THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Sixth Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

This sixth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Argentina, Canada, Jersey and Sweden. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the ripple effects from several ongoing high-profile global corruption scandals have continued to dominate the foreign and domestic bribery landscape. Most notably, in Brazil, Operation Car Wash, the wide-ranging investigation that uncovered a colossal bribery and embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has implicated many domestic and multinational firms across a range of industries, and touched a growing number of foreign countries, leading to cross-border cooperation by enforcement agencies and one of the largest foreign bribery settlements in history. In December 2016, Odebrecht SA, the largest construction company in Latin America, and its subsidiary Braskem SA, a Brazilian petrochemical company, entered coordinated settlement agreements to pay approximately US$3.5 billion in fines and penalties to authorities in Brazil, the United States and Switzerland for making improper payments to government officials, including officials at Petrobras, Brazilian politicians and officials, and political parties through Odebrecht's off-book accounts in exchange for improper business advantages, including contracts with Petrobras. Additionally, J&F Investimentos SA, the parent company of the world's largest meatpacker JBS SA, entered a leniency agreement with Brazil's Federal Prosecutor's Office, agreeing to pay US$3.2 billion for its role in corrupting more than a thousand politicians over the course of a decade. Over the past year, Brazilian enforcement authorities have increasingly utilised plea bargains and leniency agreements both to secure cooperating witnesses and encourage companies to pay fines that ultimately reduce the financial and reputational impact from harsh sanctions.

Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB). The Swiss Office of the Attorney General has been pursuing a money laundering investigation into 1MDB and two Swiss private banks with the help of Singapore, Luxembourg, and the US Department of Justice (DOJ). In June 2017, the DOJ filed additional civil forfeiture complaints seeking recovery of assets valued at approximately US$540 million. Combined with the DOJ's June 2016 civil forfeiture complaints to recover more than US$1 billion in assets, this remains the largest civil forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative. The DOJ has also turned its focus to a criminal investigation into

1MDB, particularly in relation to funds used to acquire real estate and other assets in the United States.

Judicial and legislative developments over the past year have further clarified the breadth and scope of anti-corruption investigations and enforcement. For instance, in December 2016, the French parliament passed the Sapin II law, a corporate anti-corruption law that, among other things, established the French Anti-Corruption Agency and required companies with 500 or more employees to establish a compliance programme by mid 2017. In May 2017, the UK High Court in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* reduced the scope of litigation privilege to communications created to obtain information when the litigation is in progress or reasonably imminent, is adversarial, and the communication's primary purpose is conducting the litigation. If upheld, this has an impact on how investigative internal investigations in the UK are structured so as to maintain legal privilege. Finally, in June 2017, the US Supreme Court held in a unanimous decision in *Kokesh v. SEC* that claims for disgorgement brought by the Securities and Exchange Commission (SEC) were subject to a five-year statute of limitations, thereby limiting the SEC's ability to seek monetary penalties for misconduct that occurred more than five years before the enforcement action.

Continuing a recent trend, the enforcement actions this year reflect cooperation between authorities all over the globe to investigate and charge companies involved in corruption scandals. For example, the successful investigation into Odebrecht SA and Braskem SA was a result of cooperation between the DOJ, the Brazilian Federal Prosecutor's Office and the Swiss Office of the Attorney General. Likewise, in January 2017, the DOJ, the UK's Serious Fraud Office and the Brazilian Federal Prosecutor's Office reached an US$800 million coordinated settlement agreement with Rolls-Royce Plc, a UK-based multinational engineering company that manufactures, designs and distributes power systems, for its role in a bribery scheme involving payments to foreign officials around the globe in exchange for government contracts. And recently in September 2017, in the only corporate Foreign Corrupt Practices Act (FCPA) enforcement action under the Trump administration to date, Swedish international telecommunications company Telia Company AB and its subsidiary entered coordinated settlement agreements with the DOJ, SEC and the Public Prosecution Service of the Netherlands, agreeing to pay US$965 million in fines and penalties for making bribe payments of over US$331 million to an Uzbek official in exchange for expansion into the Uzbek telecommunications market. This is the second settlement arising from the expansive collaborative investigation into bribe payments made to an Uzbek government official; Amsterdam-based telecommunications company VimpelCom Limited and its subsidiary entered a US$795 million global settlement last year to resolve similar allegations as a result of cooperation between enforcement agencies in, among others, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Ireland, the Netherlands, Norway, Spain, Sweden and Switzerland.

