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White-Collar Crime 2021

Chile: Law & Practice and Trends & Developments
Jorge Bofill Genzsch and César Ramos
Bofill Escobar Silva Abogados

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CHILE

Law and Practice

Contributed by:
Jorge Bofill Genzsch and César Ramos
Bofill Escobar Silva Abogados see p.16

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1. LEGAL FRAMEWORK

1.1 Classification of Criminal Offences

The Chilean Criminal Code classifies criminal offences according to the severity with which they are punished. Crimes (*crímenes*) are the most serious types of law-breaking, with penalties ranging from five to 20 years of imprisonment; in a few cases, life imprisonment may be considered. Misdemeanours (*simples delitos*) are punished with 61 days to five years of imprisonment. Offences (*faltas*) are those acts punished with one to 60 days of imprisonment and fines, and very rarely lead to jail time.

For an act to be punishable, it must have been done with intent. However, certain acts are punishable precisely for their recklessness. The Chilean criminal system does not require any kind of motive to be ascribed to the offender in order to impose a sanction.

Individuals may also be held responsible for attempting to commit a criminal offence without actually having completed the criminal act. However, in such cases, the offender will face a reduced penalty.

1.2 Statute of Limitations

Under Chilean criminal law, limitation periods are established in consideration of the nature of the criminal offence. Crimes (*crímenes*) have a limitation period of 15 years in cases where the law imposes a penalty of life imprisonment, or ten years in the other cases; misdemeanours (*simples delitos*) are limited to five years; and offences (*faltas*) are limited to six months. The limitation period is suspended once a criminal procedure is directed against the defendant.

This term is counted from the day on which the criminal offence was committed. If the offence consists of a continuing act, the limitation period starts to run once the defendant performs the last action.

If the accused leaves the country at any time during the limitation period, the limitation period runs at half the speed – ie, two days abroad count as one for the purposes of calculating the limitation period.

1.3 Extraterritorial Reach

In principle, only crimes committed in Chile can be prosecuted before Chilean courts. There are only a few exceptions to this. The extra-territorial reach of Chilean criminal law is specifically regulated in the Code of Organisation of Courts (*Código Orgánico de Tribunales*), v gr. Instances include crimes committed abroad by Chileans against Chileans, if the offender returns to Chile without having been prosecuted abroad, and cases where bribes are accepted by Chilean public officials abroad or there occurs bribery of a foreign public official committed by a Chilean.

In addition, most of the Chilean legal literature and jurisprudence understands that the Chilean state can prosecute crimes if the execution of a criminal act begins in Chile, even though its effects are felt in another country, or if the execution of a crime begins abroad but the consequences are felt in Chile.

1.4 Corporate Liability and Personal Liability

Traditionally, criminal liability in Chile has been conceived as a category applicable only to individuals as opposed to legal entities. However, in the context of Chile's application to become a permanent member of the OECD, a political decision was made with Law No 20,393, which entered into force in 2009, introducing into the Chilean legal system the concept of corporate criminal liability. Hence, as of 2009, legal entities may be investigated by the public prosecutor and be criminally sanctioned in cases where:

- the illegal conduct consists of certain specific crimes defined by law;
- 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;
- the act has been performed for the direct benefit or interests of the company; and
- the behaviour of the agent or representative occurred because of a defect or failure in the company's mechanisms of control and supervision.

Since the enactment of Law No 20,393, the list of offences for which a company can be held criminally liable has been extended several times. Today, companies are criminally liable for the following crimes:

- bribery, money laundering;
- financing of terrorism;
- receipt of stolen goods;
- disloyal management;
- commercial bribery;
- unlawful negotiation;
- misappropriation;
- instructing a worker to attend the workplace during a quarantine; and
- certain conducts that are related to water pollution and illegal fishing activities.

Regarding all the above-mentioned offences, the public prosecutor may seek both the individual responsibility of the persons who performed the conduct and the criminal responsibility of the company. However, the Public Prosecutor's Office has no institutional guidelines that preferentially prosecute either individuals or companies. Moreover, managers are not criminally responsible for the mere fact that the company is convicted of the crime.

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 where the defence strategies are incompatible (the Bar Code of Ethics and the Criminal Procedure Code are applicable).

In the case of a reorganisation, merger, acquisition, division or dissolution of a company where one of the sanctioned crimes was committed, Law No 20,393 provides that the responsibility for such acts is transmitted to the successor.

1.5 Damages and Compensation

Victims of a crime may file for damage compensation before the criminal courts or directly before the civil courts. Nevertheless, once the civil action has been declared admissible before the criminal court, the right to do so in the civil court is precluded.

Such a right is exclusive to the victim. If third parties want to seek civil compensation derived from a crime, they must bring it before the civil courts.

On the other hand, the action to obtain the return of the specific assets that were taken from the victim of the crime may only be filed before the criminal court.

In a criminal proceeding, plaintiffs have the option of requesting that the judge order precautionary measures upon the property of the accused to ensure the fulfilment of possible future civil liabilities – ie, through the retention of certain assets and the prohibition on performing acts or contracts regarding certain assets. In the event that these measures are imposed upon the defendant, the victim must file a civil action during the criminal trial, in order to seek damage compensation.

