

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

TENTH EDITION

Editor

Mark F Mendelsohn

THE LAW REVIEWS

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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

PERU

Teresa Tovar Mena and Viviana Chávez Bravo¹

I INTRODUCTION

In the message that President Pedro Castillo delivered when he addressed the nation for the first time in the role on 28 July 2021, the anniversary of Peruvian independence day, he said that the fight against corruption was going to be one of the pillars of his government. He emphasised that, to that end, it was necessary to punish harshly and quickly all those involved in corruption.

One of the most significant developments in recent years in the fight against corruption has been the advent of corporate criminal liability for bribery. Traditionally, corporations could not be held criminally liable for bribery, only the individuals who committed the crime. However, in 2016, the Peruvian Congress approved Law No. 30,424 that establishes criminal liability for corporations, although solely for the crime of active bribery of foreign public officials.

Later, in 2017, Law No. 30,424 was amended, extending such liability to other crimes, such as active bribery of domestic public officials, money laundering, and terrorism financing.

The above was a result of the uncover of the *Odebrecht* case, by the end of 2016, because of a plea agreement between this company and the Department of Justice of the United States, where the Brazilian construction company recognised that, in the past 20 years, it paid bribes to public officials in 12 countries, including Peru, to secure government contracts.

Between 2005 and 2014, *Odebrecht* made and was the cause of approximately US\$29 million in corrupt payments to public officials in Peru. The Brazilian company realised benefits of approximately US\$143 million because of these corrupt payments.² This case also includes the financing of electoral campaigns of several presidential candidates, which is currently under investigation as a money laundering offence.

This corruption scandal has had severe consequences in the Peruvian political environment. Former President Ollanta Humala spent nine months in pretrial detention for allegedly having received corrupt payments during his electoral campaign and continues to be under investigation (being obliged to periodically appear in court). The judiciary also ordered former president Alejandro Toledo to be placed in pretrial detention for having received a US\$20 million bribe payment. In July 2019, he was arrested in the United States as a result of an extradition order.³ Former President Pedro Pablo Kuczynski (who resigned from the presidency in 2018) is also under investigation and in pretrial detention.

¹ Teresa Tovar Mena is a partner and Viviana Chávez Bravo is a senior associate at Estudio Echecopar, member firm of Baker & McKenzie International.

² www.justice.gov/opa/press-release/file/919911/download.

³ In March 2020, he was released on bail, owing to covid-19 risk.

The Peruvian government has implemented several measures to protect the interests of the country in this context. The government has entered into agreements that are still in force with entities that have admitted the commission of bribery crimes (e.g., construction companies in charge of projects in progress, such as Odebrecht). Among these measures, the law that guarantees the payment of civil indemnifications to the government by companies that have committed crimes is of the utmost importance. Sanctions for the commission of bribery crimes include debarment from contracting with the Peruvian government.

Another milestone in the fight of the Peruvian government against corruption was the criminalisation of private corruption – approved in 2018 – that also had a great impact on the business environment.

Despite all that has been done to date in the fight against corruption, it is expected that new developments are yet to come in the short term. The newly installed government, under the presidency of Pedro Castillo, has publicly stated, in more than one occasion, that it will review all the legislation on corruption and, specifically, the sanctions provided in the Criminal Code, to reinforce them, both in relation to public officials, and to the national and foreign companies and businessmen involved. In the words of President Pedro Castillo, ‘We must have legislation that discourages crime of all kinds and not like the current one, which encourages it’.

This chapter describes the main aspects of the anti-corruption legal framework in Peru.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Criminal liability

Law No. 30,424, in force as of January 2018, establishes that legal persons may be held criminally liable for bribery crimes – including money laundering and terrorism financing – when they are committed in the name of or on behalf of the legal entity and for its direct or indirect benefit, by:

- a* shareholders, directors, *de facto* or *de jure* administrators, legal representatives, or attorneys-in-fact of the legal entity, including those of its affiliates or subsidiaries; and
- b* individuals under the authority and control of the persons mentioned above who have committed the crime under their order or authorisation, or because of non-compliance with their duties of supervision, vigilance and control.