In the United States, the DOJ has continued to emphasise the importance of an effective compliance programme and self-reporting. In February 2017, the DOJ Fraud Section released a guidance document, 'Evaluation of Corporate Compliance Programs', identifying a list of 119 common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. Relatedly, April 2017 marked the one-year anniversary of the DOJ's Pilot Program, aimed at providing greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations, and

remediation of internal controls and compliance programmes. The Pilot Program remains in effect under the current administration, but its future remains uncertain as the DOJ continues to assess its utility and efficacy. To date, the DOJ has issued seven declinations to companies that self-reported and disgorged profits under the Pilot Program, with no monitorship requirements.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2017

Chapter 1

ARGENTINA

Maximiliano D'Auro, Manuel Beccar Varela, Dorothea Garff, Francisco Zavalía and Tadeo Leandro Fernández[1]

I INTRODUCTION

The Argentine Criminal Code (ACC) is the main regulation that governs and punishes behaviours related to bribery and corruption. The legal framework punishing domestic and foreign bribery is set forth in Sections 256 to 259 of the ACC. The offence of bribery of foreign public officials was introduced by means of Law No. 25,188 in Section 258 *bis* of the ACC, which was amended by Law No. 25,825 in order to cover the bribery of officials of international organisations.

In addition, there is civil and administrative liability regarding breaches of foreign and domestic bribery laws. Individuals can be held criminally, administratively and civilly liable for bribery of a foreign public official. However, in Argentina, companies cannot be held criminally liable for foreign bribery offences and corporate criminal liability has been established in the country only for money laundering (Sections 303 and 304 ACC), terrorist-financing offences (Section 306 ACC), insider trading (Sections 307, 308 and 313 ACC), manipulation of financial markets and misleading offers (Sections 309 and 313 ACC), financial intermediation (Sections 310 and 313 ACC), financial fraud (Sections 311 and 313 ACC), financial bribery (Sections 312 and 313 ACC), tax offences (Law No. 24,769 amended by Law No. 26,735, Section 14), customs offences (Law No. 22,415, Section 887), currency-exchange offences (Law No. 19,359, Section 2f), antitrust law (Law No. 25,156, Section 47) and the supply law (Law No. 20,680 amended by Law No. 26,991, Section 8).

Argentina is one of the only parties to the Organisation for Economic Co-operation and Development's (OECD) anti-bribery convention that does not sanction companies for corruption. The National Executive Branch sent a bill on corporate criminal liability (the Bill) to Congress with the aim of assessing the deficiencies noted by the OECD in its evaluations (see Section VIII).

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

Section 256 of the ACC sets forth that any public official who, personally or by means of an intermediary, receives money or any other gift, or directly or indirectly accepts the promise of these, in order to carry out, delay or not do something in relation to his or her duties, shall be punished with imprisonment of one to six years and disqualification for life.

1 Maximiliano D'Auro and Manuel Beccar Varela are partners, and Dorothea Garff, Francisco Zavalía and Tadeo Leandro Fernández are senior associates, at Estudio Beccar Varela.

Section 256 *bis*, paragraph 1 of the ACC sets forth that any public official who, personally or through an intermediary, requests or receives money or any other gift, or directly or indirectly accepts the promise of these, in order to make unlawful use of his or her influence before a public official, with the purpose of having the official do, delay or not do something in relation to his or her duties, shall be punished with imprisonment of one to six years and special disqualification from holding public office for life.

Section 256 *bis*, paragraph 2 of the ACC also sets forth that if this conduct is intended to make unlawful use of any influence before a magistrate of the Judiciary Branch or the State Attorney's Office, with the purpose of having the magistrate issue, decree, delay or omit any resolution, sentence or judgment concerning any matter under his or her jurisdiction, the maximum prison sentence will be increased to 12 years.

Section 258 of the ACC sets forth that any person who personally or through an intermediary gives or offers any gift for the purpose of soliciting the crimes punished by Sections 256 and 256 *bis*, paragraph 1 shall be punished with imprisonment from one to six years. If the gift is given or offered with the purpose of soliciting the conduct described in Sections 256 *bis*, paragraph 2 and 257, the punishment shall be imprisonment from two to six years. If the perpetrator is a public official, special disqualification from two to six years shall also be imposed in the first case, and from three to 10 years in the second case.

