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NEW LEGISLATION

Act on Criminal Liability of Legal Entities
for Crimes Committed against the Public Administration and Transnational Bribery

Introduction

The Republic of Argentina has ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and since 2003, after the enactment of the Act No. 25,825, the Criminal Code criminalises domestic and foreign bribery (Section 258 *bis*).

Nevertheless, the OECD remarked on several occasions that the Republic of Argentina has not adopted legislation to ensure that legal entities can be held liable for domestic and foreign bribery. The Act responds to the requirement of Section 2 of the OECD Convention establishing the responsibility of the legal entities for the bribery of a foreign public official and provides Argentina with a regulation that brings our country closer to the standards incorporated for combating corruption in the current legislation of many countries, such as Brazil, Germany, the United Kingdom and the United States.

I. Crimes contemplated in the Act.

The Act provides that the legal entities will be responsible for the following crimes:

(a) Bribery and influence peddling, domestic or foreign (Sections 258 and 258 *bis* of the Criminal Code);
(b) Negotiations incompatible with public office (Section 265 of the Criminal Code);
(c) Concussion (illegal exactions) (Section 268 of the Criminal Code);
(d) Illicit enrichment of officials and employees (Sections 268 (1) and (2) of the Criminal Code);
(e) False aggravated financial statements and reports (Section 300 *bis* of the Criminal Code).

II. Sanctions Regime.

The sanctions contemplated under the Act include:

1. Fines between two (2) and five (5) times the amount of the benefit illegally obtained or that could have been obtained;
2. Total or partial suspension of business operations for a term of up to ten (10) years;
3. Suspension to participate in public tenders or bids for public works or services or in any other activity involving the public sector, for a term of up to ten (10) years;
4. Dissolution and liquidation of the legal entity when it was formed for the sole purpose of committing the crime, or the commission of these acts constitutes the legal entity's main activity;
5. Loss or suspension of any government benefits that the legal entity might have;
6. The publication of a summary of the conviction sentence at the expense of the legal entity.

To determine the scope of the sanctions, judges will take into account (i) non-compliance with the internal rules and procedures of the legal entity, (ii) the number and hierarchy of the officials, employees and collaborators involved in the crime, (iii) the omission of surveillance over the activity of the perpetrators and participants of the crime, (iv) the extent of the damage caused, the amount of money involved in the commission of the crime and the size, nature and economic capacity of the legal entity, (v) the legal entity's voluntary self-disclosure of the crime to the authorities as a consequence of an internal investigation, (vi) the subsequent behaviour, (vii) the willingness to mitigate or repair the damage and the recidivism. The legal entity shall be exempted from liability when simultaneously the following three conditions are met (i) it has voluntarily disclosed the crime to the authorities as a result of an internal investigation, (ii) it has implemented a compliance programme prior to the crime and (iii) it has reimbursed the illegally obtained benefit.

III. Compliance Programme.

The Act provides that the legal entities may adopt a compliance programme to prevent, detect and punish unlawful acts or crimes that may occur or that may be committed during the course of business. The compliance programme is of critical importance for legal entities since (i) it is one of the three essential conditions for the legal entity to be exempted from liability; (ii) it is a mandatory condition for the legal entity to enter into contracts with the public sector and (iii) it is a mitigating factor at the time of assessing the scope of the sanctions by the authorities.

According to the provisions of Sections 22 and 23 of the Act, the compliance programme shall be aligned with the risks inherent to the legal entity's activity and shall be consistent with its size and economic capacity. Therefore, it is particularly recommended for the program to be designed intelligently, avoiding insufficient or excessive regulations.

In accordance with the above-mentioned sections, the program must contain, at least, the following:

a) a code of ethics or conduct, or compliance policies and procedures applicable to all directors, managers and employees, regardless of their position or function, that guide the planning and performance of their tasks in order to prevent the crimes contemplated under the Act;
b) the implementation of special procedures to prevent violations in connection with contracts entered into with the public sector;
c) periodic training on the compliance programme for directors, managers, employees and third parties or business partners.

Additionally, the following actions may be adopted as mitigating factors:

d) periodic analysis of risks and the subsequent amendment of the compliance programme;
e) unequivocal support to the compliance program by the legal entity's senior executives and management;
f) existence of internal channels for reporting irregularities, open to third parties and properly communicated;
g) appropriate whistleblower protection policy against retaliations;
h) an internal investigation system that protects the rights of those individuals under investigation and imposes effective sanctions on violations of the code of ethics or conduct;

i) the implementation of procedures to verify the integrity and reputation of third parties or business partners, including suppliers, distributors, service providers, agents and intermediaries, at the time of retaining their services in the course of the business relationship with the legal entity (known regularly as "*due diligence*");
j) due diligence procedures applicable to corporate mergers, transformation and acquisitions, to verify the existence of irregularities, of unlawful acts or of the existence of vulnerabilities in the legal entities involved;
k) monitoring and continuing assessment of the compliance programme's effectiveness;
l) appointment of an internal individual in charge of the development, coordination and supervision of the compliance programme;
m) compliance with the regulatory requirements regarding the programme as issued by the respective national, provincial, municipal or communal authorities that rule the activity of the legal entity.

The characteristics of the prevention programme described above do not vary substantially from those reflected in international trends and the criteria that multinational companies -subject to rules such as the U.S. Foreign Corrupt Practices Act or the UK Bribery Act- have adopted in recent years.

IV. Leniency Agreement.

Before being summoned to a judicial process, legal entities may enter into a leniency agreement with the Attorney General's Office by means of which the legal entity commits to provide accurate, complete and verifiable information for the clarification of the facts, identification of the individuals and legal entities that participated in the crime, or the reimbursement of the proceeds of the crime as well as the fulfilment of the following conditions, among other:

a) payment of a fine equal to half of the minimum fine applicable under section 7, subparagraph 1 of the Act (that is to say, the illegally obtained benefit or that which could have been obtained);
b) restitution of the goods or reimbursement of proceeds resulting from the crime; and
c) delivery to the Government, of the goods that would potentially be seized in the event of judicial sentence/judgment.

Additionally, the Act provides that the following conditions may be established, without prejudice to others that may be agreed upon based on the circumstances of the particular case:

d) taking necessary actions to remediate or repair the damage which was caused;
e) provision of a public service to the community;
f) imposition of disciplinary sanctions to the individuals involved in the crime;
g) implementing a compliance programme in the terms of sections 22 and 23 of the Act, or improving or amending a pre-existing programme.

The information provided in the framework of the investigation for the execution of the agreement will be confidential and the judge may accept or reject the leniency agreement. If approved, the judge or the public prosecutor will verify compliance of the leniency agreement by the legal entity.

V. Transnational bribery. Expanded jurisdiction.

One of the essential changes introduced by the Act is the modification of Section 1 of the Argentine Criminal Code, which expressly incorporates Argentine judges' jurisdiction to punish the crime of transnational bribery "*committed abroad by Argentine citizens or legal entities domiciled in the Argentine Republic …*". Consequently, the crime can now be prosecuted by Argentine judges even when it was committed in a foreign country.

It is therefore important for legal entities to have adequate knowledge and control over their employees', intermediaries', agents' or representatives' activity even when their appointment or the provision of services will be performed overseas, in particular, if the same will represent or otherwise act on behalf of the legal entity before public officials.

VI. Other provisions of the Act.

The Act provides that the "*Registro Nacional de Reincidencia*" (Argentine National Recidivism Registry) shall record the conviction sentences imposed on legal entities with respect to the crimes contemplated under the Act.