Thus both individuals and legal entities may be held criminally liable for bribery crimes committed as of 1 January 2018.

ii Bribery of domestic officials offences

The Peruvian Criminal Code distinguishes between passive and active bribery.

Passive bribery refers to the act of requesting, accepting or receiving donations, promises or any type of advantages, by a public official, to do or refrain from doing an act in violation of his or her obligations, or without violating his or her obligations. This constitutes a crime sanctioned with imprisonment, as well as debarment from participating in public procurement processes.

Active bribery refers to the act of offering, giving or promising a donation, benefit or advantage, to a public official, to cause the public official to do or refrain from doing an act in violation of his or her obligations, or without violating them.

Another offence related to bribery is ‘influence peddling’.⁴ The Peruvian Criminal Code sanctions the person who has – or alleges to have – the ability to influence on the decision-making of a public official (e.g., for having a bond with the public official) and exchanges this influence for an undue advantage.

It is also important to mention that Article 8 of the Code of Ethics in the Public Function prohibits public officials from obtaining improper benefits or advantages, for themselves or another person, by using their position, authority, real or apparent influence. In this regard, the Peruvian Criminal Code also sanctions public officials who receive bribe payments as follows: proper passive bribery,⁵ improper passive bribery,⁶ specific passive bribery⁷ and illicit enrichment.⁸

The Peruvian Criminal Code also establishes corruption practices, different from ‘bribery’, as follows:

- a* Abuse of authority:⁹ When a public official uses his or her position or position for private gain.
- b* Improper payment:¹⁰ When a public official or servant abuses his or her position, and requests improper payments or contributions or emoluments in an amount that exceeds the legal tariff.
- c* Simple and aggravated collusion:¹¹ When a public official, directly or indirectly, intervenes in the contracting and acquisition of goods, works or services, concessions or any operation carried out by the state, or agrees with the interested parties to defraud the state or public entity or agency of the state.

iii Definition of public official

The Peruvian Criminal Code¹² has a broad definition of ‘public officials’. This definition includes any individual who:

- a* is a member of the public administrative career;
- b* either appointed or elected for a political or confidence public position;
- c* has a labour or contractual relationship of any nature with governmental organisms or entities, including state-owned companies, regardless of the labour regime applicable;
- d* is an administrator or custodian of assets attached by a court, even if such assets belong to private entities or persons;
- e* is a member of the military or police forces; or
- f* performs functions in the name of the state.

⁴ Peruvian Criminal Code, Article 400.

⁵ Peruvian Criminal Code, Article 393.

⁶ Peruvian Criminal Code, Article 394.

⁷ Peruvian Criminal Code, Article 395.

⁸ Peruvian Criminal Code, Article 401.

⁹ Peruvian Criminal Code, Article 382.

¹⁰ Peruvian Criminal Code, Article 383.

¹¹ Peruvian Criminal Code, Article 384.

¹² Article 425.

Additional laws regulating the Public Administration (e.g., the Code of Ethics in the Public Function, Law No. 30,057 and the Law of Civil Service) contain a definition of 'government official' with a different scope. However, in analysing the alleged commission of a corruption crime, the definition contained in the Peruvian Criminal Code will prevail.

iv Impediments for participating in commercial activities

Law No. 27,588 regulates what public officials, directors, holders, senior officials, members of advisory councils, administrative courts, commissions and other collegiate bodies that fulfil a public function or commission of the state are permitted and prohibited from doing. According to this Law, directors of government-owned companies or government representatives in directories and advisers, officials or servers with specific commissions who, due to the nature of their function or the services they provide, have accessed privileged or relevant information, or whose opinion has been determining in decision making, are prohibited from:

- a* providing services in private entities in any form;
- b* accepting paid representations;
- c* being part of the board of directors;
- d* acquiring, directly or indirectly, shares from private companies, its subsidiaries or entities that could have economic linkage to them;
- e* entering into civil or commercial contracts with such entities; and
- f* intervening as attorneys, advisers, sponsors, experts or arbitrators of individuals in processes that have pending with the same division of the government in which they provide their services, while they hold the position or fulfil the conferred assignment.

