THE INTERNATIONAL INVESTIGATIONS REVIEW

NINTH EDITION

Editor
Nicolas Bourtin

THE LAWREVIEWS

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PREFACE

In the United States, it is a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike have faced increasing scrutiny by US authorities for several years, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in the past many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice has increasingly sought and obtained guilty pleas from corporate defendants. While the new presidential administration in 2017 brought uncertainty about certain enforcement priorities, and while US authorities in 2018 announced policy modifications intended to clarify or rationalise the process of resolving corporate investigations, the trend towards more enforcement and harsher penalties has continued.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a

realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its ninth edition, this publication covers 25 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
June 2019

Chapter 10

CHILE

Jorge Bofill and Daniel Praetorius[1]

I INTRODUCTION

There is no overarching regulation of the investigations and proceedings dealing with the regulation and punishment of companies but there is a multiplicity of proceedings and ad hoc configurations for each enforcement agency. An immediate consequence of this is the frequent duplication of enquiries and sanctions from agencies of the same or a broadly similar nature.

In Chile, infringements defined as 'crimes' by law are dealt by the Public Prosecutor's Office, the agency that handles investigation and prosecution before criminal courts. As a principle, legal liability is strictly individual and is not applicable to collective structures such as companies, but to natural persons who have participated in the infringement. Nonetheless, an exception to the *societas delinquere non potest* principle was introduced in 2009 with the enactment of Law No. 20,393, which established for the first time in Chile the criminal liability of legal persons for a limited number of crimes, such as bribery, money laundering and the financing of terrorism, among others. There has been an ongoing trend towards expanding the list of crimes that may give rise to the criminal liability of companies.

Alternatively, a heterogeneous range of non-criminal infringements can be found in different laws that entrust enforcement to diverse special agencies. In this group, it is relatively common for the respective agency to be entitled not only to investigate but also to impose sanctions. In contrast with criminal procedures, the civil agencies are also generally entitled to prosecute and sanction legal persons as well as individuals. These entities are usually designated as superintendencies and form part of the government (unlike the Public Prosecutor's Office, which is an autonomous entity that does not depend on the government).

Among the most relevant active agencies in recent years are the Financial Market Commission, the Internal Revenue Service in taxation issues, the National Economic Prosecutor, along with the Court for the Defence of Free Competition in antitrust matters and the Environment Agency and the environmental courts.

All these agencies are subject to different statutes and proceedings when it comes to investigating and sanctioning infringements to the laws for the areas in which they have authority; they also have different investigation powers.

In recent years, there has been a trend to broaden special powers available to some of these agencies, as their powers have been insufficient in certain cases and are limited when compared to those available to the Public Prosecutor's Office. For example, special powers were granted in 2009 by means of Law No. 20,361 to the National Economic Prosecutor,

1 Jorge Bofill and Daniel Praetorius are founding partners of Bofill Escobar Silva Abogados.

which has the authority, upon court approval, to execute dawn raids, seize goods and wiretap conversations. The Financial Market Commission, which replaced the Superintendency of Securities and Insurance and the Superintendency of Banks and Financial Institutions, introduced new and broader investigation powers in 2018, similar to those available to the National Economic Prosecutor, including the ability to request that bank secrecy is lifted.

Prosecution of crimes is, in general, not influenced by political agendas or domestic priorities. This is mainly due to the fact that, as already mentioned, the Public Prosecutor's Office is an autonomous entity independent of the government. Furthermore, the National Public Prosecutor is elected by the executive, legislative and judicial branches of the state. Agencies in charge of civil enforcement have different relationships with the government, but as they have less autonomy than the Public Prosecutor's Office, they are more vulnerable to political influence.

An interesting phenomenon regarding investigations of corporate conduct is the assumption that – particularly in certain areas – for the system to be more efficient, suspects must collaborate with agencies and find a quick remedy to the generated conflict. Evidently, as there is no legal obligation to actively collaborate, this is only relevant when the suspects have incentives to collaborate such as exemption from, or at least mitigation of, sanctions. Instruments such as leniency programmes, self-reporting and implementation of internal compliance programmes may be seen as forms of cooperation with the authorities, with underlying incentives.

