

SHIFTING THE INCENTIVES FOR PREVENTING CORRUPTION IN ARGENTINA



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Argentina is on the verge of redefining the role of the private sector with regard to corruption. A new bill aims to introduce a new criminal liability framework for legal entities concerning corruption-related offenses and will soon be sent from the Executive Branch to the National Parliament. This new system seeks to modify the incentives for the private sector regarding their relationship with the state. Up to now it has been ruled by schemes that – instead of promoting – further inhibit the establishment of a culture of integrity and cooperation with public authorities.

In Argentina, investigations of public-private corruption affairs often clash with “silence pacts”, which are secured by institutional arrangements, distancing corruption crimes from those who make decisions in the company. These silence pacts often come to the aid of the defendant charged with a corruption-related offense in criminal prosecutions. Defendants benefit, for example, from the concealment of relevant information or the payment of defense lawyers' fees. The outcome of such a system is not surprising: sanctions are imposed in only three percent of all initiated investigations; they are typically issued against public officials – and not against their corporate counterparts. As a result, most companies see preventive efforts as an unnecessary cost.

The proposed legislative changes seek to shift this structure of incentives, not only by making companies legally liable but also by rewarding those enterprises that genuinely prevent corruption through compliance programs and cooperation with the authorities when facing an investigation.

Once the bill has been successfully passed, Argentina will join other countries in the region that have provided prosecutors and judges (as in Chile and

Peru) or administrative bodies (such as in Brazil and Colombia) with sanction powers to open investigations, prosecute corruption crimes and sanction not only involved individuals but also their companies. This wave of legislative reforms is taking place on the impulse of the Organization for Economic Co-operation and Development (OECD) in view of the lack of deterrence generated by legal systems that only target individuals.

Argentina is the only member of the OECD's Convention on Combating Bribery of Foreign Public Officials that still does not sanction companies for corruption. The proposed bill takes into account the experiences of neighboring countries, including the establishment of specific criteria to determine whether preventive programs implemented by companies are adequate or exist merely on paper. The current American debates on how to evaluate a compliance program have been adequately transferred to the Argentinean context in order to enrich the local discussions with the private sector.

The bill also seeks to incentivize private sector cooperation in the investigation of corruption crimes through "leniency agreements", e.g. the sharing of relevant information for the collection of evidence and identification of individuals involved in exchange for reductions in fines and potential suspension of the prosecution

process. Achieving greater public-private cooperation is a major objective that the bill will help to reach. This would constitute a major improvement, considering the scant tradition of such cooperation in Argentina as well as the strong, mutual suspicion and lack of trust that have pervaded relations between the public and the private sector in recent years.

The introduction of a new system of corporate criminal liability for corruption will level the playing field between both domestic and multinational companies operating in Argentina. The multinationals are, for the most part, obliged to adhere to international regulations, but often adapt them to the local environment. This, in many cases, forces them to lower their standards in order to be able to compete with their national competitors, which up to now are not subject to the same international regulations.

Without doubt, this new bill will promote changes in the medium and long term that will help shape a better business environment for all participant market actors, fostering a sustainable culture of transparency and integrity.

By Fernando Basch and Guillermo Jorge

Fernando Basch and Guillermo Jorge were co-authors of the drafted bill on criminal corporate liability referred to in this Compliance Bulletin.

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