LATIN LAWYER INSIGHT

The Guide to Corporate Compliance

Editors
Andrew M Levine
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Valeria Plastino
Fabio Selhorst

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LACCA
Latin American Corporate Counsel Association

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Publisher's Note

Latin Lawyer and LACCA are delighted to publish *The Guide to Corporate Compliance*.

Edited by Andrew M Levine, a litigation partner at Debevoise & Plimpton LLP, Reynaldo Manzanarez Radilla, a corporate attorney and compliance professional, Valeria Plastino, vice president, general counsel and regional ethics and compliance officer at CenturyLink, and Fabio Selhorst, general counsel, chief integrity officer and chief communications officer at Camargo Corrêa Infra, this new guide brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all practitioners.

We are delighted to have worked with so many leading individuals to produce *The Guide to Corporate Compliance*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Infrastructure and Energy Investment* and *The Guide to Corporate Crisis Management*, as well as our jurisdictional references and our new tool providing overviews of regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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Risk Management in the Financial Services Industry in Argentina and the Changes Being Adopted

Maximiliano D'Auro and Gustavo Papeschi[1]

Introduction

Significant anti-corruption laws have been enacted in Latin America in the past decade, as well as country-specific anti-corruption compliance guidelines. This chapter does not intend to cover all the implications related to risk management in the financial services industry in Argentina, let alone Latin America. Instead, we briefly address the current status in Argentina, as well as the particularities that a risk-based approach to anti-bribery and corruption (ABC) programmes should consider in implementing an adequate integrity programme for financial services providers (FSPs).

A matter of self-perception and the adequacy of any ABC programme

Comparing anti-money laundering and ABC programmes: FSP point of view

The financial services industry has often been in the eye of the storm as regards matters relating to money laundering or the failure to prevent it. Several cases (many of them of massive proportion) have populated the mainstream news and legal forums during the past decade.

Because of that, regulations forced the industry to allocate large amounts of resources to create and maintain anti-money laundering (AML) departments, policies and procedures.

After many years, FSPs have become used to this new paradigm for doing business. Over time, they have made it an essential part of their day-to-day operations and have strongly embraced the many benefits of a robust AML programme. The strong enforcements made both locally and internationally have made Argentine institutions realise the severity of the new regulations and act accordingly.

1 Maximiliano D'Auro is a partner and Gustavo Papeschi is a senior associate at Beccar Varela.

In Argentina (and probably in many other places), that is not currently the case for ABC programmes in FSPs. While FSPs have addressed AML for many years, the same cannot be argued with reference to ABC programmes. Argentine financial institutions have not yet allocated to ABC programmes the same kind and amount of resources as they have with AML initiatives.

Local subsidiaries of foreign institutions may be in a better position. The reason for that is the extraterritorial application of foreign anti-bribery laws (the most relevant being the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act). In that sense, the FCPA provisions apply broadly to three categories of persons and entities: (1) 'issuers' and their officers, directors, employees, agents and shareholders; (2) 'domestic concerns' and their officers, directors, employees, agents' and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.[2] Moreover, Argentina has been at the centre of many bribery investigations and settlements based on the FCPA, including Siemens Aktiengesellschaft, Olympus Latin America, Inc, Helmerich & Payne Inc, Ralph Lauren Corporation, Stryker Corporation, Zimmer Biomet Holdings Inc, IBM, Bridgestone Corporation and Ball Corporation, to name just a few.[3]

There is a simple explanation for it: Argentina enacted its major AML legislation in 2000 (although its enforcement came many years after that) but the Corporate Criminal Liability Act for corruption-related offences[4] was only passed in late 2017.

Although many financial institutions already had some kind of ABC programme before the enactment of the Act (mostly just a general code of conduct or similar and, in many cases, inherited from their holding companies), those were not (or, in some cases, are not) as well developed as the AML programmes. At the very least, they lack the same allocation of resources as the AML programmes.

The FSPs' self-perception

Other than the aforementioned legislative reason, an interesting phenomenon we have experienced in the case of financial institutions is that although their self-perception of

2 Released in November 2012, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' [the FCPA Guide], among other information, specifies which persons and entities are covered by the FCPA's anti-bribery provisions. The FCPA Guide can be accessed at https://www.justice.gov/criminal-fraud/fcpa-guidance.