The system developing from the new laws has also allowed the emergence of a broader scope for the development of efficient rights and possible judicial defences.

Individuals who are targets of prosecution by the administrative authorities or the public prosecutor have many options, not only to prove their innocence but also to find an agreed solution to the conflict.

II CONDUCT

i Self-reporting

No clear guidelines exist as to the approach that corporations should take in response to illegal or criminal behaviour. There are only a few special regulations in some areas that establish certain reporting duties.[2]

As a result, it cannot be stated that, as a general rule, corporations are compelled to report activities that may be prosecutable by state agencies. Nevertheless, the judicial and legal systems are gradually providing incentives to encourage self-reporting as part of internal corporate policies. The incentives basically consist of exemption from liabilities or leniency regarding sanctions.

One example of regulations that contain incentives to encourage self-reporting can be found in Law No. 20,393, which establishes criminal liability of legal entities. According to this law, self-reporting may constitute a mitigating circumstance if it is performed by the legal representatives of the company before prosecution is initiated. The law also allows the public prosecutor to enter into deferred prosecution agreements with legal entities, where the

2 For example, in the context of money laundering, certain individuals are obliged to give notice to the authorities; however, this obligation does not apply to events occurring inside the company, but rather those performed by third parties.

prosecution is suspended and eventually dropped if the defendant agrees to submit itself to certain conditions, such as the payment of a certain sum of money or to provide a particular service to the community.

In the field of antitrust enforcement, Chilean law considers leniency mechanisms in cases of collusion, by means of which the party coming forward can apply for a reduction and even an exemption of administrative and criminal sanctions when certain conditions are met,[3] such as the immediate cessation of the illegal conduct and the submission of reliable and useful information that can be used by the National Economic Prosecutor's Office as sufficient proof to file a claim before the Court for the Defence of Free Competition. A total exemption from administrative and criminal penalties is only available to the first involved party submitting its application for leniency.

The National Economic Prosecutor performs the assessment of leniency mechanisms in accordance with a procedure outlined in the Internal Guidelines on Leniency in Cartel Cases, published in March 2017, which aims to provide legal certainty to whoever wishes to obtain leniency benefits and to limit the authority's discretion when assessing any proposals for leniency.

In environmental matters, the applicable legislation establishes benefits to encourage self-reporting, consisting of the reduction of or an exemption from applicable fines, subject to certain conditions, among them to propose and fulfil a programme to mitigate or eliminate the environmental adverse effects of the activities of the business that are in violation of environmental regulations.

Customs laws also encourage self-reporting, which, in respect of certain infringements and provided that all customs duties are paid, exempts the offender from the initiation of an administrative enforcement proceeding.

The Tax Authority has also encouraged and issued special rules for self-reporting in certain specific circumstances.

Law No. 21,000, which in 2017 created the new Financial Market Commission, foresees a leniency mechanism similar to the one that exists for cartel cases. According to this mechanism, self-reporting of infringements to securities regulations implies a reduction of up to 100 per cent of the applicable fine. The first person coming forward may benefit from a reduction of up to 100 per cent of the applicable fine in cases where more than one offender is involved, and up to 80 per cent when he or she is the sole responsible person. Subsequent offenders may only benefit from a reduction of up to 30 per cent of the applicable fine, provided they deliver important additional information on the case. As violations to securities regulations may not only be subject to civil enforcement by the securities supervisory authority in certain cases, but also to criminal enforcement by the Public Prosecutors' Office, the law also provides for mitigation from criminal liability, which is only available for the first person self-reporting an infringement that also constitutes a crime. Exceptionally, the law provides an exemption from criminal responsibility if the information provided by the defendant allows specific felonies contemplated in the Law on the Securities Market to be revealed or discovered.

3 In 2016, collusion was reinstated as a crime by means of Law No. 20,945. This conduct can, therefore, also be prosecuted by the Public Prosecutor's Office if the National Economic Prosecutor files a criminal complaint after the administrative case has ended with the imposition of a sanction.

ii Internal investigations

Despite the development of internal investigations in terms of enforcement and judicial practice, the practice has not become widespread in Chile. The lack of legal culture in this area and the absence of precedents as to the confidentiality of findings, as well as whether they are covered by professional privilege, have led in several cases to agencies and prosecutors seizing documents produced within the scope of internal investigations. Although internal investigations conducted by outside legal counsel should be protected by privilege, it is not unusual for companies to conduct investigations internally rather than seeking assistance from outside counsel. In the absence of clear legal rules, it is arguable whether privilege covers the activities of other internal personnel, such as auditors or compliance officers. Until case law clarifies the extent of privilege in Chile, internal investigations would perhaps be better conducted by lawyers – preferably third parties – to improve protection of the confidentiality of the investigation and its findings.