These impediments extend up to one year after the cessation or completion of the services provided under any contractual form, whether by resignation, termination or dismissal, expiration of the contract term or contractual resolution.

v Gifts, gratuities, travel, meals and entertainment

According to the Peruvian anti-corruption legislation, any payment made in favour of a public official, a gift or hospitality could be considered as bribery if no prior formal request has been filed and no formal approval has been issued by the corresponding government agency.

Pursuant to Articles 393 to 401-B of the Peruvian Criminal Code, a gift or hospitality could be considered bribery, depending on the circumstances and time on which it is granted. In this regard, 'concealed bribery' will be considered effective bribery if there is an obvious disproportion between the reason for the gift or hospitality (for example, the birthday of the official) and the value of the gift (for example, a new car).

The courts will also consider the behaviour of public officials as an element to analyse the commission of 'concealed bribery'. This means determining whether – as consequence of the gift or hospitality given – the official performs an act under his or her direct functional competence benefiting the person or company who delivered the gift or hospitality (for example, grant an authorisation or award a tender).

vi Political contributions

As of November 2017, Law No. 28,094 (the Political Parties Act) prohibits political parties from receiving contributions of any kind from private legal entities, whether national or foreign.

vii Sanctions

Public officials can be sanctioned with up to 20 years' imprisonment, depending on the type of bribery committed, and may be subject to secondary penalties, such as removal from office and temporary or definitive prohibition from being elected or appointed for public office.¹³ In certain cases, monetary fines could also apply.

Private individuals can be sanctioned with up to eight years' imprisonment, depending on the type of bribery committed, and may be subject to secondary penalties. These secondary penalties include prohibition from carrying on professional or social activity in the exercise or in the context of which the offence was committed and temporary or definitive prohibition from being elected or appointed for public office.¹⁴ In certain cases, a monetary fine could also apply.

If a legal entity is found liable for a bribery crime, the criminal judge can impose these sanctions:

- a fines of up to six times the benefit obtained or expected to be obtained with the commission of the crime;
- b up to two years' suspension of the entity's activities;
- c up to five years' or permanent prohibition from conducting future activities of the same kind or nature as those that were performed to commit, favour or cover up the crime;
- d debarment from contracting with the government;
- e cancellation of licences, concessions, rights and other administrative authorisations;
- f temporary (up to five years) or definitive closure of the company's premises; and
- g dissolution of the company.

viii Defences

Having a prevention model or compliance programme by which adequate monitoring and control measures are implemented to prevent crimes or to significantly reduce the risk of their commission has the following benefits:

- a Exemption from liability: if a legal entity adopted and implemented, prior to the commission of any of the crimes, a prevention model (appropriate to its nature, risks, needs and characteristics), it may be exempted from liability.
- b Mitigation of the sanction: if a legal entity (1) adopted and implemented a prevention model after the commission of a crime and before the start of the oral trial, or (2) proves to have partially implemented the minimum elements of the prevention model, then the fine to be imposed on such legal entity may be reduced.

The minimum elements of prevention models to apply for the exemption of liability are:

- a appointment of a person in charge of the prevention functions;
- b measures taken to identify, evaluate and mitigate risks to prevent crime;
- c implementation of an internal complaint proceedings (e.g., a whistle-blower hotline);

13 Pursuant to Law No. 31,178, a person will be permanently prohibited from being elected or designated for a public office if he or she: (1) commits the crime while belonging to a criminal organisation; (2) the conduct is related to programmes with welfare, support, social inclusion or development purposes; or (3) the agent takes advantage of a situation of public calamity or health emergency, or the commission of the crime compromises defence, security or national sovereignty.

14 *ibid.*

- d* dissemination and periodic training on the prevention model; and
- e* ongoing evaluation and monitoring of the prevention model.

