banned from contracting with the state when one of its administrators, legal representatives, members of the board of directors or of the controlling shareholding has been convicted for public corruption, private corruption, unfair administration, misuse of privileged information and transnational bribery, among other things. This inability is not a penalty in the criminal process but is a general debarment preventing the legal entity from being involved in government procurement.³⁶ In addition, derived from the execution of the administrative conduct of transnational bribery, the Superintendence of Companies may impose a direct debarment from public procurements for up to 20 years to the legal entity.³⁷
- d* Fines – these derive from the execution of the administrative conduct of transnational bribery. The Superintendence of Companies may impose fines of up to 200,000 times the minimum monthly wage if the legal entity is found responsible for that offence.³⁸

32 Paragraph 1 of Article 2 of the Colombian Transnational Bribery Law. The same definition was included as Paragraph 1 of Article 433 of the Colombian Criminal Code.

33 Article 107 of the Colombian Criminal Procedural Code: (Law 906 of 2004).

34 Article 91 of the Colombian Criminal Procedural Code.

35 Law 2014 of 2019, article 2 extended debarment time of 20 years.

36 Article 8(j) of the Public Procurement Law (Law 80 of 1993), included by Article 1 of the Colombian Anti-Corruption Statute.

37 Article 5 of the Colombian Transnational Bribery Law.

38 Article 5 of the Colombian Transnational Bribery Law.

- e Publication of the sanction in the media – this reputational penalty consists of the publication of an extract from the decision of the Superintendence of Companies in widely circulated media and on the website of the legal entity for a period of one year.³⁹ The prohibition from receiving government subsidies lasts for five years.⁴⁰

ii Administrative law

Bribery of foreign public officials offences

The Transnational Bribery Law creates administrative corporate liability. This administrative offence takes place when a director, employee, contractor or controlling shareholder of a Colombian company (whether or not they have the legal authority to bind the entity), commits transnational bribery. This conduct consists in giving, offering or promising, to a foreign public official, directly or indirectly, money or any other benefit in exchange for an agreement from the foreign official to perform, omit or delay any act related to the exercise of their functions in relation to international business transactions.

Defence

Companies can reduce or avoid penalties when they self-report.⁴¹ To be eligible to avoid a penalty, they must meet two conditions. First, they must come forward before the Superintendence of Companies initiates its own investigation. Second, they must come forward before exercising rights or fulfilling obligations. If these conditions are not met, penalties can still be mitigated by up to 50 per cent when offences are disclosed after they have been committed.⁴² This reduction of penalties will only apply to administrative fines and not to criminal sanctions.

One of the elements that the Superintendence of Companies must take into account when imposing fines for corruption is the existence of transparency and ethics programmes. This type of programmes are not mandatory for all companies in Colombia. Only companies that meet the conditions defined in the regulation should have one.⁴³

Similarly, the Superintendence of Companies has defined the mandatory requirements of a business transparency and ethics programme, applicable from 1 January 2022. This regulation states that the business transparency and ethics programme must contain, at least, the following:

- a an exhaustive assessment of the corruption and transnational bribery risks of the entity (creating a corruption and transnational bribery risk matrix);
- b define the role and responsibilities of all the entity's directors and the compliance officer;
- c documentation of the business transparency and ethics programme;

39 Article 5 of the Colombian Transnational Bribery Law.

40 Article 34 of the Colombian Anti-Corruption Statute, modified by the Article 35 of the Colombian Transnational Bribery Law.

41 Article 19 of the Colombian Transnational Bribery Law.

42 The Superintendence of Companies regulates the application of this programme through Resolution No. 200-000816 of 2018. Essentially, the Superintendence recognises that the main criteria to define the effectiveness of the collaboration are that the information must be provided in a timely manner, be useful and provide high-quality evidence.

43 Resolution No. 100-006261 of October 2020 applicable for 2021 obligation, and Circular 100-000011 of 9 August 2021, applicable from 2022.

- d* appointment of a compliance officer (who must be domiciled in Colombia and have proven expertise on the matter and resources to exercise his or her functions);
- e* existence of due diligence mechanisms;
- f* existence of mechanisms for control and supervision of compliance policies and of the business transparency and ethics programme;
- g* disclosure of compliance policies and business transparency and ethics programme; and
- h* existence of adequate communication channels.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations

In Colombia, merchants must keep their accounting books and records organised in a clear, complete and reliable manner that facilitates their consultation. Such books must allow for a verification of individual entries and of the general state of the business.⁴⁴

Companies required to adopt a money laundering control system must keep their books and records in accordance with the rules governing the preservation of the merchant's information.

As a general rule, the obligation applicable to the merchants obliges them to keep such information for no less than 20 years unless the company opted for a preservation method, in which case the term will be 10 years.

ii Money laundering laws and regulations

In Colombia, the Criminal Code prohibits money laundering⁴⁵ and defines it as the acquisition, investment, transportation, custody or administration of funds with the purpose of hiding or concealing its illicit origin. Whoever engages in these activities can be subject to imprisonment from 10 to 30 years and receive fines of up to approximately US\$12 million.

