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Round-up of corporate
crime developments
across CMS

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Chile spotlight

Extension of Corporate Criminal Liability in Chile

Chilean Law No. 20,393 (the “Corporate Criminal Liability Law” or “CCLL”) was enacted in 2009 and originally established five crimes for which legal entities could be criminally liable: money laundering, financing of terrorism, bribery of public officials, bribery of foreign public officers and handling of stolen goods.

According to the CCLL, a legal person will be criminally liable when the offence has been committed directly and immediately in the interest or for the advantage of that legal person, by its owners, controllers, managers, senior executives, representatives¹ or those who perform administrative and supervisory

activities. For corporate liability to arise, the commission of the offence must be a consequence of a breach or non-fulfilment by the legal entity of its supervision and managerial duties.

Although it will be determined on a case-by-case basis, a common criteria to determine whether a company’s supervision and managerial duties have been breached is to analyse the existence of a compliance programme and its effectiveness. Therefore, a judge could consider that a legal entity’s supervision and managerial duties were duly performed if, before the commission of the unlawful conduct, the company had adopted and implemented a compliance programme, which should include effective measures, policies and procedures.

Should the judge rule that the legal entity effectively fulfilled its supervision and managerial duties, only the individuals whom committed the crime may be found liable.

In addition, the legal entity will not be found liable if the unlawful conduct was committed purely for the benefit of the perpetrator (i.e. it was not committed in the interests of the legal entity).

Following the enactment of the CCLL, evidence has shown that the crimes in the original law are not the most frequent cases of corporate corruption in Chile. Likewise, the penalties in the CCLL did not produce a significant deterrence effect.

Accordingly, relevant amendments to the CCLL and the Criminal Code were enacted in November 2018, extending corporate criminal liability to new crimes and establishing more severe penalties for corporations.

New crimes

From November 2018, corporations may be criminally liable, in addition to the original crimes, for the crimes of disloyal or wrongful administration,² private sector corruption, as well as certain cases of incompatible negotiations³ and misappropriation.

More severe penalties

Corporate penalties have been increased and now include dissolution or cancellation of the legal entity; fines ranging from USD 28,000 to USD 21.3m;⁴ permanent or temporary prohibition from entering into acts and contracts with the government; confiscation of the assets unlawfully acquired or disgorgement; permanent or temporary loss of fiscal benefits or an absolute prohibition from receiving them; publication of the condemnatory judgment and/or a requirement to pay a deposit of a sum equivalent to the investment made in an account held by the Treasury (if the crime involves making an investment that exceeds the legal entity’s income).

The judge may impose one or more of these penalties, depending on the circumstances of the case.

Comment: No relevant cases have yet been tried under these new amendments, therefore, it is too soon to assess the precise impact of these developments. However, it is expected that the legal modification will raise business standards, especially those ones which govern the relationship between the public and private sectors. We also expect Chile will continue adapting its legislation and practices to simulate those existing in bigger jurisdictions (mainly the USA and Europe), with which Chile has an intense economic exchange.



¹ Representatives are defined as those “who perform administrative and supervisory activities”. This often refers to employees, but should be assessed on a case by case basis.

² This would arise when the agent in charge of the administration or management of the property of a third party, causes material detriment through executing, or omitting, any action manifestly prejudicial to the principal's interests.

³ This would arise when certain individuals take a personal interest, directly or indirectly, in any type of negotiation, contract, operation, etc. in which that person participates due to their position. The individuals who are not allowed to take interest in said operations are public servants, arbitrators, commercial liquidators, bankruptcy officers independent experts (“peritos”), trustees, directors, and in general, any person who is in charge of managing the assets of third parties who are unable to do so themselves.

⁴ The fines amounts are expressed in US Dollars for ease of reference.

CMS round-up

Austria: Surveillance powers extended

Austria recently amended its criminal procedure code in relation to the surveillance rights of law enforcement authorities. This amendment was accompanied by lengthy discussions, out of concern for the scope of surveillance.