Upon request of the Public Prosecutor, the Superintendence of Capital Markets (SMV) will evaluate the suitability of the implementation and functioning of the prevention model. If the SMV report determines that the prevention model is adequate, the Public Prosecutor will order the conclusion of the investigation or proceeding. The SMV has approved the document 'Guidelines for the Implementation and Functioning of the Prevention Model',¹⁵ which contains recommendations on how legal entities can implement in practice the minimum elements of a prevention model, as described above.

The prevention model must include the appointment of a person in charge of the prevention functions (e.g., a compliance officer) by the maximum managing body of the legal person or equivalent. The compliance officer must exercise his functions with autonomy and independence.

ix Plea agreements (effective collaboration regime)

Pursuant to Article 472 of the Peruvian Code of Criminal Procedure, the Public Prosecutor's Office is entitled to promote or receive requests for effective collaboration from those subjects who, whether or not they are subject to an investigation or criminal proceedings, are involved in the commission of certain crimes, including bribery of public officials. Originally, this regime was intended for individuals only; however, because of an amendment introduced in 2018,¹⁶ legal entities may also apply for it.

Thus, in order for a legal entity to have access to an effective collaboration regime, it must have:

- a* voluntarily abandoned its criminal activities;
- b* admitted freely and expressly or not contradict the facts in which it has intervened or which are imputed to it. Those facts that are not accepted will not be part of the effective collaboration process, and will abide by the resolution of the corresponding criminal process; and
- c* presented itself to the Public Prosecutor's Office showing its willingness to provide useful information.

This information must allow, among other aspects, avoiding the continuity, permanence or consummation of a crime, or substantially diminishing the magnitude or consequences of its execution, as well as the prevention or neutralisation actions or damage that could occur.¹⁷ The main purpose of requests for effective collaboration is for the applicant to provide useful

15 Available at www.smv.gob.pe/ConsultasP8/temp/Lineamientos%20para%20el%20Modelo%20de%20Prevenci%b3n%20%20SMV%20versi%b3n%20diagramada%202021.pdf.

16 Law No. 30,737 amends nine Articles (472, 473, 474, 475, 476-A, 477, 478, 479 and 480) of the Code of Criminal Procedure regulating the so-called 'process for effective collaboration'.

17 Code of Criminal Procedure Article 475:

Information effectiveness requirements and reward benefits

1. The information provided by the collaborator must allow, alternatively or cumulatively:

(a) To avoid the continuity, permanence or consummation of the crime, or substantially diminish the magnitude or consequences of its execution.

(b) Know the circumstances in which the crime was planned and executed, or the circumstances in which it is being planned or executed.

information to assist the Public Prosecutor's Office in elucidating the facts, in exchange for the granting of reward benefits, which will be included in the agreement on benefits and collaboration entered into by the applicant and the Public Prosecutor's Office, which is confidential. This agreement is submitted to the judiciary for control and review of legality and, only if no legal violations are detected, will it proceed to approval, acquiring full force.

The benefits that may be obtained from applying to collaborate effectively are:

- a* exemption from applicable complementary consequences;
- b* decrease below established minimum parameters;
- c* remission (substitution) of the complementary consequence;
- d* other benefits established in the legislation. For example, if the agreement is entered into and approved judicially in the stage of preliminary diligence, this could include a benefit for which the Public Prosecutor's Office promises it will not formalise the preparatory investigation against the collaborator. Similarly, if this were to occur at the preparatory investigation stage, the agreement could exclude the legal entity from the prosecution;
- e* suspend application of Law No. 30,737,¹⁸ as well as obtain a recategorisation of the legal entity; and
- f* non-debarment from contracting with the government (see Section IX.i).