Class actions are not contemplated in Chilean legislation. The nearest equivalent is the common solicitor, by which it is ordered that within a short period of time the plaintiffs designate a common representative to act on behalf of all of them. However, it is not a widely used practice.

1.6 Recent Case Law and Latest Developments

Over the past decade, Chile's legislation has undergone significant reformation, with special emphasis on anti-corruption legislation, adjusting it to fit the best international practices.

The most relevant recent legislative activity was the enactment of Law No 21,121, published on 20 November 2018, which implemented important amendments, particularly in anti-corruption legislation. This law established commercial bribery and disloyal administration as new crimes and, in addition, incorporated several changes regarding bribery, bribery of foreign public officials, unlawful negotiation and money laundering, including an increase of applicable penalties.

Nonetheless the need for a new criminal code has been acknowledged by different governments in recent years. The current Criminal Code was enacted in 1875 and, although it has undergone constant modification and has had to be complemented by multiple laws that incorporate new crimes, there is consensus among all actors on the need for a modern criminal code. Consequently, since 2013 three drafts of a new criminal code have been worked out by the Ministry of Justice, the latest of which was submitted to the Ministry of Justice in October 2018. The commissions in which academics and distinguished practitioners drafted a modern Criminal Code were chaired by Mr Jorge Bofill.

In this context, Congress is currently discussing a legal reform based on the work of said commissions that aims to systematise economic crimes and offences against the environment. The reform intends to restrict the effect of mitigating and aggravating factors, mostly unrelated to business crime, replacing them with a specific catalogue of factors.

In addition to this, it limits the applicability of alternatives to imprisonment, such as probation, introduces the general confiscation of profits, reforms the system of fines and introduces relevant changes to the statute of liability of legal persons, eliminating the requirement of the benefit of the company, and extending both the catalogue of crimes and of persons whose intervention generates the liability of the legal person.

Finally, modifications are introduced in different economic crimes, including: the introduction of the statute of environmental crimes; the regulation of the criminal protection of business secrecy; and a relevant modification to bankruptcy crimes and crimes against the securities market.

Likewise, several crimes currently in force are modified in order to improve their wording and solve the difficulties of interpretation and application that have arisen in practice. Also, a crime of misleading advertising is introduced in the Consumer Law and criminal protection is included against cases of labour exploitation.

2. ENFORCEMENT

2.1 Enforcement Authorities

The Public Prosecutor's Office is the agency in charge of investigation and prosecution before criminal courts. Other special agencies may enforce a range of non-criminal sanctions under different statutes and proceedings. In some cases, these special agencies are entrusted not only to investigate, but also to impose sanctions. This is the case for the Financial Market Commis-

sion, the Internal Revenue Service (the national tax authority), the National Economic Prosecutor (along with the Court for the Defence of Free Competition in antitrust matters), and the Environment Agency and environmental courts.

In recent years different courts have dealt with the discussion on whether the same facts can be prosecuted at the same time under criminal and administrative proceedings without affecting the double jeopardy principle. The judicial trend has been to permit prosecution in both venues, but there have been some exceptions.

There are no specialised courts for white-collar offences. However, the Public Prosecutor's Office has attorneys specialised in the prosecution of certain types of crimes, including prosecutors dedicated to investigating economic crimes. In addition, the Public Prosecutor's Office has units specialised in certain crimes, which advise the national prosecutor's office, regional prosecutor's offices, and collaborate with the specialised prosecutors who handle the investigation of crimes within their jurisdiction. One of these units is the Specialised Unit on Money Laundering, Economic Crime and Organised Crime (*Unidad Especializada en Lavado de dinero, Delitos Económicos y Crimen Organizado*, ULDDECO). Moreover, there are specialised police squads in charge of carrying out the investigations requested by the Public Prosecutor's Office, such as the Economic Crimes Brigade (*Brigada Investigadora de Delitos Económicos*, BRIDEC) and the Money Laundering Investigative Brigade (*Brigada Investigadora de Lavado de Activos,* BRILAC).

2.2 Initiating an Investigation

The Chilean Criminal Procedure Code establishes that investigations may be initiated by means of a complaint, the filing of criminal action by the victim of the offence and other legally authorised individuals and bodies or by the sua sponte decision of the Public Prosecutor's Office. If the victim files a criminal action, the court conducts an admissibility assessment of the complaint, in order to verify that the facts constitute a criminal offence, prior to the initiation of the investigation.

The law does not allow much discretion to the prosecutor. Therefore, in principle, all crimes that come to its knowledge should be investigated.

2.3 Powers of Investigation

There is practically no threshold that the prosecutor needs to meet in order to request the voluntary production of documents by a company under investigation, or even a third party. The same applies to subpoenas to individuals, related to either the company under investigation or a third party. If the documents are not produced or the individual does not appear before the prosecutor, the latter lacks powers to enforce its instructions and will file a request before the courts. Depending on the type of information requested, the legal threshold varies slightly. As a rule, courts rely on the good faith of the prosecutors and deny these requests only exceptionally.