The amendment includes new investigative measures for monitoring encrypted messages (§§ 134 Z 3a, 135a Austrian Criminal Procedure Act). It stipulates that telecommunications companies must store a person's data for up to twelve months if there is "an initial suspicion". Authorities may access this data upon obtaining a court permit. In addition, the expansion of video surveillance on motorways was initiated. License plates are now recorded and stored for two weeks. Information such as make, type and colour of the car is also recorded.

Colombia: New criminal tax offences introduced

In order to restore the balance of Colombia's budget, in December 2018 Congress approved the new financing law, L.1943/18. This law came into effect on 28 December 2018 and reformed the existing fiscal crimes. It also introduced a new crime, imposing criminal sanctions for general tax evasion or tax fraud activities. It is the first time in recent Colombian legal history where any manoeuvre leading to decreased taxation could lead to a prison sentence. The new legislation also eliminates the possibility of avoiding prosecution altogether by paying pending taxes before sentencing, if the evaded amount is above a specific limit that varies according to the type of evaded tax. Currently, these offences only apply to individuals but another piece of legislation is currently under debate in Congress and, if approved, it will extend liability to corporations. These actions show the Colombian government's changing attitude to fiscal and corporate crime.

Czech Republic: New crime of obstruction of justice and money laundering developments

Since 1 February 2019, the Czech Criminal Code has recognised a new crime of obstruction of justice. This crime primarily sanctions conduct whereby evidence of material importance is submitted for a decision with knowledge that it is counterfeit or has been altered. Additionally, the crime also sanctions the provision, offer or promise of benefit for committing a crime of false accusations, false testimony and false expert opinion or false interpretation.

Moreover, as a reaction to international criticism that Czech legislation on money laundering was deemed to be fragmented and insufficient, the crimes of sharing and sharing out of negligence were repealed. The two previously individual crimes are now enshrined in the new comprehensive definitions of 'Legalisation of Proceeds of Crime' and 'Legalisation of Proceeds of Crime of Negligence' respectively. These definitions now clearly and explicitly cover all types of conduct that could fulfil the definition of money laundering, as specified in relevant international treaties.

France: First assessment of the implementation of the Sapin II law

On 1 June 2017, the French law for the prevention and detection of corruption, the "Sapin II" law, entered into force. Sapin II requires certain large companies, groups of companies and public bodies to adopt compliance programmes.

This law also created the French Anti-Corruption Agency (AFA) with two functions: (1) to help companies comply in the implementation of appropriate internal procedures; and (2) to prevent and detect corruption and to monitor the implementation of those procedures. During 2018, the AFA carried out around 50 audits of 30 private companies, including 11 subsidiaries of foreign groups, and 15 public actors. It has also produced seven practical guides to help companies to implement anti-corruption programs. More guides will be published in 2019.

Furthermore, for the first time in France, Sapin II law creates the possibility for a legal entity suspected of money laundering, corruption or influence-trafficking offences to negotiate a settlement with the French Public Prosecutor. This mechanism is called the Convention judiciaire d'intérêt public (CJIP) and is similar to US deferred prosecution agreements.

A company may avoid criminal sanctions if it agrees to several cooperation actions, such as paying a fine to the French Treasury proportionate of the amount gained from the offence but capped at a maximum of 30% of the company's average annual turnover. The first CJIP agreement was concluded at the end of 2017. More agreements have since been concluded but there have been less than ten to date.

Germany: Proposed new laws on corporate criminal liability and investigations

The German federal government is currently working on a draft for a corporate criminal law and a draft law regulating internal investigations.

Currently, German law does not provide for criminal sanctions for legal entities, only for natural persons. The sanctioning of criminal offences, such as bribery, committed from within a company is currently governed by the applicable administrative offence law and provides for fines as well as the skimming of profits. The planned law is intended to ensure that companies that profit from criminal misconduct of their employees are subject to stronger sanctions.