Within the scope of these investigations, statements from the individuals directly involved are usually essential; however, it is important to stress that these statements must be given voluntarily by the persons involved, as they are not obliged to cooperate or submit evidence. Therefore, any participation in interviews or handing over of information must be done freely, and with the understanding that the investigation is for the benefit of the company, not for the personal defence of the individuals being interviewed or providing the information, unless the lawyer also assumes the personal defence of this person. To avoid future conflicts of interest, it should be made clear that all the information that the interviewee may provide will belong to the client (the company) and will be privileged for its exclusive benefit.

The gathering of publicly accessible documents belonging to a company must be differentiated from documents that fall under the control or possession of a company's employee. This is particularly the case when documents or files are stored in individuals' email accounts or computers assigned to them in the normal course of business. At least in principle, emails or documents contained within databases – even when the hard drives belong to the company – may not be accessed by the company or its counsel without the individual's consent. Furthermore, it is possible that accessing such documents without the holder's consent may expose investigators to criminal liability. However, in a recent decision, Chilean superior courts ruled that an employer who reviewed the institutional emails of a worker, stored on a computer owned by that employer, once the worker left the company, did not commit an unlawful act, since there was a suspicion of irregular behaviour of the worker and the company reviewed the emails with the purpose of protecting business data of obligatory reserve.

Finally, companies need not share or submit the results of internal investigations to the state agencies, especially when the investigation has been conducted by outside counsel and is privileged; however, the provision of such records may justify the mitigation of an eventual sanction, especially in the context of Law No. 20,393 (the Corporate Criminal Liability Act), which recognises the amelioration of possible sanctions if the company under scrutiny improves its internal systems and compliance rules.

iii Whistle-blowers

In the absence of almost any legal regulation, whistle-blowing is so far not a relevant issue in Chilean legal practice. Of course, it is not uncommon that in the context of enforcement actions and especially of criminal prosecution, individuals who are targets of investigations

may decide to cooperate with the enforcement agency or the prosecutor to obtain more lenient treatment of their own cases. The Criminal Procedural Law allows prosecutors to enter into agreements with defendants in criminal cases, where these agreements are normally approved by the relevant criminal court. However, rather than a specific policy promoting whistle-blowing as part of the enforcement activity against corporations, this is a general statute applicable to, in principle, all criminal cases of any nature. In fact, the only limitation on these settlements is determined by law for cases where the possible sanction on the defendant exceeds five years in prison in the event of conviction.

Recently, in an effort to improve enforcement in anti-corruption cases, Law No. 21,121 introduced some specific incentives for defendants to cooperate with criminal investigations. Individuals who effectively cooperate and provide information that substantially contributes to the clarification of the investigated facts, or serves to prevent the perpetration of a crime or facilitate the confiscation of assets derived from the crime, may be rewarded with the consideration of a mitigating circumstance.

There are no legal provisions, at least for the private sector, to protect whistle-blowers from retaliation, so the response of a company confronted with whistle-blowing by an employee will depend on its internal policies. However, since the implementation of compliance programmes has been increasingly growing in recent years, at least in large – particularly multinational – companies, it has become more common for companies to have specific whistle-blowing policies.

In the public sector, Law No. 20,205[4] introduced certain provisions aiming to protect whistle-blowers who hold a public office when reporting crimes or administrative infringements to the competent authorities. However, these provisions are very limited as they only refer to certain public officers and only consider suspension of the ability to apply certain disciplinary measures against such persons for a period of up to 90 days after the investigation initiated by the report of the whistle-blower has ended. The whistle-blower may request that his or her identity and the information that he or she provides are kept confidential.

III ENFORCEMENT

i Corporate liability

Corporations are generally only liable for their acts within the civil and administrative spheres. Exceptionally, they are also criminally liable when they are involved in specific acts.