The mere fact of invoking the effective collaboration regime does not lead to the automatic granting of reward benefits. Obtaining those benefits would be possible if the information provided is relevant and has been duly corroborated, and if the collaborator has complied with the obligations and commitments assumed in the corresponding agreement on benefits and collaboration.

x Commercial bribery

As of September 2018, the Peruvian Criminal Code includes the offence of commercial bribery. This offence occurs when a partner, shareholder, manager, director or any employee of a legal entity accepts, receives or requests a donation, advantage or undue benefit of any nature (for itself or another person) to do or refrain from doing an act in favour of a third party in the acquisition or distribution of goods, in the contracting of commercial services or in commercial relationships. Whoever promises, offers or provides such advantage to the representative or employee of the legal entity also participates in this offence.

Individuals who participate in this offence can be imprisoned for up to four years. Legal entities are not criminally liable for this offence.

(c) *Identify the perpetrators and participants in a crime committed or to be committed, or the members of the criminal organisation and its functioning, in such a way as to dismantle or diminish it, or arrest one or more of its members.*

(d) *Deliver the instruments, effects, profits and criminal assets related to the activities of the criminal organisation, ascertain their whereabouts or destination, or indicate the sources of financing and supply of the criminal organisation*

18 For more information on this Law, see Section IX.ii.

III ENFORCEMENT: DOMESTIC BRIBERY

In addition to the *Odebrecht* case, a relevant case is the *Construction Club* case, which involves several national and foreign construction companies that are alleged to have participated in a cartel to award infrastructure works (bid rigging). Although this case began as an antitrust case, it is alleged that the companies would have paid bribes to public officials (through third parties) to guarantee the functioning of the cartel.

A preliminary investigation was initiated against the representatives of the construction companies, former public officials of the Ministry of Transports and Communications and those who would have acted as intermediaries to pay bribes.¹⁹ The construction companies were also included in the investigation, as 'civilly responsible third parties' jointly liable for the payment of damages resulting from the crimes committed by their legal representatives. In addition, the Corporate Supra-provincial Prosecutor's Office Specialised in the Criminal Corruption of Public Officials has requested the incorporation of the construction companies in the investigation as 'entities subject to accessory consequences'. Although the construction companies cannot be held liable for the offences under investigation (since they occurred before the entry into force of Law No. 30,424), they could receive accessory measures, such as the closure of establishments, suspension of activities and fines). The judge ordered the incorporation of the construction companies to the process in November 2019 and, after an appeal filed by some of them against the decision; the court confirmed it on February 2020.

Another relevant case, related to the *Odebrecht* case, is the discovery of front companies that would have been used to receive the money from Odebrecht so that the company had cash in Peru to pay bribes.²⁰ A judge ordered the preliminary detention of the owner of such companies and the raid of his properties.

Another relevant case is the *White Collars of the Port* case, which arose from a disclosure of recordings of lawful telephone interceptions obtained within a previous investigation linked to organised crime (for crimes such as drug trafficking) that involved judges and prosecutors. The audios revealed that counsellors of the extinct National Magistracy Council, a former Supreme Court judge and even businesspersons were involved in a series of alleged acts of corruption, influence peddling and other related crimes. Indeed, there were plenty of indications that justice operators – including the highest authorities – favoured third parties in exchange of personal benefits, against the public interest.

Another important case, initiated in 2019, but which has recently acquired greater relevance because of the individuals involved, is the *Dynamics of the Centre* case. The Prosecutor's Office and the High Complexity Crime Investigation Division infiltrated the Transport Directorate of Junin's regional government to investigate an alleged network of corruption in the delivery of driver's licences. At the time the investigation began, the Governor of Junin was Vladimir Cerrón, General Secretary of the political party *Peru Libre*,

19 For additional information on the diligence and measures order within the investigation (e.g., prevention from leaving the country, seizures, preventive prison), see: <https://elcomercio.pe/politica/caso-lava-jato-primera-detencion-club-construccion-noticia-488776>; <https://gestion.pe/peru/politica/procuraduria-embarga-s-41-mlls-investigados-club-construccion-261650-noticia/>; <http://semanaeconomica.com/Article/legal-y-politica/politica/271333-club-de-constructoras-jueza-dicto-impedimento-de-salida-del-pais-a-ocho-investigados/>; <https://elcomercio.pe/politica/fiscalia-solicita-18-meses-prision-preventiva-seis-miembros-club-construccion-noticia-634951>.