Section 257 of the ACC sets forth a punishment to any magistrate from the Judiciary Branch or the State Attorney's Office who personally or through an intermediary, receives money or any other gift, or directly or indirectly accepts the promise of these, in order to issue, decree, delay or omit any resolution, sentence or judgment concerning any matters under his or her jurisdiction. In such a case, the defendant shall be punished with imprisonment from four to 12 years and disqualification for life.

Additionally, a fine of up to 90,000 Argentine pesos can be imposed where an offence is committed 'with the aim of monetary gain' (Section 22 *bis* ACC).

The ACC defines the terms 'public official' and 'public employee' in Section 77 as 'any person who temporarily or permanently discharges public functions, whether as a result of popular election or appointment by the competent authority'. In principle, public officials can participate in commercial activities if there is no conflict of interest, as provided in Law No. 25,188 on Ethics in Public Office (the Public Ethics Law). Section 13 of Law No. 25,188 sets forth certain activities that are incompatible with the exercise of public functions. However, certain public officials included in the scope of the Ministries Law No. 22.520 (such as the head of the cabinet, ministers, secretaries and undersecretaries) and judges (by virtue of the National Justice Regulation, Section 8) can only engage in teaching activities during their tenure.

According to Argentine legislation, facilitating payments could be characterised as a bribery offence under the ACC. There are no safe harbours or exemptions, and 'grease' payments (for routine government actions) are not allowed. Pursuant to the Public Ethics Law, public officers are forbidden from receiving presents, gifts, donations, benefits or gratuities, of things, services or goods 'as a result of their work or in the performance of their public duties'. However, the prohibition does not apply in cases of 'courtesy gifts' and 'gifts offered as diplomatic practice'. Decree No. 1179/16 sets forth a registry for those gifts and the applicable proceedings.

Currently, the offence of bribery does not apply to bribery between private individuals; it is only applicable when government officials and employees are involved. The exception to this concerns the recent introduction of an offence of bribery for employees or officials

of financial institutions (Section 312 ACC). This provides that employees of financial institutions and entities operating in the stock exchange shall be punished from one to six years and special disqualification of up to six years if they personally, or through an intermediary, receive money or any other benefit as a condition to provide loans, finance or stock exchange transactions. A draft reform of the Criminal Code is being considered, which addresses bribery between private individuals.

In addition, under the terms of Section 173, subsection 7 of the ACC, any person who, under the law, by authority or contract, is vested with the management, administration or care of goods or pecuniary interests belonging to another person and, with the purpose of obtaining an unlawful gain for himself or herself or a third party, or violating his or her duties, damages such interests conferred upon him or her or incurs excessive expenses to the detriment of the person he or she represents, shall be punished with prison from one to six years.

III ENFORCEMENT: DOMESTIC BRIBERY

The Federal Court on Criminal and Correctional Matters is the competent court on bribery and corruption matters concerning public officers, and the National Constitution provides a special mechanism for the removal and prosecution of officials and judges (impeachment). Federal judges are assigned to conduct bribery and corruption investigations, and have broad powers under the Criminal Procedure Code (CPC), including requesting reports from both public and private agencies, and ordering numerous procedural and precautionary measures aimed at avoiding and preventing obstruction to investigations and the escape of criminals.

All national and provincial police forces are at the disposal of the Federal Judiciary as court assistants, to perform, execute and comply with its orders. The authority of a federal judge is limited geographically to Argentina. The authorities and judiciary co-operate in practice with overseas regulators. The only protection provided is that some people may be required to sign written reports in order not to testify as witnesses. This applies to the President, Vice President, provincial governors, Mayor of the City of Buenos Aires, national and provincial ministers and legislators, members of the judiciary and provinces, Diplomatic Ministers and General Consuls, and senior officers of the armed forces (Section 250, CPC).