The prosecutor will be granted permission to perform raids and seizures if it shows the court that there is a reasonable case for them.

In general terms, the reasonability or correctness of the police and/or prosecutor's conduct will be discussed ex post facto, upon a request by the defendant with regard to motions to exclude evidence.

2.4 Internal Investigations

The conduct of internal investigations has not become a widespread practice in Chile. As a consequence of this, and of the lack of a legal culture that considers such investigations as protected by privilege, prosecutors have seized

evidence produced in the context of internal investigations.

Because of this, and until case law clarifies the extent of privilege in Chile, internal investigations should be conducted by external lawyers to help protect the confidentiality of the investigation and its findings.

Companies are not obliged to grant prosecution agencies access to the results of their internal investigations. However, under the Corporate Criminal Liability Act (Law No 20,393), the surrender of such documents could be considered a mitigating factor.

2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Transnational co-operation is carried out by the National Prosecutor and the courts, which formulate requests and provide information to foreign prosecutors, through various international treaties and co-operation agreements.

Within the Public Prosecutor's Office, the International Cooperation and Extraditions Unit (*Unidad de Cooperación Internacional y Extradiciones*, UCIEX) is the unit in charge of international relations. UCIEX supports investigations and prosecutions of crimes whose scope extends beyond the national territory and all those in which prosecutors require the co-operation of other states, of an international organisation or that require an extradition procedure. The UCIEX is responsible for carrying out the various international co-operation agreements signed by Chile, such as the Convention against Organised Crime of the United Nations and extradition treaties with several countries, including the USA and the UK.

Such co-operation is also common between state agencies, such as the Financial Market Commission and the National Economic Prosecutor's Office. In order for an extradition request to be granted, the crime must be sanctioned by both countries and attract a penalty of more than one year and the request must be limited to the crime for which it is being requested. Such requests are submitted before the Supreme Court. There are no specific provisions dealing with white-collar crimes.

2.6 Prosecution

White-collar prosecutions are frequently initiated upon the filing of a criminal complaint by the victim, who has the right to have an active role in the proceedings. Once the complaint is admitted by the judge, the prosecutor is obliged to investigate. But even if the case is opened by the prosecutor himself or herself, the law does not grant him or her discretion, other than the analysis of the merits. In other words, if there is enough evidence of the alleged crime, the prosecutor should file charges and pursue the case. Unfortunately, there are no guidelines issued by the higher authorities of the Public Prosecutor's Office and the handling of the case will often depend on the decisions made by each prosecutor. There is no judicial control over the decision of the prosecutor to file or not file charges.

2.7 Deferred Prosecution

The Chilean Criminal Procedure Code provides mechanisms to resolve a criminal proceeding without a trial. Parties may settle a dispute with a direct agreement between the plaintiff and the defendant. This is especially applicable in white-collar cases. The judge may dismiss the agreement only if the public interest requires further criminal prosecution.

On a related note, the defendant may reach a deferred prosecution agreement with the Public Prosecutor's Office consisting of the fulfilment of certain conditions for a certain period, after which the proceedings are terminated, if the estimated penalty to be applied in the particular case does not exceed three years of imprison-

ment and if the accused has no previous criminal record.

2.8 Plea Agreements

Defendants may voluntarily acknowledge charges in exchange for a conviction on reduced charges or penalties, or in exchange for an agreed-upon sentence.

To this end, the accused must accept the facts of the charges and the background information on which they are based. In that sense, this is not a guilty plea, but rather a plea accepting the facts as true. This is only possible if the penalty requested by the Public Prosecutor's Office does not exceed five years of imprisonment.

3. WHITE-COLLAR OFFENCES

3.1 Criminal Company Law and Corporate Fraud

Law No 20,393, which governs the criminal liability of legal entities, contains the offences that may give rise to criminal liability of companies. When enacted, the law applied only to three predicate offences: bribery of a public official, money laundering and financing of terrorism. This rather limited list has been expanded over time, and now includes the offence of receipt of stolen goods, disloyal management, commercial bribery, unlawful negotiation, misappropriation, instructing a worker to attend the workplace during a quarantine and certain water pollution and illegal fishing-related crimes.

Companies shall be liable for the aforementioned crimes when they are committed – directly and immediately in their interest or for their benefit – by their owners, controllers, officers, principal executives, representatives or those who carry out management and supervisory activities (as long as the commission of the crime is the result of the latter's failure to comply with their management and supervisory duties).

Bribery of public officials consists of offering or consenting to offer any kind of benefit different to those to which public officials are entitled according to their position (basic bribery). If the benefit is granted in consideration of the performance of an action that they are obliged to do pursuant to their duties, of either not performing or not having performed an action or for performing or having performed an action, in infraction of a particular duty or of committing certain corruption crimes, the punishment increases (aggravated bribery).

Money laundering is committed by anyone who in any way hides or conceals the illicit source of certain assets knowing that they proceed, directly or indirectly, from the perpetration of conduct that constitutes any of the predicate crimes listed by law, or who, knowing the origin of these assets, hides or disguises them.