The regulation⁴⁶ provides that companies engaged in financial services or companies of the real estate sector that have assets exceeding certain thresholds and that are engaged in legal services, real estate, mining, accounting and automotive industries, among others,⁴⁷ must implement a system designed to prevent money laundering activities and terrorism financing.

In addition to implementing a control system, companies must also file periodic reports on suspicious activities with the Information and Financial Analysis Unit (UIAF).⁴⁸

⁴⁴ Decree 2649 of 1993.

⁴⁵ Article 323 of the Colombian Criminal Code.

⁴⁶ Depending on the specific sector, the regulation setting forth the obligation is the Article 102 of Decree 663 of 1993 (for the financial sector), and the External Circular 100-000006 of the Superintendence of Companies (for the real estate sector, the threshold for the asset value will vary from industry and industry).

⁴⁷ For instance, foreign trade operators are regulated by the customs authority and its regulation on this matter is set forth in the authority's External Circular 170 of 2002.

⁴⁸ See www.supersociedades.gov.co/delegatura_aec/normatividad/estudios_economicos_financieros/documentos_nacional/Anexo-1-ROS.pdf.

iii Prosecution

The UIAF is responsible for investigating and prosecuting money laundering and terrorism financing, and overseeing compliance with the obligations set forth in the anti-money laundering laws. Criminal prosecution requires that the UIAF exercises its investigative powers and subsequently reports the potential misconduct to the Superintendence of Finance, the tax authority and the GPO.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

The Superintendence of Companies has imposed one fine for transnational corruption in a case related to Interamericana de Aguas y Servicios SA (Inassa) for corrupt practices in Ecuador. The fine is equivalent to approximately US\$1.2 million (after a reduction of the original US\$1.7 million following a decision on the reconsideration remedy filed by Inassa).

Recently, the Superintendence of Companies announced undertaking preliminary inquiries for cases of transnational bribery and its cooperation with government authorities in other jurisdictions on those cases, efforts recognised by the OECD.⁴⁹

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Colombia officially became the 37th member of the OECD on 28 April 2020. Colombia is also a member of the United Nations and the Organization of American States and as such signed the United Nations Convention against Corruption and the Inter-American Convention against Corruption.

The UIAF is a member of the Egmont Group, which provides a platform for 164 agencies around the world to exchange expertise and financial intelligence to combat money laundering and terrorist financing.⁵⁰

VIII LEGISLATIVE DEVELOPMENTS

On 30 December 2019, President Duque enacted Law 2014 of 2019 in which some consequences for corruption behaviour were added to the legal framework. Some of the measures approved include:

- a modification of the general debarment from public procurements in order to:
- extend the debarment time for a criminal conviction for crimes related to corruption from 20 years to permanent debarment;⁵¹
 - extension of this permanent debarment to those legal entities whose legal status has been suspended according to the law; and
 - extend the permanent debarment of legal entities when one of its administrators, legal representatives, members of the board of directors or of the controlling

49 www.supersociedades.gov.co/Noticias/Paginas/2019/OCDE-reconoce-esfuerzos-de-Supersociedades-en-lucha-contra-Soborno-Transnacional-.aspx.

50 See www.egmontgroup.org/.

51 This debarment has been regulated through Decree 1358 of 2020.

shareholdings has been convicted of corruption, to those cases in which these individuals have been benefited with an non-prosecution agreement with the GPO;⁵²

- b* extension of the inabilities and incompatibilities of the public contracting regime to any private contracting process in which public resources are committed;⁵³
- c* exclusion from the benefit of house arrest to individuals who have been convicted of crimes against the administration, including acts of corruption;⁵⁴ and
- d* include the unilateral transfer, without any compensation, of public contracts by the contracting entity when the awarded contractor has been criminally or administratively convicted for corruption.⁵⁵ Additionally, the contracting entity is allowed to execute the penalty clause included in the contracts.⁵⁶

More recently, the government issued Decree 1358 of 2020, which regulates the debarment from public procurements, and procurements involving public sources, of legal entities and individuals found guilty of conduct related to corruption.

Finally, the government issued Decree 830 of 2021 in which it defined local public exposed persons (PEP),⁵⁷ including certain reporting obligations for them and the creation of the list of local PEPs in the Public Employment Information and Management System.⁵⁸ In addition, this Decree defined the concept of foreign PEP.⁵⁹

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Data protection is currently governed by the Colombian Constitution, the Statutory Law 1581 of 2012⁶⁰ and Decree 1377 of 2013 (collectively, the Colombian data protection laws).

Entities wanting to process personal data from individuals residing in Colombia must⁶¹ obtain prior, express and informed consent⁶² from those individuals. Silence and tacit and blanket consent are not acceptable.