There are no special procedures or guidance for investigating these crimes. However, the following institutions are important:

a The Anticorruption Bureau (OA). This operates under the Ministry of Justice and is governed by Decree No. 102/99, which grants various investigative powers. The OA has certain powers under this Decree, including to request information, obtain expert opinions, conduct preliminary investigations and file criminal complaints with the federal judiciary.

b Administrative Investigations, a special prosecutor's office within the Public Prosecutor. This investigates and promotes the investigation of crimes concerning corruption and administrative irregularities.

c The Office of the Prosecutor for Economic Crime and Money Laundering (PROCELAC), a unit within the Attorney General's Office (AGO) designed to combat money laundering and other economic crimes. PROCELAC has six operational areas: money laundering and terrorist financing; economic and banking fraud; capital market; tax crimes and smuggling; crimes against public administration; and bankruptcy.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Section 258 *bis* of the ACC sets forth that the punishment of imprisonment from one to six years and special disqualification for life from the exercise of any public office applies to any person who offers or gives a public official from a foreign state or from an international public organisation, personally or through an intermediary, money or any object of pecuniary value or other benefits such as gifts, favours, promises or benefits, for:

a that person's own benefit or for the benefit of a third party; and

b the purpose of having that official undertake or not undertake an act related to his or her office or to use the influence derived from the office he or she holds in an economic, financial or commercial transaction.

In the Phase 3 and 3bis OECD Working Group Reports of 2014 and 2017 on Implementing the OECD Anti-Bribery Convention in Argentina it was assessed that the definition of public official in Section 77 of the ACC (see Section II) includes two deficiencies: (1) it is not autonomous; and (2) it is too narrow, as it does not cover bribery of employees of foreign state-owned or state-controlled enterprises or officials of any organised foreign area or entity, such as an autonomous territory or a separate customs territory. In the Phase 3 Report of 2014 it was stated that the definition of a foreign official would be broadly interpreted with regard to the Convention, however, there is no case law confirming such interpretation. In addition, the Working Group reflected that Argentina argued that all payments made personally to an individual public official are necessarily illegitimate (paragraph 35).

Argentine law prohibits payments through intermediaries or third parties: The bribery of a foreign public official offence can be committed either directly or indirectly (Section 258 *bis* ACC).

Additionally, Section 45 of the ACC sets forth that the following would be punishable with the same penalty given to the perpetrator: (1) the person who takes part in the commission of a criminal act; (2) the person who provides assistance or cooperation without which the offence could not have been committed; and (3) the person who directly abets another to commit a criminal act. Pursuant to Section 46, the following are punishable with a reduced penalty (from one-third to one-half): (1) the person who cooperates in the commission of a criminal act in ways other than those mentioned in Section 45 of the ACC; and (2) the person who gives assistance because of a previous promise.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The main legal rules that require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing are the following:

a the Argentine Civil and Commercial Code, Sections 320 to 327;

b the Business Associations Law No. 19,550 and the Financial Administration Law No. 24,156, regarding state-owned companies;

c the Stock Market Law No. 26,831;

d the regulations issued by the National Securities Commission (CNV); and

e the regulations issued by local commercial registries.

Besides the bribery offence itself, Section 300(2) of the ACC sets forth a sanction of six months to two years' imprisonment for the founder, director, trustee, liquidator or receiver of

a corporation or cooperative, or of any other legal person who knowingly publishes, certifies or authorises either a false or incomplete inventory, balance sheet, profit and loss account or related reports on any event material to the assessment of the company's financial position, whatever the purpose sought.

Additionally, the CNV, commercial registries and professional associations can impose administrative and disciplinary sanctions to the wrongdoers.

On the other hand, Law No. 25,246, enacted in 2000, was the first to regulate both criminal money laundering and terrorism-financing offences in the ACC and anti-money laundering provisions.

Law No. 25,246 has been amended several times, most importantly in 2011 by Law No. 26,683, which, apart from several changes to the anti-money laundering sections of the law, added a new chapter to the ACC called 'Crimes against the Economic and Financial Order', which includes money laundering among other financial crimes.

Regarding money laundering, Section 303 of the ACC states that the offence of money laundering shall be committed when a person:

> *converts, transfers, administrates, sells, encumbers, disguises or in any other way introduces into the market assets which proceed from a criminally illicit act, with the possible consequence that the original or subsequent assets acquire the appearance of having legal origin.*

This Section also penalises the person who receives money or other assets from the commission of a crime in order to use them in any of the above-mentioned transactions.

Section 304, in turn, sets forth specific sanctions for cases in which money laundering was committed on behalf of, with the intervention of or for the benefit of a legal entity.