Financing of terrorism legislation punishes those who in any way, directly or indirectly, request collect or supply funds for those who intend to commit terrorist offences.

Receipt of stolen goods is committed when one person transports, sells or possess any good knowing that it is the result of the commission of other specific offences.

Disloyal administration penalises the person in charge of the management of a foreign interest who abuses his or her powers of attorney or executes or omits in a way manifestly contrary to the interest of the holder of the affected interest, causing damage to him or her.

Commercial bribery legislation sanctions an employee or agent who, in the exercise of his or her duties, requests or accepts an economic or

other benefit for the purpose of favouring or for having favoured the contracting of one offeror over another. Whoever gives, offers or consents to give that benefit to that employee or agent for the same purpose is also sanctioned.

Unlawful negotiation consists of taking a personal interest in any negotiation, action, contract or operations by public officials, liquidators and administrators, in which they take an interest by reason of their position or functions.

Misappropriation is a crime against property consisting of the retention of goods belonging to somebody else, when those goods were legally in his or her possession through a title different to ownership.

It is also punishable to instruct a worker to go to the place where he performs his work when this is different from his residence, and the worker is under quarantine or mandatory sanitary isolation decreed by the health authority.

Finally, new offences included in the catalogue are:

- the introduction into the sea, rivers, lakes of chemical, biological or physical contaminants that cause damage to hydro-biological resources;
- the processing, transformation, commercialisation and storage of banned hydro-biological resources or products derived therefrom;
- the performance of extractive activities in areas of management and exploitation of deep-sea resources, without being the holder of the rights; and
- being in possession of, producing or storing hydro-biological resources which are in state of collapse or over-exploitation without being able to prove their legal origin.

Usually, sanctions against corporations consist of a monetary fine. However, applicable penalties may include: dissolution of the legal entity and cancellation of its legal status; a temporary or permanent ban on entering into contracts with state entities; total or partial loss of tax benefits or an absolute ban on receiving these for a certain period, among others.

3.2 Bribery, Influence Peddling and Related Offences

The Chilean Criminal Code sanctions bribery of domestic and foreign officials. As stated in **1.6 Recent Case Law and Latest Developments**, the enactment of Law No 21,121 in 2019 introduced the offence of commercial bribery. Companies are also subject to criminal liability regarding these offences.

Bribery of domestic public officials – as described in **3.1 Criminal Company Law and Corporate Fraud** – is punished with imprisonment from two months to ten years and fines related to the size of the bribe.

Bribery of foreign officials constitutes an exception to the principle of territoriality generally applicable in Chile. In that sense, Chilean courts may have jurisdiction regarding the bribery of a foreign official committed abroad, either by a Chilean national or a foreigner with residence in Chile. The offence consists of the offering or promising of an economic or any other benefit to a foreign public official in return for the foreign public official's performance or omission of an act that would provide an unfair advantage in an international transaction (or business deal) to the offeror of the bribe. Similar to the case of domestic officials, this conduct is sanctionable with imprisonment ranging from three to ten years, restrictions on holding public office and a fine from 200% to 400% of the amount of the bribe. If the benefit offered is not of a financial

nature, the fines will range from 100 to 1,000 monthly tax units (UTM).

Commercial bribery consists in requesting, accepting, offering or giving bribes of any kind in order to favour, within the authority of their duties, the engagement of one party over another. In the case of receiving a bribe, the employee that seeks or accepts it faces up to 18 months to three years of imprisonment and, in the case of an economic benefit, a fine of 100% to 200% of the bribe, whereas of any other nature, a fine ranging from 50 to 500 monthly tax units. On the other hand, those that offer commercial bribes face 18 months to three years imprisonment, whereas those who agree to offer a bribe privately face imprisonments from two to 18 months, and fines ranging from 50 to 500 monthly tax units.

3.3 Anti-bribery Regulation

Chilean legislation does not include a specific obligation to prevent bribery and influence peddling, nor does it oblige companies to maintain compliance programmes. Nonetheless, Law No 20,393 acknowledges the importance of compliance programmes, as it assumes that management and supervisory duties of the legal entity have been met if, prior to the commission of the offence, the legal entity has implemented a crime prevention model. A well-functioning compliance programme may be an exculpatory factor for the legal entity.

3.4 Insider Dealing, Market Abuse and Criminal Banking Law

The relevance of information in stock transactions is recognised in several provisions of the Securities Market Law (Law No 18,045). This law includes several offences that violate the protection of information in transactions of securities, including adulteration, misuse and concealment or improper disclosure of information to be considered in sales decisions or in the terms of commercial acts involving publicly traded securities.

Articles 59 and 60 of Law No 18,045 contain a catalogue of crimes related to abuse of the stock market. Article 59 punishes providing false information to the market. Article 60 contains a series of offences involving the fraudulent acquisition of shares without making a tender offer in those cases in which it is mandatory to do so, the use or disclosure of privileged information to obtain benefits or avoiding a loss in transactions of public offer values, the improper use of values in custody and the deliberate concealment or elimination of accounting records or custody of securities.