3 Siemens Aktiengesellschaft <https://www.justice.gov/opa/pr/former-siemens-executive-pleads-guilty-role-100-million-foreign-bribery-scheme>; Olympus Latin America Inc <https://www.justice.gov/criminal-fraud/fcpa/cases/olympus-latin-america-inc>; Helmerich & Payne Inc <https://www.justice.gov/opa/pr/helmerich-payne-agrees-pay-1-million-penalty-resolve-allegations-foreign-bribery-south>; Ralph Lauren Corporation <https://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay>; Stryker Corporation <https://www.sec.gov/news/press-release/2013-229>; Zimmer Biomet Holdings Inc <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act>; IBM <https://www.justice.gov/atr/case-document/plaintiffs-proposed-findings-fact-public-version>; Bridgestone Corporation <https://www.justice.gov/atr/case-document/file/489806/download>; Ball Corporation <https://www.sec.gov/litigation/admin/2011/34-64123.pdf>.

4 Corporate Criminal Liability Act No. 27401 of 8 November 2017 (Arg.) (*Ley de Responsabilidad Penal de la Personas Jurídicas*) <https://www.legiscompliance.com.br/legislacao/norma/124>.

risk with regard to AML issues is rather high, their self-perception with regard to ABC risks is rather low.

At least in appearance, they seem to have justifiable reasons for that:

- They are highly sophisticated companies, with a great deal of internal controls. Although those controls are not necessarily to address ABC issues, they generally have the effect of preventing any off-the-record outcome of funds or valuables; in a way, their main business is being accountable for the funds they manage.
- Although they are heavily regulated by the relevant supervisory authority (Central Bank, Securities Authority, etc.), the technical and professional nature (as opposed to political) of these regulators makes any type of corrupt behaviour unlikely.
- Generally, their core business is not related to the state as a client. They are not public-work contractors, customs brokers or any other company whose core business is based on their relationship with government. Therefore, their self-perception is that any non-regulatory contact with government officials is rather limited. While middle management's contacts are regular, they are mostly technical in nature; although contact of a political nature may exist, this typically involves high-level management. Therefore, the chances of occurrence of any act of bribery are lower.

Is this self-perception accurate? We believe not.

Although the reasons listed above may help to reduce any ABC risk, this reduction is far from material.

In that sense, in 2018 and 2019 alone, major fines or settlements have involved large banks: (1) Barclays, based in the United Kingdom, agreed to pay US$6.3 million to settle violations of the FCPA's internal accounting controls and record-keeping provisions in connection with its hiring practices in Asia (27 September 2019); (2) Deutsche Bank AG agreed to pay more than US$16 million to resolve violations of the FCPA's internal accounting controls and record-keeping provisions in connection with its hiring practices (22 August 2019); and (3) Credit Suisse Group AG agreed to pay more than US$30 million to the US Securities and Exchange Commission and a US$47 million criminal penalty to resolve charges that the firm obtained investment banking business in the Asia-Pacific region by corruptly influencing foreign officials in violation of the FCPA (5 July 2018).[5]

Although it is true that the core business of financial entities is not strictly based on their relationship with state authorities as other high-risk companies, they also do regular state business in a country like Argentina:[6] they expand territorially, for which they need to get permits to open new branches; they deal with judges (both judicial and administrative) to solve any disputes with their clients, partners or the state; they make corporate gifts to reinforce their client relationships; they organise marketing events, for which they need the relevant permits; and, most importantly, they do have business with state bodies or state-owned companies (e.g., payroll services for state-owned companies or state agencies,

5 See https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

6 Ranked as 66 of 180 in the 2019 Transparency International report on the Corruption Perceptions Index.

and public-debt services as arrangers, underwriters) but simply treat them as any other corporate counterparty.

Whether higher or lower, FSPs (as any other company) are subject to substantial ABC risks. All aspects of an organisation (internal policies, culture, interactions, etc.) need to be taken into consideration to ensure that an ABC programme is adequate under the Corporate Criminal Liability Act, and other applicable laws and rules in the matter. Furthermore, FSPs' compliance progammes must be 'adequate', as required under the Corporate Criminal Liability Act (i.e., the same requirement levels as any other company). A more detailed explanation of the requirements for adequate compliance programmes is given in the section headed 'The integrity programme adequacy'.