As for anti-money laundering, Law No. 25,246, as amended, sets forth a list of 'compelled subjects' (which includes both public and private entities, as well as natural persons) that are obligated to, among other duties, report suspicious activity to the Financial Information Unit (FIU). They must also adhere to the obligations of know-your-customer and no tipping-off.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

The following are notable cases mentioned in the 2014 OECD Working Group Report: *River Dredging*; *Power Project* (Philippines); *Undeclared Cash* (Venezuela); *Gas Plant* (Bolivia); *Inter-American Development Bank Debarment (*Honduras); *Oil Refinery* (Brazil); *Agribusiness Firms* (Venezuela); *Grain Export* (Venezuela); *Military Horses* (Bolivia); *Oil Sector Construction* (Brazil). The *Tax Collection* (Guatemala) and *Electricity Transmission* (Brazil) cases, among others, are also mentioned in the 2017 OECD Working Group Report.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Argentina is signatory to the following international conventions:

a the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1993 (approved by Law No. 24,072);

b the Inter-American Convention against Corruption of 1997 (approved by Law No. 24,759);

c the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention) of 2000 (approved by Law No. 25,319);
d the United Nations Convention against Transnational Organized Crime of 2002 (approved by Law No. 25,632); and
e the United Nations Convention against Corruption (UNCAC) of 2006 (approved by Law No. 26,097).

Furthermore, Argentina is a full member of both the Financial Action Task Force and the Financial Action Task Force of Latin America. In addition, the FIU is a member of the Egmont Group.

VIII LEGISLATIVE DEVELOPMENTS

On 27 September 2017, the Senate of the National Congress preliminarily approved the Bill on corporate criminal liability (the Bill), which was sent to the House of Representatives for debate.

According to the approved text, legal entities will be criminally liable for the crimes:

> *that have been carried out, directly or indirectly, with their intervention or in their name, interest or benefit . . . They are also liable if anyone who acted for their benefit or interest is a third party who does not have powers to act on their behalf, provided that the legal entities have ratified the management, even if it is tacitly . . .*

The Bill imposes successor criminal liability in all cases of merger, acquisition or other corporate conversion. However, the Senate suppressed the joint and several liability of parent companies for sanctions imposed on their subsidiaries.

According to Section 7, punishment will include (1) a fine of between two to five times 'the undue benefit obtained [by the legal entity] or that could have been obtained'; (2) total or partial suspension of activities, which in no case shall exceed 10 years; (3) suspension of participation in public tenders or invitations to public works or services or in any other activity linked to the state, which in no case may exceed 10 years; (4) dissolution and liquidation of the legal entity when it was created for the sole effect of the commission of the crime, or the acts that constitute the main activity of the entity; (5) loss or suspension of state benefits; and (6) publication of an extract from the conviction at the expense of the legal entity.

The Senate's preliminary approval established that legal entities will be exempt from criminal and administrative responsibility when the following actions occur simultaneously: (1) the self-report of an offence as a result of an internal investigation; (2) the implementation of a prior compliance programme, whose violation would have required an effort by the wrongdoers in the commission of the crime; and (3) the return of the ill-gotten gain.

Section 16 of the Bill lays out an effective cooperation agreement (ECA). The AGO and the legal entity can enter into an ECA by means of which the entity is obliged to collaborate through the disclosure of information or precise, useful and verifiable data for the clarification of facts, the identification of the authors or participants and the recovery of the proceeds of the crime, and thus comply with the conditions established in the Bill, as described below. The ECA can be signed at any time before the accused is summoned for trial.

The Bill provides that the negotiation between the entity and the AGO, and also the information that is exchanged in the framework of the negotiation until the approval of the agreement, must be strictly confidential and its breach constitutes a crime.

The text approved by the Senate requires the ECA to stipulate the following conditions regarding the legal entity: to pay an amount equivalent to half of the minimum fine as set forth in Section 7 of the Bill (as mentioned above); restitution of the proceeds of the crime; and 'abandoning in favour of the State the assets that would presumably be confiscated in case of a conviction'. There are also the following optional conditions: to repair the damage; to render a determined service in favour of the community; to apply disciplinary measures against those who have participated in the criminal act; and to implement an integrity programme or make improvements to the existing programme.