The Chilean legal system defines privileged information as any information – related to one or more issuers of shares, to their businesses or to one or more shares issued by them – not disclosed to the market and whose knowledge, by its nature, is capable of influencing the quotation of the issued shares, as well as the information held on the acquisition or disposal operations to be carried out by an institutional investor in the stock market. It is also worth mentioning that Law No 18,045 assumes that the directors, managers, administrators, principal executives and liquidators of an issuer of securities or institutional investor are in the possession of privileged information.

The General Banking Act provides some specific offences that affect banking activity and bank staff. The most common crime covered by this law is related to the fraudulent obtainment of loans, where a person who, by providing false data about his or her situation or assets, causes damage to the bank or financial institution. It is also worth mentioning that the General Banking Act provide for a specific criminal offence that sanctions unauthorised banking activity.

In April 2021, an amendment to Law No 18,045 increased the penalties associated with insider dealing and modified the manner in which penalties are terminated.

3.5 Tax Fraud

The Chilean Tax Code, in its Article 97 No 4, sets out various hypotheses of tax fraud punishable under Chilean legislation. The system does not distinguish between tax fraud and mere tax evasion, however, it requires the use of fraudulent procedures or machinations. This means that Chilean legislation combines the criminalisation of mere tax evasion with a fraud model that is oriented according to the offence of fraud.

Article 97 No 4 contains three different forms of tax fraud:

- providing maliciously incomplete or false statements that may lead to a tax burden lower than the correct one, malicious omission in the accounting books, the use of commercial documentation already used in previous transactions, and the use of other fraudulent procedures aimed at hiding or distorting the true amount of the transactions carried out or to circumvent tax;
- the malicious performance, by taxpayers subject to sales and services tax or other taxes subject to withholding or surcharge, of any manoeuvre aimed at increasing the amount of credits to which they are entitled in relation to the amounts they must pay; and
- obtaining tax refunds that do not correspond to the taxpayer's actual situation, by simulating a tax operation or any other fraudulent manoeuvre.

The same provision provides a penalty to any person who maliciously forges any commercial document or title, with the purpose of committing or enabling the commission of the crimes just described.

Faced with a fraudulent conduct, the Chilean Internal Revenue Service (the national tax authority) has the option of choosing whether to pursue an administrative or a criminal sanction. The Internal Revenue Service has the exclusive power to sue or denounce this type of crime in order to allow the Public Prosecutor's Office to initiate a criminal investigation of the events.

3.6 Financial Record-Keeping

In the Chilean legal system, there is no specific criminal sanction related to financial record-keeping. However, there are many rules that impose on corporations an obligation to maintain correct accounts and a duty to provide reliable financial information.

Likewise, the partners of external auditing companies that maliciously issue an opinion or provide false information on the financial situation or other matters on which they have expressed their opinion, certification, opinion or report are criminally sanctioned. In addition, those who provide services in an external auditing firm and alter, conceal or destroy information of an audited entity in order to obtain a false opinion about its financial situation commit a criminal offence.

The Financial Market Commission is the public entity that supervises corporations.

There are, nevertheless, specific criminal sanctions for acts that consist of providing false or misleading information to the market (including false information contained in financials delivered to the Financial Markets Commission) in connection with publicly traded securities.

3.7 Cartels and Criminal Competition Law

Competition law identifies two stages of prosecution in cases of collusion: (i) an administrative phase, where the National Economic Prosecutor files a lawsuit against the identified offenders

before the Court of Defence of Free Competition; and (ii) when, and only if convicted in the administrative phase, the National Economic Prosecutor, in severe cases, decides also to file a criminal action before criminal courts.

The National Economic Prosecutor is forced to initiate the criminal prosecution of collusion cases when the facts under investigation "seriously jeopardise free competition".

If convicted in the administrative phase, offenders are exposed to sanctions of up to 30% of the revenue derived from the product or service associated with the offence. If the amount is indeterminable, companies are subject to a maximum fine of 60,000 Annual Tax Units (UTA). Additionally, executives may be disqualified for a period of five to ten years from serving as directors of certain enterprises, and the company will be banned from contracting with any state authority or institution.

During the subsequent criminal procedure, individuals risk imprisonment ranging from a term of three to ten years.

3.8 Consumer Criminal Law

The Consumer Protection Act (Law No 19,496) does not contain criminal offences as such, but a catalogue of offences isolated from criminal law, such as unjustified refusal to sell or misleading advertising. Therefore, there is no consumer criminal law as such, and the generic crime of fraud or injuries (for sale of defective products) will be applied in cases that seek to establish criminal responsibility for an act against consumers.

Sanctions under the Consumer Protection Act are regulated by Article 24, which establishes that, where the provisions of this law do not state otherwise, infringements will be punished with a fine of up to 300 tax units per month.

3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

Law No 19,223 regulates cybercrimes, particularly computer sabotage and espionage. However, this law, enacted in 1993 after a specific event, has not been modernised and is therefore no longer an adequate response to new technological crimes. Faced with this difficulty, most cybercrimes have been prosecuted through the figure of fraud.

