

**International legal requirements for the prevention of
corruption (Prevention phase/internal initial suspicion phase)
South America with focus on Argentina and examples from
Brazil and Chile**

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Agenda

- Corporate criminal laws in Argentina, Brazil and Chile
- Requirements for anti-corruption compliance and “Integrity programs”
- Penalty exemption or mitigation
- Further incentives for more compliance

Corporate criminal laws in Argentina, Brazil and Chile

Context 2020 Latam America Corruption Survey Miller & Chevalier

Key Findings	Argentina	Brazil	Chile
Offender prosecution awareness	61 %	93 %	38%
Do you believe that an offender is likely to be prosecuted in the country where you work?	39 %	86 %	43 %
Lack of trust in the judicial branch	87%		
	YES	NO	
After you lost business to competitors that made illicit payments, did you report your concerns to the authorities?	12 %	88 %	
After you reported your concerns to the authorities, did the government investigate the matter?	33 %	67%	

Offenses covered by the Corporate Criminal Liability laws

Argentina - Law Nr. 27,401 (2018)	Brazil - “Clean Companies Act” Nr. 12,846 (2014)	Chile - Law Nr. 20,393 (2009)
<ol style="list-style-type: none">1. Bribery and influence peddling of public officials, whether local or international (sections 258 and 258 bis, ACC)2. Negotiations incompatible with public office (section 265, ACC)3. Illegal exactions (section 268, ACC)4. Illegal enrichment of public officials and employees (sections 268(1) and 268 (2), ACC)5. Aggravated offences of counterfeiting of balance sheets (section 300 bis, ACC)	<p>Active and passive bribery of public officials, whether local or international</p> <p>+ Other illegal acts committed against domestic or foreign Public Administration. Particularly, in the context of public tenders. (section 5)</p>	<ol style="list-style-type: none">1. Money laundry (section art. 27, Law 19,913)2. Terrorism financing (section 8, Law 18,314)3. Bribery of public officials, whether local or international (section 250, 251bis Chilean CC) and concealment of stolen goods (“receptación”, section 456bis A, Chilean CC)

Penalties for legal entities

Penalty	Argentina - Law 27,401 (section 7)	Brazil - Law 12,846 (section 6 and section 19)	Chile - Law 20,393 (section 8)
Fines	Fine from 2 to 5 times the undue benefit obtained or that could have been obtained	Fines within % provided by law (administrative)	Fine for tax benefit
Suspensions	Full or partial suspension of activities for up to 10 years	Suspension or partial prohibition of their activities (judicial) no time limit	-
Exclusions	Exclusion from public tenders or contracts with the government, for up to 10 years	Exclusion from public tenders can be declared according to art. 46 of Law 8443, when fraud is verified in the bidding process	Temporary or perpetual prohibition to celebrate acts and contracts with the government
Dissolution / liquidation	Dissolution and liquidation of the legal entity (when it was created for the sole purpose of the commission of the crime or it is its core activity)	Mandatory dissolution of the legal entity (judicial)	Dissolution or cancellation of the legal status (with exceptions)
Loss of benefits	Loss or suspension of government benefits	Prohibition of receiving incentives, subsidies, grants, donations or loans from public organizations or entities and public financial institutions or controlled by the government, for a minimum period of 1 (one) and a maximum of 5 (five) years (judicial)	Partial or total loss of tax benefits or prohibition of receiving them for a period.
Publications	Publication of the condemnatory ruling at the expense of the legal entity	Publication of the condemnatory ruling at the expense of the legal entity (administrative)	Publication of an extract of the ruling (accessory penalty)
Other		Loss of goods, rights or values that represent an advantage or proceeds from the infringement, except the right of the injured party or third parties in good faith (judicial)	Other accessory penalties provided in section 13

Enforcement authorities

Argentina	Brazil	Chile
Judicial Power: Federal Court of Criminal and Correctional Matters (for crimes involving public officials at federal level)	Federal Controller General's Office	Judicial Power: Criminal oral courts District courts
Other relevant institutions <ul style="list-style-type: none"> • Anti-Corruption Office • Office of the Prosecutor for Economic Crime and Money Laundering (PROCELAC) • The National Prosecutor's Office for Administrative Investigations 	General Federal Defense State authorities	
	Office of the Public Prosecutor	

Requirements for the prevention of corruption: compliance and “Integrity programs”

Compliance Programs, ¿why are they useful?

According to Argentine Law 27,401:

- Condition to enter into certain contracts with the federal government
- Possible penalty exemption or mitigation
- Possibility to enter into an Effective Cooperation Agreement with the Attorney General's Office

Integrity Programs in Argentina

Definition

A set of actions, mechanisms and internal procedures for the promotion of integrity, supervision and control, aimed at **preventing, detecting and correcting** irregularities and illegal acts penalized by this Law.

Adequacy standard

The content of the Program shall have a direct relation with the **risks** of the activity in which the company engages, its **dimension** and its **economic capacity**.