The planned law on internal investigations is intended to create a binding framework for internal investigations for the first time. It is supposed to clarify existing legal issues in this context and to create legal incentives for companies to conduct internal investigations and to disclose the results of such investigations. Internal investigations currently raise many legal questions, particularly in connection with employee interviews

and the confiscation of investigation results. With regard to the latter, the German Federal Constitutional Court ruled in 2018 that the results of an internal investigation may be confiscated by the prosecution authorities.

It is still unclear when and how the announced regulations will be implemented. A first draft law is expected in the course of the year.

Peru: Regulation of Law No. 30424 comes into force

On 9 January 2019, the Supreme Decree No. 002-2019-JUS was published approving the Regulation of Law No. 30424 (the "Act"). The Act regulates the criminal liability of legal entities in respect of crimes such as bribery, collusion, influence peddling, money laundering and financing of terrorism that are committed by or on behalf of legal entities (and that may determine a direct or indirect benefit in favour of those legal entities). The Act further establishes and specifies the components, standards and minimum requirements with regard to the prevention models that must be implemented in organisations in order to prevent, identify and mitigate the risk of committing these crimes. The Act places emphasis on the self-regulatory criteria that can be applied by legal entities in that they have the power to define the scope of their prevention models or systems, as well as the methodology for their design, implementation and monitoring, which enables a particular model to suit a legal entity's specific needs and risks.

The Act also develops the criteria and information to be evaluated by the Securities Market Regulator in Peru (Superintendencia de Mercado de Valores ("SMV")) in relation to when the SMV would issue a technical report. The technical report would cover the implementation and operation of a legal entity's prevention model, required for the formalisation of a preliminary investigation into legal entities may they be subject or not to the SMV's jurisdiction (but only upon a Criminal Prosecutor's request).

Poland: Proposed changes to corporate criminal liability

A new law on corporate criminal liability may be adopted by the Polish Parliament this year. If so, it would materially change the existing rules in Poland and make it possible to quickly and effectively impose and enforce penalties against corporate entities, including companies operating abroad. At the same time, the severity of penalties may be dramatically increased (up to c.a. EUR 14m).

Under the new law, the liability of a corporate entity is to be independent of any previous conviction of an individual (the direct perpetrator), and it is possible to hold a corporate entity liable for an offence without establishing who the direct perpetrator was. Instead of drawing from a closed list of crimes committed by individuals which can entail liability of the company – the new draft law introduces potential liability for any crime, including criminal negligence.

The draft law also introduces a wider list of additional sanctions, in particular the possibility to order the confiscation (forfeiture) of all or part of the company's assets and interim measures, for example, an interim ban on certain business operations.

Russia: Tightening of anti-corruption enforcement

Since 2013, Russian officials have been unable to hold foreign bank accounts and/or possess foreign financial instruments. This ban applies to an extremely wide range of Russian public officials, as well as their spouses and children. However, until recently, there have been no mechanics to enforce such legislation and discover information in respect of foreign accounts held by Russian citizens.

In 2018, the Russian Federal Tax Service started exchanging data on the foreign assets of Russians in 58 jurisdictions, including the British Virgin and Cayman Islands, Mauritius and other offshore and low tax jurisdictions. In January 2019, a special law was enacted authorising the Russian Prosecution Office to combine data received from the Russian Federal

Tax Service and from the Central Bank of Russia. It also authorised the Prosecution Office to enforce the relevant anti-corruption legislation by conducting its own investigations of offences. The law also limits "bank secrecy", authorising the Central Bank to disclose information to Prosecution General in order to ensure the anti-corruption compliance.

This development is a further move in Russia's ongoing anti-corruption campaign and has caused several of Russia's top-officials to resign over allegations of undeclared foreign accounts and illegal business activities.