Corporate Criminal Liability Act and Anti-Corruption Office Guidelines

Long overdue

The introduction of the Corporate Criminal Liability Act has meant, among other things, the fulfilment of the long overdue obligation to make legal persons liable for bribery-related acts that Argentina assumed when signing the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention. The lack of implementation of corporate liability for these types of crimes had been considered in several reports by the OECD Working Group on Bribery in International Business Transactions, the last of which was the 2017 Phase 3*bis* evaluation report. Its fulfilment has been a clear sign of the renewed interest Argentina has in carrying out its obligations, clearing its way towards becoming a full member of the OECD[7] and adapting its legal system to the international standards in the fight against corruption.

Main purpose

In a very brief summary, the Corporate Criminal Liability Act has made companies liable for the criminal consequences of certain bribery-related crimes committed by individuals on behalf of the company or for its benefit or interest.

In addition (and probably as important), the Act defines the concept of an integrity programme as the set of actions, mechanisms and internal procedures promoting integrity, supervision and control, oriented to prevent, detect and correct irregularities and criminal acts listed in the Act.[8] Although the law does not require companies to implement an integrity programme, it is highly advisable to do so, not least because it could be used as a defence in a criminal investigation. Furthermore, they are mandatory if the company does business with the national government.

Besides, in respect of FSPs, implementing effective compliance programmes became imperative after Argentina's landmark case in anti-corruption enforcement, the Notebooks

7 González Guerra, Carlos M; Tamagno, María José, 'Ley de responsabilidad penal de la persona jurídico' in *Compliance, anticorrupción y responsabilidad penal empresaria*, González Guerra, Carlos M; et al.; directed by Saccani, Raúl Ricardo; Durrieu, Nicolás, 1st. ed. (Buenos Aires: La Ley, 201).

8 Corporate Criminal Liability Act No. 27401 (footnote 4, above), Article 22.

scandal.[9] Made public in 2018, the case revealed a massive corruption plan that had taken place between 2005 and 2015 involving public officials and the private sector. Some of the people under investigation were, in fact, directors within the financial sector at the time the facts were under scrutiny,[10] who had close connections with the federal government. Moreover, the scandal affected the value of several companies' shares (including some in the banking system).[11]

Argentine legislation's 'long arm' and international cooperation

Although the Corporate Criminal Liability Act was conceived from a local point of view, following the 'long arm' doctrine set forth in foreign legislation, it has also included provisions to extend the Argentine criminal courts' reach beyond the national borders.

The Act has amended Article 1 of the Argentine Criminal Code to broaden the Code's territorial scope. As a consequence and in addition to covering (1) crimes committed or with effects in Argentina and (2) those committed abroad by Argentine officials in favour of their functions, the Act has included a new case. For the purposes of the newly included crime provided in Article 258 *bis* of the Criminal Code (namely, bribery of a foreign official), the Argentine Criminal Code shall also be applicable for actions committed by individuals or entities domiciled in Argentina, even if the action is committed abroad.[12] For these purposes, the Criminal Code broadly defines foreign officials as 'any person from another state, or any territorial entity recognised by Argentina, designated or elected to comply a public function, at any level or governmental territorial division, or in any kind of organism, agency or public company in which such state has direct or indirect influence'.[13]

Furthermore, Argentina is a member of several multilateral, regional and bilateral treaties that facilitate cooperation with other jurisdictions. Many of them specifically target corruption crimes.[14] Moreover, Law 24767 on International Cooperation in Criminal Matters is applicable when no treaty exists with other countries.

Law 24767 sets forth the principle of 'wide and prompt' cooperation.[15] This means that if judicial assistance is required by a relevant foreign authority, under the conditions established by this Law, Argentine authorities should cooperate. In this regard, the principle of reciprocity is the main condition for cooperation: in the absence of a treaty that requires cooperation, the assistance of Argentine authorities is subordinated to the existence or offering of reciprocity.

9 National Chamber of Cassation in Criminal and Correctional Matters, Docket No. CFP 9608/2018.

10 Official information regarding the case available at https://www.cij.gov.ar/causas-de-corrupcion.html.

11 'El "efecto cuadernos" llegó a los mercados y golpeó fuerte al Merval', *La Política Online* (7 August 2018) <https://www.perfil.com/noticias/economia/el-efecto-cuadernos-llego-a-los-mercados.phtml>.

12 Criminal Code of the Argentine Nation, Article 1 <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm>.

13 id., at Article 258 *bis*.

14 The treaties to which Argentina is a party can be accessed at http://www.cooperacion-penal.gov.ar/tratados-internacionales.