Anti-Corruption Office - Guidelines

- Guidelines on Compliance/Integrity Programs under Law 27,401 (2018)
- Specific Guidelines for SME (2019) → Supplementary

Requirements for Compliance Programs

Requirement	Argentina - Law 27,401 (2018), section 23	Brazil - "Clean Companies Act" + Decree 8420 (2015), section 42 Guidance for Private Companies	Chile - Law 20,393 (2009), section 4
Establishing a Compliance Program (CP) / Crime Prevention Model or System (CPS)	Suggested (mandatory for certain contracts with Federal Government)	Suggested	Suggested
Certification of the CP / CPS	Not specified	Not specified	Mandatory
Ethical code, policies and procedures	Mandatory	Suggested	Mandatory
Specific procedures for interactions with the public sector	Mandatory	Suggested	Not specified
Trainings	Mandatory	Suggested	Not specified
Periodical risk assessment and amendment of the CP	Suggested	Suggested	Not specified
Tone from the top	Suggested	Suggested	Not specified
Internal reporting channels (+open to third parties)	Suggested	Suggested	Mandatory
Anti-retaliation policy for whistle-blowers	Suggested	Suggested	Not specified
Internal investigation mechanism	Suggested	Suggested	Not specified
Procedures to immediately stop irregularities detected and take measures	Guidelines	Suggested	Not specified
Disciplinary measures	Suggested	Suggested	Not specified
Background checks on relevant third parties	Suggested	Suggested	Not specified
Specific policies for third parties	Guidelines	Suggested	Not specified
Due diligence during M&A	Suggested	Suggested	Not specified
Continuous monitoring and evaluation of the CP / Supervision	Suggested	Suggested	Not specified
Compliance officer / prevention manager	Suggested	Suggested	Mandatory
Independence, structure and authority of compliance officer	Guidelines	Suggested	Mandatory
Compliance with applicable regulations	Suggested	Not specified	Not specified
Accurate/complete books and records	Guidelines	Suggested	Not specified
Internal controls for reliability of financial statements	Not specified	Suggested	Not specified
Transparency in political contributions	Guidelines	Suggested	Not specified

Penalty exemption or mitigation

Exemption from punishment - Argentina

According to Law 27,401 (section 9), exemption is feasible if the following concurrent conditions are met:

1. The legal entity has implemented an adequate Compliance Program, prior to the commission of the offense.
2. The individual offender made an effort to violate the legal entity's internal policies and procedures.
3. The legal entity has spontaneously reported the crime to the correspondent authorities as consequence of an internal detection and investigation procedure; and
4. The legal entity has returned the undue benefit obtained.

Internal investigations- Argentina

Conducting of internal investigations is encouraged by Law 27,401 (section 8: penalty graduation, Section 9: exemption of penalty, Section 23, part of an integrity program):

Element of Section 8: “the spontaneous reporting to the authorities by the legal entity as a result of its own internal investigation or detection”.

Challenges:

Scope and interpretation of “Work product”.

As a general rule privileged information produced within the lawyer-client relation is protected by the constitution and special laws.

Labor law and expectation of privacy: precedents often deny use of collected evidence in interviews or computers.

Leniency agreements - Argentina

According to Law 27,401 (section 16): the legal entity could enter into an **Effective Cooperation Agreement** with the Attorney General's Office.

- The Agreement requires disclosure of accurate, useful and verifiable data leading to clarification of facts, the identification of authors or participants, or the recovery of the proceeds of the crime.
- Other requirements (section 18):
 1. Restitute the proceeds of the crime;
 2. Abandon in favor of the Government assets that would presumably be forfeited in case of conviction; it could also be required to:
 3. Take the necessary actions to repair the damage caused;
 4. Render certain services to the community;
 5. Take disciplinary measures against those who have participated in the crime;
 6. Implement an integrity program according to Law 27,401.
- Approval by judge (section 19)
- ≤ 1 year to assess data provided (section 21)
- Ruling has to respect agreement (section 21)

Leniency agreements - Brazil

The Anticorruption Leniency Program (inspired by the DOJ's amnesty program) reproduces the key features of Brazil's Antitrust Leniency Program.

Requirements:

1. Be the first among those involved in a corruption scheme to state its interest in cooperating,
2. admit its participation in the wrongdoing,
3. cease any further involvement,
4. cooperate fully with the investigation,
5. agree to pay compensation for any harm caused to the Public Administration.

Further incentives for more compliance

Further incentives for more compliance

Registers:

Brazil	Argentina
Register Pró-Ética	Integrity and Transparency Register for Companies and Entities - RITE (currently in course)
<p>Pioneering initiative in Latin America.</p> <p>Created by CGU in 2010 in partnership with the Ethos Institute.</p> <p>Objective: encourage companies to adopt policies and actions necessary to create a healthy environment to reduce the risks of fraud and corruption.</p>	<p>AO's + Collective initiative for the development, improvement and maturity of companies' and entities' integrity programs, to promote the exchange of best practices and generate more transparency in the interactions between the private and the public sector.</p>

Collective Actions and Partnerships:

to foster a more transparent environment. Business can make a “positive contribution” by acting collectively and using their influence **to level the playing field**, promote business integrity and ultimately build trust.

Vielen Dank!

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