To comply with the Budapest Convention, an international instrument that seeks to homogenise the regulation of computer crimes at the international level, a bill intending to modernise Law No 19,223 is currently being discussed in Congress.

It is also worth mentioning that the Chilean Criminal Code contemplates the crime of fraudulent communication of factory secrets. However, the application of this crime is rather limited: the typical conduct includes only "factory secrets" (that is, an establishment with the facilities and machinery necessary to manufacture, make up, elaborate or obtain a product) and does not include any other kind of company.

3.10 Financial/Trade/Customs Sanctions

This issue has been previously covered in different sections, except for customs sanctions (in **3.4 Insider Dealing, Market Abuse and Criminal Banking Law** and **3.6 Financial Record-Keeping**). Customs offences cover two forms of smuggling. Smuggling, in its proper sense, consists of introducing into or extracting from the national territory goods whose import or export is prohibited. Contraband offences in the improper sense, on the other hand, are types of customs fraud – ie, introducing or exporting a good while defrauding the public treasury by avoiding the payment of taxes on that good.

3.11 Concealment

According to the Chilean Criminal Code, concealers are those who, with knowledge of the perpetration of a crime or of the acts carried out to commit it, and without having participated in it as perpetrators or as accomplices, intervene after its execution. The concealers are sanctioned with a penalty two degrees lower than that indicated by law for the perpetrator of the crime. In principle, if the defendant is convicted for an offence, he or she cannot be also convicted for concealment, with the exception of the case of money laundering, where the defendant can be convicted for a specific offence and for self-laundering his or her own money, which can be understood as a way of concealing the product of a crime.

3.12 Aiding and Abetting

The Chilean Criminal Code distinguishes between two classes of co-operators: (i) the co-perpetrator, legally equated with the perpetrator, although he does not take direct part in the execution of the crime; and (ii) the accomplice in the strict legal sense.

The co-perpetrator is the one who conspires with another and provides the means for the commission of the crime. The accomplice, on the other hand, is one who is not included in the definition of co-perpetrator, but who also assists in the execution of the act with previous or simultaneous actions. In the case of the co-perpetrator, he is punished with the same penalty as the perpetrator, while the accomplice is punished with a lower penalty.

3.13 Money Laundering

In force since 2003, Law No 19,913 – that created the Financial Analysis Unit (*Unidad de Análisis Financiero,* UAF) – contains the main money-laundering regulation in Chile, under which both natural and legal entities may be prosecuted. Criminal prosecution for the crime requires the pre-existence of another predicate offence listed in Law No 19,913. Those offences have been subject to a progressive expansion and now include crimes such as:

- terrorism;
- securities fraud;
- insider trading;
- banking fraud;
- misappropriation of public funds;
- arms trafficking;
- smuggling;
- crimes against intellectual property;
- perversion of the course of justice;
- bribery of a public official or a foreign public official;
- illicit association;
- kidnapping;
- child abduction;
- production of pornographic material and child prostitution;
- trafficking of migrants; and
- scams.

Sanctions for individuals include fines of up to USD80,000 and the confiscation of the laundered assets as well as up to 15 years of imprisonment. Legal entities may face penalties such as the dissolution of the legal entity, a temporary or permanent ban on entering into contract with state entities, loss of tax benefits, seizure of goods and monetary fines.

Law No 19,913 also contemplates the obligation of certain individuals to report suspicious transactions in the exercise of their functions. In the event of a failure to inform the UAF or having instead informed those involved or third parties about the suspicious transaction, the same law contemplates a sanction of three to five years of imprisonment and a fine of 100 to 400 UTM.

4. DEFENCES/EXCEPTIONS

4.1 Defences

There are no special defences available for individuals charged in connection with white-collar offences. In that sense, those offenders have the same defences available to them as for other crimes. Defendants in the Chilean criminal system have ample rights of defence, they are granted access to the file as of the beginning of the investigation and have broad access to an attorney, including the Public Criminal Defence.

Law No 20,393 considers the existence of an effective compliance programme as a circumstance which may exempt companies from criminal liability. Even when it does not meet the requirements for exemption from criminal liability, it may be accepted as a mitigating factor.

4.2 Exceptions

The Chilean criminal system does not contemplate de minimis exceptions of any kind regarding white-collar offences.

4.3 Co-operation, Self-Disclosure and Leniency

Regarding individuals, self-reporting or substantial co-operation in the context of a criminal investigation may be considered as mitigating factors when considering the extent of criminal responsibility.

Law No 20,393 establishes an incentive mechanism for self-denunciation for companies. Thus, if the managers of a company report their own misconduct before the start of a criminal prosecution, they will have the right to a reduced sentence.

Law No 21,121, which modifies the rules on corruption and created new criminal offences, such as disloyal management, considers substantial and efficient collaboration as a mitigating factor when considering criminal responsibility, provided that it is considered to be so by the prosecutor.