15 Law 24767 on international cooperation in criminal matters (Arg.) <http://servicios.infoleg.gob.ar/infolegInternet/anexos/40000-44999/41442/norma.htm>.

The central authority designated by Argentina for all cooperation treaties regarding criminal matters (and treaties containing norms on criminal matters) is the Ministry of Foreign Affairs and Worship. The only exception is the Treaty of Mutual Legal Assistance in Criminal Matters with the United States, in which the designated authority is the Ministry of Justice and Human Rights.

Some agreements concern specific cases. For example, in 2019, a prosecutor signed an agreement with Brazil's Public Ministry to access evidence collected in that country concerning the payment of bribes by Odebrecht to Argentine public officials in *Operation Car Wash*.[16]

There are several government authorities, such as the Federal Revenue Agency and the Financial Information Unit, that are part of international networks of cooperation.[17]

The integrity programme adequacy

For any integrity programme to be effective, it must be adequate for the relevant company. This adequacy standard dictates that the content of the integrity programme shall have a direct relation with the risks of the activity in which the company engages, its dimension and economical capacity.

Following the enactment of the Corporate Criminal Liability Act, Decree 277/2018[18] entrusted Argentina's Anti-corruption Office to establish guidelines to help legal entities comply with the provisions of Sections 22 and 23 of Law 27401.[19] Consequently, the Anti-corruption Office approved the Guidelines on Integrity Programmes through Resolution 27/2018[20] (the Guidelines).

These Guidelines aim to 'provide technical guidance for companies, civil society organisations, other legal entities, state agencies, members of the judicial system and the professional community'. In this sense, 'they must be understood as complementary to the various and rich specialised literature on compliance, available in Argentine and foreign sources'.

Furthermore, the document points out that even if it provides suggestions to design and implement integrity programmes, they must be necessarily tailored to each legal entity's risks, needs and characteristics, and adapted to the context in which they operate and to their associated risks. For these reasons, the Guidelines highlight that carrying out a risk assessment prior to the design and implementation of the programme is a key step and goes into it in depth.

As mentioned above, the adequacy rule applies to all companies, including FSPs. Any particular risk (or lack thereof) to the relevant FSP should be initially and regularly

16 Announcement of the agreement in the news section of Argentina's Public Prosecutor's Office website (19 June 2019) <https://www.fiscales.gob.ar/procuracion-general/soterramiento-del-sarmiento-se-firmo-el-acuerdo-con-autoridades-brasilenas-para-acceder-a-pruebas/>.

17 For example, Argentina's financial information unit is part of Egmont Group and has signed several memorandums of understanding (MOUs) for the exchange of information with foreign counterparts. A list of the states with which MOUs have been signed can be accessed at https://www.argentina.gob.ar/uif/internacional/convenios.

18 Published in the Official Gazette on 6 April 2018.

19 These are the sections establish the adequacy standard.

20 Published in the Official Gazette on 4 October 2018.

assessed, balanced and reflected in the integrity programme, as is the case for any other type of company.

In addition, when designing compliance programmes, FSPs should comply with other federal laws that also aim to tackle corruption. For instance, on 15 May 2019, the Argentine National Congress enacted a law that allows companies to make financial contributions to political campaigns, within certain limits. Law No. 27504 establishes that, if made in cash, donations should be made via the banking system so that the donor can be identified and the contribution traced reliably.[21] This requirement gives banks a more relevant role regarding transparency in political funding.

We move on to the several elements that both the Corporate Criminal Liability Act and the Guidelines mandate or recommend should be included in any integrity programme.

The Act provides that (1) the ethical code, policies and procedures of integrity, (2) the rules of integrity in public tender processes and other interactions with the public sector, and (3) training and awareness should be mandatory, while other elements are only advisable.[22] Nonetheless, our belief is that all the elements listed in the Act should be included (or at least addressed) to guarantee the adequacy of the integrity programme.

As both the Act and Guidelines follow the generally accepted international standards in the subject matter, it is not necessary to provide a full description of each of them. Instead, we describe the specific particularities applicable to FSPs for the relevant elements of an integrity programme, as our experience on the matter has taught us. We address only those where particular considerations should be made.

Although we do not comment on them, the following elements are also mentioned in law as advisable elements of an integrity programme: internal whistle-blower systems; protection of whistle-blowers from retaliation; due diligence in mergers and acquisitions and other corporate transformations; and periodic monitoring and assessment of the adequacy of an integrity programme.[23]

The elements of a successful integrity programme

Ethical code, policies and procedures

These are essential parts of an integrity programme, because they summarise the FSP's general policies. These documents should clearly contain values, ethical patterns, prohibitions and sanctions.