The civil liability of legal entities arising from acts committed by their employees is fully recognised in civil legislation.[5] To enforce the aforementioned, the following conditions must be fulfilled:

a in the course of committing an illegal act, harm has been inflicted on a third party;
b there is a direct cause and effect relation between the individual's behaviour and the damage; and
c the damage is attributable to the negligence or intent of the agent.

4 Law No. 20,205 of 24 July 2007, named 'Protection to the public official who denounces irregularities and faults to the probity principle'.

5 Article 2314 et seq. of the Civil Code, particularly Article 2320.

The damage committed by the agent is attributable to the organisation of which he or she is an employee if the harm might have been prevented by the organisation had it carried out the expected level of diligence; the specific 'degree' of diligence that would release the organisation from liability is a matter of judicial interpretation, but there is a good chance that proper implementation of mechanisms to prevent illegal acts may lead to exemption from liability.

The administrative system of liability of legal entities is simpler. Given that the regulation specifically applies to corporations, they may be held liable. Thus, companies are subject to the sanctions that the legislation provides without requiring discussion on how the acts of the employees compromise the liability of the respective legal entities.

In connection with criminal liability, since Law No. 20,393 on Criminal Liability of Legal Entities entered into force in 2009, companies can be held criminally liable in connection with certain illegal acts committed by their agents. Hence, corporations may be investigated by the public prosecutor and be criminally sanctioned provided that:

a the illegal conduct consists of certain specific crimes defined by law;

b the illegal act is carried out by an owner, controller, representative, key officer or any person conducting managerial or supervisory functions in the company or by individuals working under the direct supervision of any of the aforementioned persons;

c the act has been performed for the direct benefit or interests of the company; and

d the behaviour of the agent or representative occurred because of a defect or failure in the company's mechanisms of control and supervision.

In connection with the criterion mentioned in (a), criminal liability of legal entities is restricted to certain offences committed by their agents. As a consequence, the possibility of enforcing this kind of liability is rather limited, but there has been a trend in recent years towards broadening the scope of predicate offences that may give rise to this kind of liability, which is expected to continue.

After a three-year discussion in Congress, Law No. 21,121 expanded the range of crimes for which legal persons are liable and increased the penalties to which they are exposed in the case of committing a crime. The new set of crimes applicable to legal persons include the offence of disloyal management, commercial bribery, unlawful negotiation and misappropriation. The first two are completely new to the Chilean Criminal Code, even for natural persons. Therefore, legal entities are now forced to incorporate new standards of control and probity to avoid criminal prosecution.

One offence that may trigger the criminal liability of legal persons is bribery. Under Chilean law, any individual is punishable for bribery when offering or consenting to offer any kind of benefit different to that which public officials are entitled to according to their position. Bribery of an international foreign official may also trigger criminal liability of a legal entity when committed by one of its agents. Commercial bribery, as stated beforehand, has only recently been established as a crime with the enactment of Law No. 21,121. The new figure sanctions the conduct of an employee or agent requesting, accepting, offering or giving a bribe to favour one party over another for entering into an agreement.

Another crime that may trigger the criminal liability of a legal entity is money laundering. The individual to be sanctioned is the person who in any way hides or conceals the illicit origin of specific goods, knowing that they come, directly or indirectly, from the

commission of other specific offences;[6] or acquires, owns or uses the aforementioned goods for the purpose of profit, being aware, on their receipt, of their illicit origin. This offence is also punishable when committed with inexcusable negligence.

The third offence that may trigger the criminal liability of legal entities is the financing of terrorism; Chilean law punishes those who, by any means, directly or indirectly, request, collect or supply funds for the purpose of committing terrorist offences.

The fourth felony is the one known as *receptación*. Chilean law punishes an individual who has, transports, buys, sells, transforms or commercialises in any way goods, knowing (or having reason to believe) that those goods come from the commission of other specific offences.[7]

Additional to the offence of commercial bribery introduced by Law No. 21,121, is the offence of unlawful negotiation, which may also give rise to criminal liability of legal entities. This applies to anyone who is directly or indirectly interested in a negotiation, action, contract, operation or management in which he or she has to intervene owing to his or her position; patrimony that he or she must manage; assets that are under his or her custody; or companies in which he or she participates. This crime alludes directly to the roles exercised by public officials, arbitrators, liquidators, expert witnesses, guardians, and directors or managers of stock corporations.