Self-reporting is particularly relevant in the field of antitrust. Leniency measures have been used in an increasingly successful manner to prosecute collusion cases. The antitrust law contemplates an exemption from criminal liability and the reduction of fines for self-reporters. The Financial Market Commission uses a similar mechanism, incentivising self-denunciation with exemptions from fines and criminal sanctions.

4.4 Whistle-Blower Protection

In the absence of legal regulation, whistle-blowing is not a widespread practice in the Chilean system. The Chilean criminal procedural system allows the prosecutor to enter into agreements with individuals, generally approved by the judge or court, but this is more of a general rule than a direct regulation to protect whistle-blowers.

There is no regulation of the above in the private sector, so individuals who report suspicious or illegal conduct within a company will depend on that company's internal policies. Due to the increased application of compliance programmes in recent years, it has become more common for companies to have systems which protect whistle-blowers.

There have been attempts to include whistle-blower protection in legislation. However, these protections have had a rather limited effect, as they only refer to certain public officers and only consider a suspension of the ability to apply certain disciplinary measures against these 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.

5. BURDEN OF PROOF AND ASSESSMENT OF PENALTIES

5.1 Burden of Proof

Chilean criminal procedure considers the presumption of innocence of the accused to be a fundamental principle. In view of the foregoing, the burden of proof falls on the plaintiff or the Public Prosecutor's Office.

To convict, judges must be persuaded, beyond a reasonable doubt, by the evidence presented before them, that the accused committed the relevant crimes.

5.2 Assessment of Penalties

Each crime has a specific penalty established by law. Chile has a system in which general rules for penalty assessment are established, but in which the penalty may change depending on the mitigating or aggravating factors of the penalty, such as recidivism. In that sense, the penalty is calculated with attention to the following factors: the penalty assigned by law to the crime, the degree of development of the crime, criminal participation, mitigating and aggravating circumstances, and the extent of the damage caused.

As mentioned in **2.7 Deferred Prosecution**, the law contemplates the possibility of reaching an agreement in order to terminate the case without going to trial, either through monetary settlement or deferred prosecution agreements.

Plea agreements, on the other hand, are available when the conviction sought by the Prosecutor's Office does not reach five years of imprisonment. When defendants acknowledge the facts for which they are being prosecuted, they may apply for a reduced conviction, with the authorisation of the judge.

There are no other guidelines that judges and/or prosecutors should follow in any of these situations.

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AUTHORS

Jorge Bofill Genzsch is an experienced dispute resolution attorney in the areas of white-collar crime, corporate investigations, civil litigation, international arbitration and mediation. Jorge 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 and the statute on the criminal liability of legal entities. In April 2015, he was selected as a member of the panel of experts appointed by the Secretary-General of the UN to assess the system of administration of justice of the UN.

César Ramos is a distinguished attorney in the area of white-collar crime. He has broad experience designing legal strategies and providing clients with legal counsel and representation in highly complex cases with a high public profile. In addition to his experience in criminal litigation, he has also worked for the Studies Department of the Public Criminal Defence Service and the Justice Ministry's Legal Division. He has sat on technical and legislative advice commissions pertaining to criminal matters and criminal procedure, including the Criminal Procedures Code Reform Commission convened by the Justice Ministry in 2018.

Bofill Escobar Silva Abogados

Avenida Apoquindo 3472, Piso 19
CP 7550105
Las Condes
Santiago
Chile

Tel: +56 2 2483 9000
Email: jbofill@beslegal.cl
Web: www.besabogados.cl

Trends and Developments

Contributed by:
Jorge Bofill Genzsch and César Ramos
Bofill Escobar Silva Abogados see p.20163

The Future Reform of Chilean Economic Criminal Law

Chilean criminal law is currently undergoing its most important reform since the enactment of the Chilean Criminal Code in 1875.

The immediate precedent of the current discussion is Law 21,121, published on 20 November 2018, which introduced important modifications, particularly in anti-corruption legislation (bribery, bribery of foreign public officials, illicit negotiation and money laundering, including an increase in the applicable penalties), as well as new offences, such as commercial bribery and unfair or disloyal administration.

To update Chilean legislation, three drafts of a new Criminal Code have been worked on by the Ministry of Justice since 2013, the last of which was submitted October 2018.

Although the government has not yet submitted the latest draft to Congress, a vast legal reform project of white-collar crimes is currently being discussed, with the declared purpose of systematising economic crimes and incorporating new rules regarding corporate criminality.

Politically, the project is a reaction against broad criticism regarding the weakness or lack of severity of economic crime legislation in Chile. In the opinion of critics, a lack of effective and dissuasive sanctions generates relevant spaces of corporate impunity.

In this context, the project seeks to address the social rejection generated by crimes of an economic nature and their social impact, adapting the legislation and effectively punishing those involved in economic crimes.

Project Objectives

The project can be analysed from at least five points of view, as follows.

Definition of the concept of "economic crime"

The project seeks to define general rules applicable exclusively to "economic crimes". The catalogue of such crimes includes rules of the Criminal Code and special legislation, distinguishing four categories.