Spain: Fourth anti-money laundering directive transposed

On 4 September 2018, Royal Decree-Law 11/2018 came into force transposing the Fourth EU Anti-Money Laundering Directive into Spanish law. The resulting law introduced significant developments regarding the application of the anti-money laundering (AML) regime to corporate entities beyond those in the financial sector, imposing additional internal AML control requirements and updating the disciplinary regime for infringements, amongst other things.

Spanish law outlines specific AML obligations beyond those in the financial sector, such as applying them to professional traders of goods in transactions involving cash payments of non-residents above the threshold of EUR 10,000. Regarding the new internal control requirements, entities subject to the regime must implement internal procedures to allow employees, managers and agents to report -even anonymously- any suspected AML risk or infringement, in addition to the pre-existing formal obligation to report suspicious operations to the Supervisor. Finally, with regard to the disciplinary regime, financial sanctions have been significantly raised (e.g. up to EUR 10m or 10% of the overall annual turnover for the most serious infringements by corporate entities).

Switzerland: Whistleblower protections in the private sector

The inadequacy of the protection offered to whistleblowers in Switzerland has been widely criticised for several years. While legislation on whistleblowing in the public sector was introduced in 2011, there is no concise legal framework specifically addressing respective issues in the private sector. In September 2018, the Swiss government eventually proposed a set of rules to be introduced into the section governing employment contracts in the Code of Obligations.

By providing for a duty of employers to effectively tackle reports on irregularities, to render accounts about measures taken and to protect whistleblowers from retaliation on the one hand, and by stipulating fairly strict prerequisites and limitations to be observed by employees when reporting (actual or presumed) irregularities to anybody else than the employer on the other, the bill seems to be reasonably well balanced.

Whistleblowing continues to be a matter to be dealt with by employees and employers 'in private', as a rule. In order to benefit from this employer-friendly concept, Swiss undertakings are however well advised to establish an internal reporting process that: designates an independent whistleblowing unit; specifies rules on the procedure to follow up on reported irregularities; prohibits dismissal or disadvantages because of reports; and allows for anonymous reports.

The draft bill has yet to be approved in parliament.

UK: Approval of legislation for supercharged overseas production orders

The Crime (Overseas Production Orders) Act 2019 received Royal Assent in February 2019. Its operative provisions are not yet in force, but when they are, it will enable UK authorities, without having to go through the cumbersome mutual legal assistance processes currently in place when seeking evidence overseas, to obtain orders for the disclosure of electronic data from anyone anywhere in the world, to support investigations or prosecutions.

The commencement date for these provisions has yet to be announced but once introduced, it will make it much easier and quicker for the UK authorities to obtain overseas electronic data, given it will by-pass the need to go through the overseas country's courts or authorities.

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Legal resources and the latest news on corruption issues



Corruption is a problem not only from an ethical and competition-distorting perspective, but also because of the risk it creates to the reputation of any affected business and the potential financial implications of a finding of wrongdoing. Businesses need to stay ahead of developments in this rapidly evolving area of law and any board of directors that does not give due consideration to these issues is arguably failing in its duties.

The introduction of the Bribery Act 2010 in the UK not only clarifies and simplifies the old anti-bribery law to make prosecution more straightforward, but also provides more wide-ranging offences and harsher penalties than ever before. An increasingly proactive approach by prosecutors and regulators to policing corruption, using both traditional and more innovative civil and criminal remedies from the ever-growing arsenal available to them, have created an imperative for businesses to treat corruption as a major business issue.

Reactive compliance is not enough; to avoid liability in future, management will be expected to demand, exemplify and achieve the highest standards of ethical conduct at all levels within their organisation.

Here you will also find information on forthcoming events. Should you have any queries, please do not hesitate to contact us.

24 hour crisis hotline: 0330 20 12 010
Please contact our 24 hour crisis hotline if you have any urgent queries you would like to discuss with a member of the CMS anti-corruption team



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