Another offence that may lead to criminal liability of companies is the crime of misappropriation, which refers to those who, to the detriment of others, appropriate or divert money, effects or any other movable thing that they have received in deposit, commission or administration, or by any other title that produces an obligation to deliver it or return it. Similarly, disloyal management intends to sanction those who safeguard or administer others' patrimony, or part of it, as a result of a law, order of authority or an act or contract, and cause detriment to the administered patrimony, by abusively exercising its faculties to dispose of it, or executing or failing to execute any other action in a way manifestly contrary to the interest of the subjects affected patrimony.

Finally, regarding environmental damage, Law No. 21,132 added certain criminal conducts imputable to legal persons that relate to water contamination and illegal fishing activities.

The fact that these offences must have occurred as a consequence of a failure or defect in the control or supervisory mechanisms for companies to incur liability is steering them towards effective systems of self-regulation. These are developed through prevention programmes provided in Article 4 of Law No. 20,393; the major significance of these programmes is that, even though their implementation is not mandatory, their existence and certification by entities registered in the Financial Market Commission reduces the possibility of companies' criminal liability through a presumption of diligence, which works in their favour.

6 The list of offences that can give rise to money laundering includes drug trafficking, bribery, use of confidential information, securities and banking frauds. Recently, this list has been extended to include offences such as fraud, misappropriation, certain cases of tax fraud and piracy of intellectual property. As this increases the possibilities of application of the money laundering law, indirectly this may also lead to a greater exposure of companies to be criminally liable, as money laundering is one of the felonies that can lead to criminal liability of legal entities.

7 The list of offences that can give rise to the felony known as *receptación* (receiving) includes simple theft, robbery, cattle rustling and misappropriation.

There appears to be no reason why companies and individuals cannot be defended by the same lawyer. Any conflict of interest should be resolved under the rules provided by the Bar Code of Ethics (if the lawyers are members of the Bar) or by the criminal judge pursuant to Article 105 of the Criminal Procedure Code.

ii Penalties

The usual sanction against a company for corporate liability is a monetary fine. All administrative procedures provide a financial penalty to be applied against legal entities. The fines have gradually increased in the case of all regulations, and the trend has been adopted by state agencies such as the Financial Market Commission, the National Economic Prosecutors' Office and the Environment Agency, which now allow higher fines than ever before.[8]

Companies that require certain licences to operate or that must be registered with certain supervisory bodies may also lose their licence or be deregistered (e.g., banking). However, this kind of sanction has only been applied on very few occasions and in cases of very serious violations to sectorial regulations.

Although a fine is the usual sanction, the legislative changes dealing with criminal liability of legal entities have allowed the emergence of new sanctions in criminal matters. Law No. 20,393 provides that companies may be punished with the following penalties:

a dissolution of the legal entity or cancellation of its legal status;

b a temporary or permanent ban on entering into contracts with state entities;

c total or partial loss of tax benefits or an absolute ban on receiving these for a certain period;

d monetary fines; or

e secondary penalties as described in Article 13:

- publication of details of the sentence in the Official Gazette or any other means of national circulation, at the expense of the company;
- seizure of the product and all goods, effects, objects, documents and instruments involved in the commission of the crime; and
- whenever an offence involves investment of resources by the legal entity of an amount higher than the income it generates, imposition of a further penalty of an amount equivalent to the investment, to be paid to the Treasury.

Some of the penalties that were introduced for cases of criminal liability of companies have also been included as sanctions in civil enforcement cases, in particular a temporary ban on entering into contracts with state entities, which has been included as a sanction in cartel cases. The Financial Market Commission, following this trend, has the ability to revoke the authorisation of existence of a stock corporation in certain cases.

