

Latin America gets ready to legislate against business corruption.

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Latin America has taken an important step forward in the fight against corruption in the business environment, and in the economy in general, by enacting specific laws applied to those private companies whose corruption practices might involve national and foreign public officials.

Examples of such practices are those cited below:

- **Promising, offering, or giving an improper advantage**, directly or indirectly, to a national or foreign public official.
- **Committing fraud** during a public tendering procedure.
- **Eliminating** a proposal from a tender, etc.
- Financing, sponsoring or **subsidizing unlawful acts**.
- Obstructing an **investigation** on governmental entities or officials.
- Creating entities in a fraudulent manner in order to participate in public tenders.

In this sense, Chile, by means of the Law 20.393, and Brazil, with Law 12.846, has generated a strong regulation that sets the course for other Latin American legislations to follow. Because of this example, in countries such as Argentina, a draft law to be issued in June 2017, is

being prepared, regarding legal persons' criminal responsibility.

The model that Chile has implemented seems to be of more interest due to its conception of a state that rewards those companies that implement internal controls to detect acts of corruption and against public administration.

The trans-Andean countries have even developed a model of certification for this law allowing companies to externalize the existence of given controls, as well as the degree of responsibility they have adopted in regard to the legal norm.

Brazil's model is different, given the strong penalties that are applied to those companies involved in this type of cases, and that are regulated from **0.1% to 20% of the company's annual turnover** of the last financial year, before the beginning of the administrative proceedings, and even the possibility of applying **direct fines, from R\$ 6,000 to R\$60,000**, if the turnover of the company involved is not possible to determine.

It also establishes that the company may stop receiving incentives, loans, subsidies granted by state entities for a period of 5 (five) years, if it is found that it has participated in any of the listed offences.

An interesting point in this regulation is the possibility of reducing the fines if the company has implemented internal controls geared toward preventing and detecting this type of activities, among the following may be highlighted:

- Confidential **Reporting Hotlines or Ethics hotlines**, for employees or related third parties to be able to report these activities in a secure and anonymous fashion.
- Clear **codes of conduct** and internal policies that reflect the company's predisposition regarding this type of activities and the penalties associated with them.
- Periodic **audits** on the company's current practices, with a strong focus on the detection of illicit activities in those lines of business that are the most affected, or that face a higher risk.
- **Staff training** addressing these aspects, the applicable legislation, and the internal control measures that, in this respect, the company is undertaking.

In Argentina, the model is merely incipient, although in 2011 –given the possibility of being included in the “grey” list of countries lacking legislation on the matter of money laundering– a series of norms have been implemented, encouraging companies to develop programs and internal control schemes in order to detect eventual money laundering maneuvers. Furthermore, this coming June, the Congress will study a norm of compliance regarding legal persons' responsibility, as that mentioned in the cases of Chile and Brazil.

It is interesting how, in each of these schemes, the so-called Ethics Hotlines or Reporting Hotlines are established as a common control that canvases them from top to bottom, due to these tools' capacity to identify situations that are scarcely or never detected through other routine controls.

In this sense, it is worth highlighting the importance that American incipient legislation has given to this control tool (Reporting Hotline), which has now turned out to be highly effective as private and public controls.

In Colombia's case, Law 1778 was issued on February 2, 2016, the first law to have an actual scope regarding the administrative penalization of legal persons eventually involved in acts of transnational bribery. The issuance of this Law is one of Colombia's first expressions of commitment, after its approval of the OECD's Convention on Combating Bribery of Foreign Public Official in International Business Transactions, in 2012.

Prior to the adoption of Law 1778, Colombia had no regulation with the necessary tools to penalize those legal persons that "through one or several: employees, contractors, administrators or partners of their own, or of any other subordinate legal person, may directly, or indirectly, give, offer or promise a foreign public official: sums of money, any object with pecuniary value or other benefit or utility, for such foreign official to do, omit, or delay any action related to the exercise of his/her functions and in regard to an international business or transaction."¹

This Law focuses on the party offering the bribe and establishes a series of

sanctions, the severity of which has no precedents in Colombia's legislation. Thus, the Superintendency of Corporations (Spanish: *Superintendencia de Sociedades*) may impose one or several fines of up to COP\$ 138 billion (200 current legal minimum monthly wages), the inability to sign contracts with the state for up to 20 years, the publication of the penalty in the media, and the prohibition on receiving state incentives for five years. The Law's penalizing capacity goes further still: if a penalized company is taken over, merged or becomes partners with another company, the parent company will also be subject to sanction. And if the sanctioned company secedes, all its parties shall be jointly penalized.

It also includes a series of extenuating circumstances that must be carefully studied by any organization subject to this Law, in order to protect itself, from the outset, against any related eventuality. This includes the implementation of effective transparency and business ethics programs or anti-corruption mechanisms, and to have undertaken adequate due diligence processes. With regard to the implementation of transparency and business ethics programs, the Superintendency of Corporations established a set of criteria, in accordance with paragraph 2, Article 23 of Law 1778, which explicitly mentions media channels that may "allow Employees, Associates, Contractors, and related individuals, as well as any person that may have knowledge of an act of Transnational Bribery, or other corruption practices related to the legal person, the possibility of confidentially reporting infractions against the Anti-Bribery Law and the Business Ethics Program.

Some of the procedures recommended by the Superintendency of Corporations are to habilitate anonymous reporting hotlines and to take measures in order to avoid reprisals from Legal Persons involved against complainants or from reported employees who may have offered them to participate in irregular conducts.

We believe that, through these measures, Latin America will take a step forward toward transparency, business best practices, and the eradication of corruption, which has greatly affected the region's development.

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¹ Article 2 of Law 1778 of 2016.



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