As any element of an integrity programme, an ethical code should reflect the proper risks of the activity in which the company engages (financial, in this case), its dimension and economical capacity.

FSPs' integrity programmes should be respectful of the specific activity to be carried out by the FSP, whether it is a bank, a credit card company, an underwriter or a broker-dealer.

21 Law 27504 establishes that contributions 'must be made only through bank transfer, bank deposit accrediting identity, electronic mediums, bank cheques, credit or debit cards, or platforms and digital applications'.

22 Corporate Criminal Liability Act No. 27401 (footnote 4, above), Article 22.

23 id., at Article 23.

It is quite a common practice for the specific companies within a financial group to adopt the group's ethical code (as well as other elements of the group's integrity programmes).

Although this practice provides for the coherency of a group's ABC programme, one should avoid using an ethics code that is specific to one company as it is likely to be inadequate for another (a bank and a credit card company are not the same, even if they belong to the same group). Furthermore, an ethics code may not be sufficiently broad to be applicable to all companies in the group, given that it will lose effectiveness. If the latter approach is chosen, a complementary ethics code should be adopted in each company.

A similar situation may arise when trying to adapt the ABC programme of a foreign holding company to a local FSP. The reality of a foreign FSP (and risks) will never be the same as a local FSP –from something as simple as the exchange rate (e.g., a US$50 limit per permissible gift may not be much in Zurich but it will be an opulent gift in Argentina) to something as complex as the ability of terminating an employee agreement because of an ABC matter.

Wrongful adaptations may not only make an integrity programme ineffective but may also prevent the financial activity of the company, as it may turn out to be an obstacle (without technical justification).

The foregoing should not be interpreted as a rejection of the derivative work that is based on foreign ABC legislation, the most relevant being the FCPA. Argentine firms, lawmakers and attorneys have not only studied and used foreign legislation for technical purposes but the potential consequences from foreign authorities are also borne in mind at the time of designing and implementing integrity programmes.

Integrity in public tenders

Integrity in public tender process, and other interactions with the public sector, relates to specific rules and procedures to prevent corruption during bids, tenders, entering into contracts with the government and any other interaction with the public sector. No other element of an integrity programme is more often neglected in the financial industry. There is a general self-perception that an FSP's business (particularly in the case of banks) does not involve interaction with the public sector. State clients are generally not perceived as such, particularly in Argentina.

This phenomenon usually (but not only) appears in three lines of business: (1) credit agreements with state-owned companies; (2) payroll services for the benefit of state agencies and state-owned companies; and, perhaps the most neglected of all, (3) issuance of public debt bonds (mostly sub-sovereign debt).

These lines of business are usually simply regarded as corporate banking (particularly the first two); in fact, they belong to the general corporate banking department. Although general compliance rules and controls are usually applied (typically addressed to prevent private corruption), no particular rules for dealing with state-owned or state agencies are in place. It is quite common for banks to simply trust in the word of the state-owned company or agency in the sense that no particular procedure or tender is necessary.

But, perhaps, the riskiest line of business may be found with regard to dealing with public debt bonds, whatever the capacity of the bank (lender, underwriter, arranger, etc.). Bank

officials usually deal in informal terms and off-the-record meetings within a fast-paced environment. No public tender rules are usually complied with, regardless of how substantial the involved fees may be. Furthermore, these issuances are generally highly controversial (given their political nature) and often subject to very strict public and media scrutiny. They are therefore very risky from a reputational point of view. In that sense, because of the renegotiation of the sovereign public debt in the context of the Argentine crisis between 1998 and 2002 (known as *Megacanje*, in which a substantial part of the payment of the sovereign public debt was delayed in consideration of higher interest rates), many high-ranking public officials were indicted, including the then Minister of Economy and President. Furthermore, many high-ranking officers at both domestic and foreign banks were also implicated in the criminal case.[24]

The often used 'it is what it is' will not be held in a court of law or public opinion.

Because of the foregoing, very particular attention should be given to these interactions. However fast-paced they might be, a record should be made of every meeting and other interactions. Furthermore, all informal communications should be avoided (e.g., use of private messaging systems, such as WhatsApp). There is a tendency to believe that these types of communications should not be regarded as 'official business', a belief that should clearly be eradicated.