The first comprises a list of crimes that have the character of economic crimes, such as crimes under the securities market law, attacks against free competition and crimes under the general banking law. Then there is another group of crimes, which are considered economic if committed by a subject within or for the benefit of a company, such as fraud and unfair/disloyal administration. The third group corresponds to crimes committed by specific persons, including public officials, which qualify as economic when they involve persons within a company or are committed for their benefit. Finally, the last group of economic crimes corresponds to the crimes of receiving stolen property and money laundering.

Modifications in the determination of penalties and the alternatives to imprisonment

The project is based on a diagnosis of the inappropriateness of applying the general rules in force to economic and corporate crimes, since common grounds, designed for general criminal-

ity as aggravating or mitigating circumstances, are not akin to the nature of these particular crimes.

On the other hand, current legislation results as a general practice in the substitution of prison sentences. Currently, the possibility of an offender serving a prison sentence depends mainly on the existence of previous convictions, and the imposition of a punishment of more than five years of imprisonment is almost non-existent.

On the other hand, the project is designed under the assumption of the inadequacy of penal substitutes in the field of economic and corporate crime. The paradigmatic case of this discordance is probation, which, as a general tool, is intended to guide and contribute to the social insertion of the convicted person in the community and in the ordinary economy. Both purposes are criticised as inadequate in the field of business crime.

In view of this diagnosis, the project intends to create a differentiated system to determine penalties, with aggravating and mitigating factors related to the area of business crime. Likewise, the effect of such factors does not modify, as a rule, the range of the penalties legally established in the crime, thus providing greater predictability and judicial subjection to the decision of the criminal legislator.

Finally, the bill modifies the alternative penalties to the particularities of economic crime. The project understands that the purpose of social control and reintegration is secondary in the field of business crime. In that sense, it is oriented under a punitive perspective, an element that naturally affects the regulation of alternative penalties. Consequently, it eliminates probation and limits the penalty consisting of a monthly signature before the authorities in cases of a small economic entity or cases in which the conduct is less reproachable. In the same sense, it also eliminates the possibility that the home confinement be served at night.

Thus, the applicable penalties are mainly limited to partial home confinement, partial confinement in a public establishment and effective imprisonment.

Modifications to the pecuniary consequences of the crime

A second set of legal modifications is proposed with respect to the pecuniary consequences of the commission of economic crimes.

Chilean law establishes fines that do not take into account the economic capacity of the offender – the consequence of which is that, in the area of business crime, the greater wealth of the sanctioned means that the fine has no effect, neither from a dissuasive nor from a punitive point of view.

The project proposes to introduce a different criterion, which involves the determination of the fine considering the income of a person. In this way, the fine is intended to be differentiated and adapted to the unequal economic capacity of the convicted persons, which, in cases of high-income persons, implies a considerable increase in the amount of the fines.

Likewise, in the area of the pecuniary consequences of the crime, the bill incorporates a regulation on the confiscation of profits, which means the general introduction in the area of economic crime of the loss of all profits deriving from the crime. The bill also regulates the procedure to achieve this objective.

In addition, since the bill considers that the confiscation of profits is not a penalty, it is introduced directly without the need of a prior conviction, being sufficient for it the accreditation of

the criminal act, with a lower standard than the conviction beyond reasonable doubt.

Modifications to the criminal liability of legal persons

In the area of liability of legal persons, the bill introduces important modifications. On the one hand, it incorporates all economic crimes as a presupposition of criminal liability, thus abandoning a restricted model of crimes – which is currently applied – limited to bribery, money laundering, financing of terrorism, receipt of stolen goods, disloyal management, commercial bribery, unlawful negotiation, misappropriation, instructing a worker to attend the workplace during a quarantine, and certain conducts that are related to water pollution and illegal fishing activities.

Along with this, the figure of the supervision of the legal person is introduced, which can be applied both as a precautionary measure and as a condition for a deferred prosecution agreement or penalty.

Reform and updating of Chilean criminal law

In the area of criminal law, the bill introduces important modifications aimed at adapting the regulation to current business criminality.

In effect, by solving important gaps in regulations, new crimes are introduced, such as crimes against the environment and the illicit disclosure of business secrets. In the same line, bankruptcy offences and offences against the securities market are modified, as well as various offences currently in force, to improve their wording and solve the difficulties of interpretation and application that have arisen in practice (ie, fraud, disloyal administration and private corruption). Finally, a crime of misleading advertising is introduced in the Consumer Law and criminal protection is included against cases of labour exploitation.

In summary, the bill, approved by the Chamber of Deputies and pending discussion in the Senate, represents an important change in the practice of Chilean corporate criminal law. In this sense, both the conducts carried out by individuals in the economic sphere, as well as the prevention models implemented in companies, will be regulated by a stricter and more extensive legal framework than the currently applicable regulation, in case the bill is finally approved by the Chilean legislature.

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Bofill Escobar Silva Abogados

Avenida Apoquindo 3472, Piso 19
CP 7550105
Las Condes
Santiago
Chile

Tel: +56 2 2483 9000
Email: jbofill@beslegal.cl
Web: www.besabogados.cl