8 To name one example, in antitrust matters, the maximum applicable monetary sanction was increased from 30,000 annual tax units (*unidades tributarias anuales*) (approximately US$25 million) in cartel cases to 30 per cent of the sales of the offender during the period and in the line of business to which the infringement refers, or the double of the economic benefit obtained by the illegal conduct. If it is not possible to establish these amounts, the maximum fine can now be up to 60,000 annual tax units (approximately US$60 million).

iii Compliance programmes

As previously described, the undertaking of compliance programmes is encouraged by Law No. 20,393 (and is unique to it), for the purpose of not only being exempt from liability but also to mitigate it. The existence of these prevention models or programmes is a factor that may release the company from its liability. For these purposes, the law sets forth certain parameters that these compliance programmes should include. The minimum elements required by Law No. 20,393 are:

a the identification of the activities or processes of the company, whether habitual or sporadic, in whose context the risk of commission of the offences that can trigger the criminal liability of the legal person emerges or increases;

b the establishment of specific protocols, rules and procedures that allow persons involved in the above-mentioned activities or processes to execute their tasks in a manner that prevents the commission of the relevant offences;

c the identification of administrative and auditing procedures related to financial resources of the company that allow the entity to prevent their use to commit any of the offences to which the law refers; and

d the existence of internal administrative sanctions, and procedures for reporting or pursuing the pecuniary responsibility of any person who violates the prevention system.

Companies may have their compliance programmes certified by accreditation entities registered before the Financial Market Commission.

Furthermore, if a company that did not have a compliance programme in place at the time a criminal investigation against it has launched sets up efficient compliance mechanisms before the trial to prevent possible further offences, this action may constitute a mitigating circumstance.

Most recently, compliance programmes have had mitigating effects in unexpected areas. During a competition trial against the country's major supermarket chains, the Competition Court ruled that, on the basis of one of the accused's company's compliance programmes, the fine resulting from the competition violation would be reduced by 15 per cent. The company and the other chains implicated in the case had intended for their compliance programmes to exempt them from liability.

iv Prosecution of individuals

Liability may be attributed solely to natural persons, solely to legal entities or jointly to both; it is not necessary to prosecute the natural person directly involved in the commission of the offence to impose liability on the company. There is no special provision dealing with the possibility of the same lawyers representing the legal entities and the natural persons involved, and joint representation is common, except when the defence strategies are incompatible; the Bar Code of Ethics and the Criminal Procedure Code are closely followed.

To establish criminal liability of companies, the criteria previously described must be met. On this basis, decisions made concerning the defence of individuals and the same company may present complex problems to be resolved according to the strategic planning of the company and the interests of the individuals.

Should there be a divergence of interests, defences will be incompatible; the Criminal Procedure Code even confers authority on the court to determine this incompatibility and

request assignment of new defence counsel. However, there is nothing preventing defences being coordinated or planned in the case of common interests or even preventing the company from paying the lawyers' fees of the individuals being prosecuted.

It is clear that there are circumstances in which this analysis may be hindered. For example, if the company cooperates with an investigation undertaken by the relevant state agencies, in cases where one member of the company is being investigated, the company can neither oblige them nor force them to cooperate. Conversely, taking measures against whistle-blowers may be inconvenient for the company and not recommended in terms of eventual liability arising from labour laws, for example. It may also damage the defence strategy of the company itself.

IV INTERNATIONAL

i Extraterritorial jurisdiction

The rules on criminal liability of corporate entities – the vast majority of the criminal laws in Chile – are governed by the principle of territoriality (i.e., they are only applicable when the offences were committed in Chile). This principle has certain exceptions in Article 6 of the Organic Code of Courts, but all refer to individuals. However, since Chilean courts have jurisdiction in cases of bribery of a foreign public official committed abroad by a Chilean national or a foreign national with residence in Chile, if the bribe was committed in the interest of or for the benefit of the legal entity, criminal liability of the latter may also be pursued in Chile.

In 2016, a specific provision was introduced in connection with extraterritorial jurisdiction of Chilean courts in antitrust criminal cases (cartels), provided the collusion has an impact in Chilean markets.