Training of directors, administrators and employees

The training of directors, administrators and employees is essential to create a culture of integrity. Members of the FSP and third parties should be prioritised according to risks, and training should be adapted to their needs, characteristics and the company's operational capacity, among other things.

In the case of FSPs, particular attention should be given to the different natures of AML and ABC measures. They may look the same but (needless to say) they are quite different. It is all too common, when assessing an FSP's compliance programme, for even senior officers to fail to see the need for ABC training, arguing that they have already been trained in AML matters.

It is also interesting to note that, all too often, the main (or sole) training given on ABC issues is focused principally on foreign legislation (the FCPA, UK Bribery Act, etc.). In some cases, that training is even provided by foreign law firms.

Regardless of the immense value of this type of training (mostly for those FSPs that may have liability in respect of that legislation), it is of the utmost importance to provide training specifically adapted and construed to the local reality, so as to provide an adequate defence. Moreover, with the enactment of the Corporate Criminal Liability Act and the Guidelines, any training should be primarily focused on local legislation and circumstances.

Finally, an important consideration is the general dispersion of an FSP's business in contrast with its management. Branches and offices are located through vast territories but decision-making processes are often centralised. It is of the utmost importance that

24 'Piden el procesamiento de Cavallo por el "megacanje"', Noticias Clarín (July 2006) <https://www.clarin.com/ultimo-momento/piden-procesamiento-cavallo-megacanje_0_SJtIEJAte.html>.

employees' and officers' training includes these distant branches and offices. A simple bribe made to a local police officer to keep a small distant branch under surveillance may have disastrous implications for the entire organisation.

Third-party due diligence

There is no need to highlight the importance of third-party due diligence to evidence the integrity and trajectory of third parties, business associates and intermediaries prior to contacting them or during the business relationship. In particular, consideration should be given to the broad liability that the Corporate Criminal Liability Act attributes for acts carried out in the name, interest or benefit of an undertaking.[25]

In the case of FSPs, the importance of this issue is no different, especially given the fact that FSPs are sometimes prevented by the applicable regulations from engaging in activities not related to their core financial activity.[26]

Periodic risk assessment

An adequate programme should be adjusted to the company's risks, dimension and economic capacity. Thus, according to the Guidelines, a periodic risk assessment is essential to ensure the adequacy of the programme.

It is particularly true in the case of fintechs, but no less true for general FSPs, that financial business is always evolving. New technologies and, consequently, more regulations are created each day. As an FSP's business evolves and its internal organisation changes, a periodic risk assessment becomes more and more necessary.

Tone from the top

The commitment of top management to the programme should be 'visible and unequivocal', as the Corporate Criminal Liability Act and the Guidelines provide.

As has been mentioned, FSPs are highly regulated activities. Although the technical aspects of the regulations are usually carried out by mid-level officers, high-level officers (particularly those at large banks) are usually in direct contact with high-level public officers (e.g., the head of the Central Bank and the Secretary of Finance). It is quite usual to have both a consultancy and a lobbying activity, typically with other major banks.

Although it is difficult to refrain from these types of interactions (which, in general, are compliant with the law), the high profile of the people involved creates a major risk. Therefore, clear, written records of any interaction should be kept; if this is not possible, the interaction should be avoided.

In clear relation to the above notion, the Corporate Criminal Liability Act takes this aspect into consideration and provides the ranking of the officer or employee involved in the bribery action to graduate the entity's criminal sanction.[27]

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25 Corporate Criminal Liability Act No. 27401 (footnote 4, above), Article 2.

26 Central Bank's Regulation of Ancillary Services to the Financial Activity and Permitted Activities.

27 Corporate Criminal Liability Act No. 27401 (footnote 4, above), Article 8.

Internal investigations

According to the Guidelines, it is essential to have an investigation protocol approved by the governing body to detect and mitigate risks, and to justify sanctions for violations.

In the case of FSPs, there is one investigative particularity that should be taken into consideration: an FSP (particularly a bank) has the ability to easily access a very important (and private) part of an employee's life, namely a bank account (employees are often clients of the bank in which they work).

Although hard to believe, we have found that many employees in charge of internal investigations were not aware of the many serious implications of accessing these records for such a purpose. Not only may they be severely punished by privacy and bank secrecy laws, but also any product of the investigation would be deemed useless in a judicial or administrative case.