20 For a brief note on this case, see <https://elcomercio.pe/politica/gonzalo-monteverde-empresario-implicado-caso-odebrecht-noticia-610617>.

which currently has many seats in Congress and whose candidate, Pedro Castillo Terrones, won the presidential election. Several members of Peru Libre are under investigation. According to the thesis of the Prosecutor's Office, the money obtained through the corrupt scheme may have financed the political campaign, something that President Pedro Castillo Terrones has denied, indicating that he will collaborate with any investigation.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Criminal liability

As stated in Section II.i, as of 1 January 2018, legal entities may be held criminally liable for bribery crimes, including foreign bribery, when committed in the name of or on behalf of the legal entity and for its direct or indirect benefit. Thus, individuals and legal entities may now be held criminally liable for this offence.

ii Bribery of foreign officials

Bribery of foreign officials refers to the act of offering, granting or promising, directly or indirectly, an undue donation, promise, advantage or benefit that results in his or her benefit or in the benefit of another person, to a public official of another country or an official of an international public organisation, for the purpose of inducing the foreign public official to do or refrain from any act in violation of his or her lawful duty or without breaching it to obtain or retain business or another undue advantage in the performance of international economic or commercial activities.

iii Definition of foreign public official

Peru's Criminal Code does not contain a definition of 'foreign public official'; however, it adopts the definition of the United Nations Convention against Corruption.²¹

iv Gifts, gratuities, travel, meals and entertainment

See Section II.v.

v Facilitation payments

Peruvian law does not include an exception or defence for facilitation payments in the context of foreign bribery.

vi Sanctions

Individuals involved in a foreign bribery offence can be imprisoned for up to eight years.

If the offence was committed of behalf of a legal entity and for its direct or indirect benefit, the legal entity will also be held criminally liable for this offence and the criminal judge would be entitled to impose the sanctions described in Section II.vii.

²¹ Pursuant to Article 2(b) of the United Nations Convention against Corruption, a foreign public official is any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.

vii Defences

See Section II.viii.

viii Plea agreements

See Section II. ix.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping

Peruvian tax legislation (specifically, the Tax Code) requires companies to keep books and accounting records. Depending on the tax regime applicable to the company, the terms vary.

In addition, Legislative Decree No. 813, Criminal Tax Law, provides that failure to keep books and accounting records for tax purposes is punishable as a crime, and would be sanctioned with up to five years' imprisonment. While the Criminal Tax Law does not establish criminal liability for legal entities that benefit from the commission of the offence, it provides that they can be subject to accessory measures, which may include temporary or permanent closure of premises, cancellation of licences, debarment from contracting with the government and even the dissolution of the company.

ii Money laundering

Money laundering is a criminal activity. It includes concealing the illicit origins and the use of illegal assets or resources from criminal activity, introducing them into the financial system.

Acts that could constitute a money laundering offence include:

- a* converting or transferring money, goods, effects or profits whose illicit origin is known or can be presumed, with the purpose of avoiding their traceability, seizure or forfeiture; and
- b* acquiring, using, possessing, keeping, administering, receiving or concealing money, goods, effects or profits, whose illicit origin is known or can be presumed, to avoid the identification of its origin, its seizure or confiscation.

Penalties are up to 15 years' imprisonment and between 120 and 350 days in fines.²²

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There is no information available on actual prosecutions or convictions for foreign bribery.

22 'Days' in this instance means that the convicted must pay a certain amount of money for the number of days stated in the sentence. The amount is calculated based on the average daily income of the convicted, considering his or her assets, level of expenditure and other external signs of wealth.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Peru is a signatory to the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, the United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime and the Inter-American Convention against Corruption.