To date there are no relevant precedents in which an act committed abroad has led to enforcement by Chilean agencies in connection with that act. In certain cases, when Chilean companies have been subject to investigations abroad, this has led to agencies in Chile to investigate whether the conduct has been also committed in Chile.

ii International cooperation

The Attorney General and the courts, through direct requests as well as international pleas, are in permanent contact with foreign agencies for the purposes of international cooperation. This action is enshrined through various direct cooperation agreements among prosecuting entities as well as international treaties. An example is the cooperation among Chilean and Brazilian public prosecutors in connection with potential ramifications of the *Lava Jato* case in Chile. Cooperation is not only common in criminal prosecution but also between some state agencies, such as the Financial Market Commission in securities enforcement procedures and the National Economic Prosecutor regarding antitrust regulations.

Chile has entered into many bilateral and multilateral extradition treaties. Extradition procedures regularly apply in Chile and are carried out with the intervention of the Supreme Court.

For an extradition request to be granted, in general, the crime needs to be punishable in both countries, and the prosecution in the requesting country must relate only to the crime for which extradition is granted. The sanction for the crimes for which extradition is requested must exceed one year.

iii Local law considerations

When a crime leads to the application of diverse rules of prosecution, practice says that the domestic authorities must apply domestic law; for those in charge of the prosecution, domestic law is mandatory, it being understood that international treaties signed by the country make them part of the domestic legislation. These treaties have been approved by the domestic legislators provided that said treaties comply with the Constitution. Therefore, special regulations in Chile regarding privilege, banking secrecy, admissible evidence, etc., will govern the matter in Chile.

V YEAR IN REVIEW

As has been the case since mid 2014, when the *Penta* case came to light, the most prominent investigations during the past 12 months have been in cases related to irregular funding of political campaigns, which have led to several tax fraud investigations and, in certain cases, to the prosecution of alleged bribery. Many companies (some of them listed) and some of their high-level officers are involved in these investigations as they contributed to political campaigns by means other than those explicitly contemplated by law, in what seems to have been an extended practice in Chile in the past. The most relevant recent judicial and legislative activity respond to this matter, particularly with the enactment of Law No. 21,121, which improved and strengthened the country's anti-corruption reputation.

In the context of such cases, the Public Prosecutor's Office proceeded to close the investigation and prosecute fishing enterprise Corpesca for the crimes of bribery and tax fraud. The public trial against the politicians involved and the company began in March, and is expected to last at least six months. It will be interesting to see how, for the first time, compliance programmes are put to the test before a criminal court.

On August 2018, an environmental crisis in Quintero, Puchuncaví and Ventanas gave rise to an investigation by the Prosecutor's Office, following indications that the National Petroleum Company (ENAP) was allegedly responsible for the emission of toxic air pollutants in the area. Investigative proceedings included raids and a seizure of documents at the headquarters of the state-owned company. The seizure of documents belonging to the company's attorneys generated controversy owing to the breach of attorney–client privilege. ENAP brought an action before court to reverse the Prosecutor's Office legal infringement and legally force the return of the seized documents. The Prosecutor's Office stated that attorney–client privilege was limited to lawyers who have clients, and not to those who work under a subordination bond in a particular company. The criminal court ruled in favour of ENAP, stating that attorneys are entitled to a certain sphere of protection in the light of attorney–client privilege, since that information is expected to remain confidential.

This and other recent environmental contamination events galvanised the case for incorporating new legislation to sanction environmental crimes. To date, in Chile, only certain specific acts that may damage the environment are considered criminal; the country's legal system lacks a comprehensive and systematic criminal regulation for contaminating activities. For this reason, a new proposed regulation is now being discussed at Congress that not only establishes a new criminal regulation on this topic but also strengthens the investigative powers of the Superintendence of the Environment.

A new Criminal Code is expected to be presented to Congress for discussion in the near future. A commission of experts has already finalised a comprehensive draft, currently under review by the Ministry of Justice. This draft includes a complete new systemic treatment of all crimes and also includes a complete new penalty system.

VI CONCLUSIONS AND OUTLOOK

In recent years, and particularly over the past decade, Chile's legislation on the enforcement of penalties against illegal conduct has been undergoing a continuous and profound process of reformation. This has included updating existing felonies; adjusting Chile's legislation to international best practices, particularly in the area of anti-corruption and money laundering; and the incorporation of new crimes.