Internal officer

For large companies, the Guidelines suggest having an individual or even a team specifically for the function of developing and monitoring the programme. In smaller companies, this function can be assumed by a member of the company that has other duties.

In the case of FSPs, a very common query is whether the compliance officer's role may be taken by the AML officer. Although the particular circumstances of the FSP should be taken into consideration, we believe that it is not advisable to concentrate both these activities in just one person (regardless of the subordinates the individual may have). Although we are of the opinion that both functions may be under the same direction, there should be a specific manager for ABC issues and another for AML issues. That does not mean that both departments would not be able to share common efforts, within the limits and confidentiality requirements provided by AML regulations. In fact, it is highly advisable that they do. In that sense, many of the databases and investigations resources used for AML tasks may be used in ABC efforts.

Compliance with relevant regulatory requirements

In a highly regulated activity such as finance, it is quite common that, in addition to specific ABC and AML regulators, activity-specific regulators often have their own set of AML or ABC guidelines, rules and procedures.

It is important that an FSP's internal organisation allows the involvement of the compliance department in any interaction with the regulator that may involve any kind of AML or ABC issue, even if carried out by a completely unrelated department.

Risk management systems

It is important to highlight how ISO Standard 37001 (on anti-bribery management systems) has affected FSPs.

First, banks willing to comply with ISO 37001 are required to implement specific anti-bribery management systems.

In many countries, some banks seek to obtain ISO 37001 certification. For instance, in 2017, Crédit Agricole Group was the first French bank to obtain this certification.[28] Banco del Pacífico was the first financial entity to obtain ISO 37001 certification in Ecuador, in 2019.[29]

Although there are Argentine companies[30] and state bodies[31] certified under the rules, as at January 2020, no Argentine bank has obtained ISO 37001 certification.

Conclusions

Argentina has taken its first steps towards the implementation of adequate ABC laws and regulations. The Argentine financial industry has also done so. Although it is difficult to assess any progress at this early stage, key decision makers are increasingly showing an interest in allocating resources to comprehensive integrity programmes. This investment is not only a matter of funds. High-level officers are increasingly willing to go the extra mile with ABC efforts and considerations.

Any efforts towards strengthening the ABC measures is more than justified. Throughout Argentina's recent political and economic history, financial entities (particularly those of foreign capitals) have been the target of investigations, accusations and criminal procedures, especially in respect of their role in sovereign debt. Whether those (mostly politically based) accusations are justified or not, financial entities need to be especially careful, not only because of the recent political history, but also the evolution of both foreign and domestic legislation on the matter.

28 'Crédit Agricole Group, 1st French bank to obtain ISO 37001 certification', Caceis Investor Services (October 2017) <https://www.caceis.com/de/medien/news/aktualitaet/article/credit-agricole-group-1st-french-bank-to-obtain-iso-37001-certification/detail.html>.

29 'Banco del Pacífico es la primera institución financiera con certificación de Gestión Antisoborno', Banco del Pacífico (December 2019) <https://bancopacificoprensa.ec/banco-del-pacifico-es-la-primera-institucion-financiera-con-certificacion-de-gestion-antisoborno/>.

30 Krom, Andrés,'Una empresa argentina se convirtió en la primera en sacar un certificado anticorrupción en la región', La Nación (July 2018) <https://www.lanacion.com.ar/economia/reconocieron-a-edesur-por-sus-politicas-antisoborno-nid2150563>.

31 'Normas anticorrupción, transparencia y reputación de las empresas: debate de expertos en un Congreso Internacional de Compliance en Morón', Infobae (September 2019) <https://www.infobae.com/sociedad/2019/09/21/normas-anticorrupcion-transparencia-y-reputacion-de-las-empresas-debate-de-expertos-en-un-congreso-internacional-de-compliance-en-moron>.

Appendix 1

About the Authors

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Maximiliano D'Auro is a partner at Beccar Varela. He joined the firm in 2000 and is a member of the executive committee and heads the anti-corruption and compliance department.

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Gustavo specialises in corporate advice, banking and financial institutions, anti-corruption and compliance. He also has extensive experience in advising on distribution and franchising agreements, and on private international law matters.

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The guide delivers specialist insight to our readers – general counsel, compliance officers, government agencies and private practitioners – who must navigate the region's complex, fast-changing framework of rules and regulations.

In preparing this guide, we have been working with practitioners from a variety of disciplines and geographies, who have contributed a wealth of knowledge and experience. We are grateful for their cooperation and insight.

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