VIII LEGISLATIVE DEVELOPMENTS

In June 2021, the OECD Working Group on Bribery in International Business Transactions (the Working Group) completed its Phase 2 evaluation of Peru's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Although the Working Group recognised the importance that Peru places on fighting domestic corruption, it pointed out that Peru must improve its fight against foreign corruption, for which has provided recommendations, including:

- a* protect prosecutors from unjustified removal from cases;
- b* protect whistle-blowers in the public and private sectors, and promote a whistle-blowing culture; and
- c* enhance coordination and oversight of mutual legal assistance requests to foreign countries.

Because of the implementation of these recommendations, it is expected that some modifications to the legal framework will be introduced in the short to mid-term.

In addition, as already noted in Section I, the government has also stated its will to introduce modifications to the legislation in order to strengthen the fight against corruption.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Impediments to contracting with the government

Supreme Decree No. 082-2019-EF, the Unified Text of Law No. 30,225, the Government Procurement Law, contemplates a series of anti-corruption measures; one of the most relevant is the inclusion of debarment if bribery was committed.

As a result, legal entities whose representatives or related persons have committed any of the actions below cannot be bidders, contractors or subcontractors in public procurement contracting processes. They may not:

- a* have been convicted of corruption in Peru or abroad, by means of a consensual or enforceable sentence; or
- b* have admitted to having engaged in corruption to domestic or foreign authorities.

Regulation of Law No. 30,225 provides that the definition of a legal entity's related person is as follows:

- a* any legal entity that directly owns more than 30 per cent of the shares representing the capital or that holds shares in the capital; or
- b* any natural person or legal entity that exercises control over it and the other persons over which it also exercises control.

Debarment also applies to consortiums. Consortiums whose legal representatives or related persons have been convicted of corruption in Peru or abroad by means of a consensual or enforceable sentence or have admitted to having engaged in corruption to authorities in Peru or abroad.

ii Regime for guaranteeing payment of civil remedy to the government

Law No. 30,737 and its regulations seek to ensure the immediate payment of civil remedy in favour of the Peruvian government in cases of corruption and related crimes, as well as to avoid the halting of public investment projects and the breakdown of the chain of payments.

In this regard, the Law establishes three categories of entities subject to a specific regime consisting of different restriction measures. The Ministry of Justice and Human Rights (MINJUS) has drawn up three lists identifying legal persons and legal entities in each category. These lists are published on its official web page and are updated on a monthly basis.

The categories and the applicable measures are as follows.

Category 1

Category 1 includes legal entities:

- a* convicted by means of a definitive sentence, in Peru or abroad, for offences committed against the public administration, money laundering and other offences;
- b* whose officials or legal representatives have been convicted of corruption in Peru or abroad by means of a definitive sentence;
- c* that, directly or through their representatives, admit to having committed the aforementioned offences to authorities in Peru or abroad; or
- d* any entity involved in any of the above.

Applicable measures to entities that fall into this category are, as follows:

- a* suspension from transferring abroad, under any title, totally or partially, the entire capital, dividends or profits from their investments in the country;
- b* the need to require prior authorisation to dispose, under any title, of its assets, rights, shares or other securities representing rights; as well as the retention of 50 per cent of its sale price and subsequent deposit in the Withholding and Repair Trust (FIRR);
- c* withholding part of the payments that, by any title, must be made by the entities of the Peruvian state in their favour to these subjects, as well as their corresponding deposit in the FIRR; and
- d* preventive entry in public registries where property, assets, rights, shares or other representative values of rights are recorded, which specifies that the acquisition of these, under any title, is subject to prior authorisation of the MINJUS.

These entities will remain in this regime until the estimated amount of the civil reparation in favour of the Peruvian government is covered, as well as the full amount of the tax debt due.

Category 2

Category 2 includes legal entities that, as partners, consortiums or associates under any form of association or partnership, have participated in contracts with the Peruvian government jointly with the persons included in Category 1.

Restrictive measures applicable to entities that fall into Category 2 include the following:

- a* obligation to constitute a guarantee trust to ensure the payment of a civil remedy in favour of the Peruvian government;
- b* suspension from transferring abroad;
- c* implementation of a prevention model or compliance programme, containing the elements established in Law No. 30,424 and its regulations; and
- d* obligation to disclose information and collaborate with the Public Prosecutor's Office in charge of the investigation, which may include making documents available and allowing access to facilities, if required.