The ECA shall contain the signature of the legal representative of the entity, the defence and the representative of the AGO, and it is submitted to the judge who shall evaluate the legality or reasonability of the agreed conditions and will decide to sustain or overrule it.

If the ECA does not prosper or is overruled by the judge, the information and supporting evidence of the entity during the negotiation will be returned with no retention of copies. The use of said information and documentation will be banned for the determination of liability of the entity except if the AGO had knowledge of it independently or could have obtained it in the course of existing investigations in a case prior to the agreement.

Sections 22 and 23 make provisions for the integrity programme. Section 22 sets forth that the programme should be elaborated on in relation to the specific risks of the company. As per Section 23 of the Bill, the integrity programme must include:

a a code of ethics or conduct, policies and procedures that are applied to all directors, managers and employees, regardless of their position or functions, which guide the planning and execution of their duties to prevent the commission of the crimes provides for in the Bill;

b specific proceedings and rules to prevent illegal acts in the context of public procurement proceedings and bidding processes, in the execution of administrative contracts or in any interaction with the public sector;

c standards of conduct, code of ethics, policies and integrity procedures that are extended, when necessary according to the risks, to third parties or business partners, such as suppliers, service providers, distributors, intermediaries and agents; and

d periodic training on the programme undertaken by directors, managers, employees and third parties or business partners.

The programme could also include:

a periodic risk analysis and the consequent adaptation of the integrity programme;

b visible and unequivocal support for the integrity programme from the board and senior management;

c a well-publicised hotline that is open to employees and third parties;

d a protection policy for whistle-blowers;

e a system of internal investigations that respects the rights of those under investigation and imposes effective sanctions in case of violation of the code of ethics or conduct;

f proceedings to verify the integrity and reputation of third parties or business partners, including suppliers, services providers, distributors, agents and intermediaries;

g the performance of due diligence during the process of corporate conversion and acquisitions to verify the existence of irregularities, illegal acts or vulnerabilities of the legal entities involved;
h continuous monitoring and evaluation of the effectiveness of the programme;
i an employee of the legal entity, based internally, who is responsible for the development, coordination and supervision of the programme; and
j the fulfilment of other regulatory requirements.

The Bill also sets forth the requirement of a compliance programme for the legal entity to contract, in certain circumstances, with the state.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Regarding criminal law and criminal procedural law, criminal cases must be subject to criminal prosecution and cannot be resolved through settlements or plea agreements, as in the United States. According to Section 71 of the ACC, prosecutors are not allowed discretion other than that permitted by criminal procedural law. In this regard, Section 431 *bis* of the CPC provides for abbreviated trials in cases where the prosecution and defence reach an agreement about guilt and sentence at the beginning of the oral trial phase provided that the requested penalty does not exceed six years' imprisonment, and the defence accepts the charges and agrees to conduct the proceedings in such manner.

This is similar to the leniency programme established by Law No. 27,304, which sanctions, among other things, plea bargains in anti-corruption investigations. The defendant cannot avoid trial but the sentence of imprisonment may be reduced by up to 15 years.

It is stated in Section 76 *bis* of the ACC that suspension of trial testing may be requested by anybody convicted of a crime prosecutable *ex officio* with imprisonment for a maximum of three years. The request for the suspension of trial does not imply the confession of the crime or admission of the defendant's civil liability.

However, whistle-blower reports of potential illegal conduct to government authorities are not common. There is no specific protection and the authorities do not yet provide incentive programmes for whistle-blowers to come forward. However, despite the lack of specific regulations, many companies have established mechanisms in order to allow whistle-blowing, as well as hotlines.

The CNV's regulations require that issuing companies set up a corporate governance code, which should encourage business ethics within the company. The corporate governance code should include, among other things, the description of reporting mechanisms for employees, whether via personal or electronic means, 'ensuring that information transmitted meets high standards of confidentiality and integrity'. The CNV's regulations do not require protection from retaliation.

However, a legal system of witness protection is available, which is regulated by the National Programme for Witnesses and Suspects Protection created by Law No. 25,764. The system is intended for the protection of witnesses and defendants who have made an outstanding contribution to a judicial investigation under federal jurisdiction and are therefore in a risky situation. This may include investigations into: (1) drug trafficking; (2) kidnapping and terrorism; (3) crimes against humanity committed between 1976 and 1983; and (4) human trafficking.