Last year was not an exception to this trend. The enactment of Law No. 21,121 introduced important amendments, including more severe penalties for bribery cases and the establishment of commercial bribery and disloyal management as crimes, closing important loopholes in Chilean criminal legislation related to commercial activities and closing the existing gap with international standards on such matters. In particular, the introduction of disloyal management as a crime is expected to have a profound impact, as many conducts related to conflict of interests and dishonest administration of companies and funds, which in the past had only civil sanctions, may now also constitute a crime, broadening the scope in which the Public Prosecutor's Office may act.

This law also expands criminal liability of legal entities to these new offences (disloyal management and commercial bribery) and other crimes, representing a challenge for companies as they must urgently update their compliance programmes to avoid potential criminal prosecution. The modernisation process of corporate criminal liability is not yet finished, as it is expected to continue undergoing significant expansion over the coming years.

In addition, various enforcement agencies have been restructured and generally given more investigative powers; for example, the Superintendency of Securities and Insurance changed its legal form completely from a superintendency managed by one person to a collective commission – the Financial Market Commission – and strengthened its investigative powers. This year, the banking supervision authority merged with this Financial Markets Commission. The banking, insurance and securities market supervision will now fall under the scope of a sole supervisory body. These changes, and the number and size of cases that have emerged in recent years, have had an important impact on Chile's legal culture, transforming its approach from being reactive to proactive.

In particular, the improvement in the description of offences sanctioned under the Criminal Code, and the inclusion of new prohibitions following the entry into force of the Law on Criminal Liability of Legal Entities and its recent modifications, have had an important effect on the perception of the relevance of compliance in companies, particularly in entities engaged in activities where there is a potential risk of these kinds of conduct.

However, owing to the relative newness of the law, there have not been many cases to date in which anti-corruption laws have been criminally enforced against legal entities. Some have ended in abbreviated proceedings or deferred prosecution agreements, and, so far, only one case has faced trial, in which the legal entity was acquitted because the individual who committed bribery was the only representative of the company; the court therefore estimated that sanctioning both the individual and the legal entity affects the double-jeopardy principle. Similarly, compliance programmes implemented by companies, which may exempt

companies from liability if they are adequate (besides the *Corpesca* case, which is currently underway) have not yet been tested by public prosecutors or the courts. As stated earlier, there is a great test to come regarding the *Corpesca* case and the ability of the Public Prosecutor's Office to prove the standards that compliance programmes and their implementation have to fulfil to have the ability to exempt companies from criminal responsibility.

Appendix 1

ABOUT THE AUTHORS

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Jorge Bofill is an experienced dispute resolution attorney in the areas of white-collar crime, corporate investigations, civil litigation, international arbitration and mediation.

Mr Bofill is often requested as an expert by the Chilean Senate's Committee on Constitution and Legislation. Examples of his involvement in these matters are the complete revamping of the Chilean criminal procedure system and the statute on criminal liability of legal entities, among many others. In April 2015, Mr Bofill was selected as a member of the panel of experts appointed by the Secretary General of the United Nations to conduct an assessment of the system of administration of justice of the United Nations.

Mr Bofill has been ranked in the top tiers in the fields of dispute resolution and white-collar crime by *Chambers Latin America* since 2009, and in 2015 he received the distinction of 'Star Individual' in white-collar crime litigation.

He received his law degree from the Pontifical Catholic University of Valparaíso, *summa cum laude*, and his doctoral degree from Friedrich-Alexander University Erlangen-Nürnberg, Germany, *summa cum laude*.

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Daniel Praetorius focuses on securities, regulatory and white-collar crime litigation.

He has broad experience representing clients in criminal cases related to business activities and anti-corruption regulations as well as in securities enforcement proceedings. He has also been involved in the development of compliance programmes and has conducted internal corporate investigations.

For many years, Mr Praetorius also practised as a corporate attorney, advising clients on corporate, mergers and acquisitions and finance matters, experience that usefully complements his litigation skills on complex economic disputes.

He previously worked at Bofill Mir & Álvarez Jana, Morales & Besa, the Chilean National Prosecutor's Office's Money Laundering, Business and Organised Crime Special Unit and at Freshfields Bruckhaus Deringer LLP in Frankfurt, Germany.

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He is co-author of the book *Reforma Procesal Penal: Génesis, Historia Sistematizada y Concordancias, Tomo 1: Código Procesal Penal*, published by Editorial Jurídica de Chile (2003).

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