52 Article 8(j) of Law 80 of 1993, added by Article 2 of Law 2014 of 2019.

53 Paragraph 3 of Article 8 of Law 80 of 1993, added by Article 3 of Law 2014 of 2019.

54 Paragraph of Article 38G of Law 599 of 2000, added by Article 4 of Law 2014 of 2019.

55 Paragraph 1 of Article 9 of Law 80 of 1993, added by Article 6 of Law 2014 of 2019.

56 Article 17B of Law 80 of 1993, added by Article 7 of Law 2014 of 2019.

57 Article 2 of Decree 830 of 2021.

58 Article 6 of Decree 830 of 2021.

59 Article 4 of Decree 830 of 2021.

60 This law regulates privacy rights in respect of personal data of individuals collected and processed in any type of database.

61 Law 1581 provides some exceptions: (1) when the processing is authorised by a law for historic, statistical, scientific or other purposes; (2) when the information is of a public nature; (3) when the information is required by a government authority exercising its duties, as explicitly conferred by law; (4) when the circulation of personal information is necessary in the event of a medical or sanitary emergency; and (5) information regarding the civil registry.

62 Consent can be granted electronically, since electronic messages have the same legal effect as written documents and therefore in principle they can replace the requirement of the written document.

These entities are required to keep a record of the consent provided by data subjects, as they should be able to prove who has provided consent and, upon request, the record of consents should be made available for data subjects, their successors and the Data Protection Authority.⁶³

Data subjects have the right to revoke or request the suppression of their personal data at any time, except for certain instances in which the data controller (i.e., the entity that collected the personal data and determines the manner in which and the purposes for which it is processed) must preserve the personal data (e.g., fraud prevention).

Sensitive personal data is defined in the Colombian data protection laws as personal data which processing may affect data subjects' intimacy or the wrongful processing of which could lead to discrimination (religious beliefs are expressly cited as an example of this type of data). The Colombian data protection laws provide that consent for the processing of sensitive personal data must also be explicit and that the provision of such type of data must not be a condition for the rendering of any service.

The Colombian data protection laws expressly prohibit entities from transferring personal data across borders unless prior, express and informed consent is obtained from the data subject for this purpose.

The Colombian data protection laws are highly protective of personal data of children and adolescents (minors under the age of 18) and treat this information as sensitive. Article 12 of Decree 1377 prohibits the processing of personal data of children and adolescents, except in the case of data of a public nature, and when such data processing complies with the following parameters: it (1) 'responds and respects the highest interests of children and adolescents'; and (2) 'ensures respect for their fundamental rights'. To mitigate any risks, the entity must have the parent or the legal guardian of the child expressly provide consent, but in addition, when applicable, ensure that the child's right to be heard is respected.⁶⁴

According to the provisions of Law 1581, all data controllers responsible for processing personal data of individuals residing in Colombia shall adopt:

- a* a privacy policy; and
- b* an internal manual that regulates how the policies for processing personal information will be applied.

Pursuant to Decree 1377, privacy policies must be made available to data subjects using physical or electronic means, and must be drafted in plain and simple language, in Spanish.

Entities with total assets over 100,000 units of tax value, equivalent to 3.630 million Colombian pesos in 2021, must register all their databases (not the personal data contained therein but information on how the data is processed) with the National Database Registry.

63 Article 7 of Decree 1377 sets forth the obligations that data controllers must comply with, including the obligation to keep a record of the granted consent.

64 Article 12 of Decree 1377 provides that 'the legal representative of the child will grant the child's prior authorisation for the right to be heard, an opinion that will be valued taking into account the maturity, autonomy and ability to understand the matter.'

X COMPLIANCE

Recently, the Constitutional Court has participated in the discussion of the legality of dawn raids conducted by Colombian administrative authorities.⁶⁵ The Court has stated that dawn raids conducted by the Superintendence of Industry and Commerce and the Superintendence of Companies are evidentiary proceedings that do not violate the constitutional rights of the individual under investigation, if the specific objective of the visit is linked to their investigative goals and do not intercept separate personal communications.

Colombian entities and individuals have a legal duty of reporting⁶⁶ to the UIAF and the GPO if they are aware of the location of individuals or related entities, as well as any of their assets or funds, included in the UN security list⁶⁷ and the Colombian list (created in January 2020) of organisations and individuals associated with terrorism,⁶⁸ composed of:

- a* the current US list of terrorists (excluding FARC); and
- b* the current EU list of terrorist organisations and individuals listed as terrorists.

Entities obliged to implement a mandatory business transparency and ethics programme are obliged, from 2022, to promote the report to the Superintendence of Companies any knowledge of potential transnational bribery conduct and to the Transparency Secretariat any potential corruption conduct.

65 Sentence C-165 of 2019.

66 Article 20, Law 1121 of 2006.

67 www.un.org/securitycouncil/es/content/un-sc-consolidated-list.

68 <https://id.presidencia.gov.co/Documents/200117-Acta-Consejo-Seguridad-Nacional.pdf>.

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