Category 3

Category 3 includes legal entities under investigation for offences allegedly committed against the public administration, including bribery or related offences, in detriment of the Peruvian government, in the development of public or public-private investment projects, regardless of their date of execution.

The intervention scheme for Category 3 is optional. In other words, the incorporation of legal entities to this category occurs by means of a voluntary request.

Restriction measures applicable to entities that fall into this Category 3 are, as follows:

- a* creation of a trust to guarantee the payment of civil remedy in favour of the Peruvian state;
- b* implementation of a prevention model or compliance programme, containing the elements established in Law No. 30,424 and its regulations; and
- c* disclosure of information and collaboration with the prosecutor's office in charge of the investigation, which may include making available documents, as well as allowing access to facilities, if required.

Subjects that fall into Category 3 will remain in this regime until the issuance of a sentence or resolution concluding the process. If convicted, subjects will fall into Category 1 and the corresponding measures will apply.

X COMPLIANCE

As stated in Section II.viii, having a compliance programme that contains all the minimum elements set forth in Law No. 30,424 could enable:

- a* exemption from liability, if implemented in the organisation prior to the commission of the crimes; or
- b* mitigation of the sanction, if implemented after the commission of a crime but prior to an oral trial.

Law No. 30,424 entered into force on 1 January 2018. There have not yet been cases in which compliance programmes have been evaluated to determine whether the remedies stated above apply.

XI OUTLOOK AND CONCLUSIONS

Because of the government's interest in becoming a full member of OECD, along with the corruption scandals discovered in previous years that have compromised many members of the Peruvian political class, arousing public awareness, Peru has been working hard to focus its public policy on the fight against corruption. As declared by President Pedro Castillo and his team of ministers on several occasions, this will continue to be an objective in years to come.

Several preventive measures have been adopted to counteract corruption. For example, the need to register all visits to public officials (with public decision-making capacity), to be strengthened with the digitisation of the government (which is in progress), will make these meetings more transparent; and the obligation (of up to 1.5 million) for public officials to file affidavits declaring their interests (e.g., shares in private companies, agreements with public or private entities and participation in boards) would help to anticipate any conflicts of interest (which could later result in corruption). However, several more measures to fight corruption are expected to be implemented in the short to mid-term.

Appendix 1

ABOUT THE AUTHORS

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Teresa Tovar Mena is a specialist in corporate compliance, with experience in advising clients in the design and implementation of their compliance programmes, in the conduct of internal investigations, the conduct of compliance due diligence processes in the context of acquisitions, as well as in providing specialised training on compliance-related matters.

She also has extensive experience in advising companies in data privacy matters. In this respect, she has advised several clients on the implementation of privacy compliance programmes, and continuously provides legal advice for the development of projects of high complexity from a data privacy perspective. In addition, she is also specialised in competition law, with experience in advising companies on matters related to the application of antitrust, unfair competition and consumer protection law.

Ms Tovar is the chair of the compliance committee of AmCham Peru (Peruvian North American Chamber of Commerce) and a member of the technical committee of the National Institute of Quality, an entity appointed to develop the Peruvian versions of ISO 37001 (Anti-bribery Management Systems), ISO 19600 (Compliance Management Systems) and ISO 37301 (Compliance Management Systems – Requirements with guidance for use). She is also a member of the Baker McKenzie Latin American compliance and antitrust steering committees.

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Viviana Chávez Bravo is a specialist in corporate compliance. She has participated in several projects for the implementation of compliance programmes for clients in diverse industries. She has also advised companies in the conduction of due diligence processes and internal investigations.

Ms Chávez is also a specialist in competition law and data privacy, and has experience defending clients in administrative processes, and advising them in the development of specific projects (e.g., implementation of measures to comply with data privacy legislation in their operations and the design of antitrust compliance programmes).

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