This system does not reduce penalties, except in the case of crimes regulated by the Law of Narcotics No. 23,737, where cooperation can reduce penalties by up to one-half of the minimum, or even exempt the defendant from penalties when, during the conduct or before the start of the proceedings, the defendant either: (1) reveals the identity of the participants in the crime; or (2) provides information enabling the authorities to seize drugs, raw materials and other objects of the crime. In addition, Law No. 25,241 sets forth reduction of penalties to whomever contributes to the investigation of terrorist actions and money laundering (committed by individuals other than public officers).

Witness protection is more limited than whistle-blower protection as it does not offer protection from workplace reprisals. The Labour Contract Act addresses unjust dismissal but not other forms of reprisal.

Moreover, according to the General Regime for Public Procurement and its Regulation (approved by means of Decree No. 1023/2001 and Decree No. 1030/2016, respectively) the following persons cannot enter into contracts with, among others, the public administration: (1) bidders or offerers who have been convicted for the commission of intentional crimes are disqualified for a period that is twice the length of the sentence imposed for their crimes; (2) companies that have been convicted abroad of bribery or transnational bribery practices under the terms of the OECD Convention will be ineligible for a period that is twice the length of the imposed sentence; and (3) individuals or legal entities that are included on the lists of debarred persons of the World Bank or the Inter-American Development Bank as a result of corrupt practices referred to in the OECD Convention will be ineligible for as long as they are included on the lists.

Other examples of laws affecting the response to corruption in Argentina are the recently issued Decree No. 1246/2016, which explicitly prohibits the deductibility of bribes in the Argentine Income Tax Law, and the Decrees No. 201 and 202 of 2017, regarding conflict of interest with public officials.

X COMPLIANCE

In principle, judges and courts should consider the aggravating or mitigating circumstances specifically related to each case. They should take into account: (1) the nature of the unlawful action, the means used to execute it and the extent of damage and danger caused; and (2) the age, education, customs and the previous behaviour of the defendants, the motives that led them to commit such crimes, the degree of participation, whether they are recidivists, personal circumstances, and the circumstances of time, place, manner and occasion to determine the threat posed by the individual.

Covered institutions must implement anti-money laundering and counterterrorist financing compliance programmes containing measures and policies to prevent money laundering and terrorism financing that are covered in the specific resolutions for each class of 'compelled subjects' (which includes both public and private entities, as well as natural persons) that are obliged to, among other duties, inform the FIU of suspicious operations.

Regarding anti-money laundering and criminal tax law, Sections 304 and 313 of the ACC and Section 14 of the Criminal Tax Law set forth that judges could grade these punishments taking into account failures to comply with internal rules and procedures; lack of vigilance over the activity of perpetrators and accomplices; the extent of the harm caused; the amount of money involved in the perpetration of the crime; and the size, nature and economic capacity of the legal person. In addition, punishments of subsections 2 (temporary

or total suspension of activities) and 4 (cancellation of the legal entity) should not be imposed if the actions were indispensable to keep the entity or public works or a specific service operational.

Notwithstanding this, the existence of a compliance programme could serve as a defence against criminal charges or mitigate the penalty, depending on the particular circumstances of the case.

XI OUTLOOK AND CONCLUSIONS

In December 2015, the Argentine government changed. The new administration has promised to make the fight against corruption one of its main political goals. In addition, legal persons and their officers and directors are subject to increased scrutiny and prosecution by Argentine regulators and law enforcement agencies empowered to investigate and prosecute corporate wrongdoing. Even though the issue of criminal liability of entities is still widely discussed, more legal persons are being prosecuted or investigated and administrative sanctions are being imposed on them.

Appendix 1

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Maximiliano D'Auro is a partner at Estudio Beccar Varela. He has wide experience in banking and financial law, advising both foreign and local financial institutions, not only on structuring complex financial transactions, but also on specific regulatory matters. In this field, Maximiliano has counselled and represented major financial institutions in matters related to the Financial Entities Act, the Public Offering Act and regulations issued by the Argentine Central Bank (BCRA) and the National Securities Commission (CNV). He also has a great deal of expertise in designing and implementing compliance programmes for prevention of money laundering and terrorism financing. In addition, he focuses his practice on bank secrecy and personal data protection.

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