The background of the cover features a grayscale image of financial data. On the left, there are bar charts and line graphs. On the right, a large, detailed image of a silver metal padlock is shown, partially overlapping a table with columns for 'Date' and 'High'. The overall theme is financial security and legal analysis.

THE STRATEGIC **VIEW**

Expert perspectives on international law

Business Crime 2016

Legal analysis, forecasts and opinion by
leading legal experts in key jurisdictions

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THE STRATEGIC VIEW



Business Crime 2016

Contributing Editors
Ryan Junck and Keith Krakaur, Skadden, Arps, Slate, Meagher & Flom LLP

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Manuel M. Beccar Varela

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ARGENTINA

Manuel M. Beccar Varela and Francisco Zavalía analyse new winds in the fight against bribery and corruption in Argentina and review the Argentine Criminal Code and criminal liability

1. What trends, in terms of activity or focus, have you seen in the prosecution of business crimes in your jurisdiction in the last 12 months?

In December 2015, the Argentine government changed. The new Administration has promised to make the fight against corruption one of the main political goals of its administration.

In this regard, the Federal Courts, previously pressured by the former government, seem to be supporting that position. This trend has had a direct impact on the private sector.

Just to mention a few examples, the previous Vice Minister of Public Works, has been arrested in the context of corruption related to public funds earmarked for upgrading infrastructure.

He was caught in a convent at 3:00 am with about \$9 million in cash and luxury watches stuffed in duffel bags.

Others former government's functionaries have been indicted on corruption charges, as has a former vice-president and a former transportation secretary, who was convicted last year for taking bribes. Then there is Cristina Fernández de Kirchner, the former president of Argentina, whose assets and patrimony are being investigated for illegal enrichment and alleged involvement in a kickback scheme. She has also been indicted on charges of organising a currency trade at an artificially low price that benefited some private investors and cost Argentina's Central Bank billions of dollars.



- In most of these cases, the courts are now investigating the private sector, because it seems to prove the existence of irregular contracts and authorisations, and that politicians had used private financing to buy power.

These allegations stem from a number of cases that have come to light in recent months. The most emblematic is a money-laundering investigation involving Mr. Lázaro Báez, a former Bank employee who became the most important business man in civil construction in the Public Work sector in only 12 years of friendship with the Kirchner family, who has been indicted and is in jail for overcharging hundreds of millions of dollars.

Regarding new legislation, there have been announcements that a set of anticorruption bills is about to be sent to Congress. Among them, there is great expectation about the creation of a lenience programme specifically for anticorruption investigations, in line with the recent results of Brazilian proceedings experiences (Operation Car Wash Task Force – Lava Jato).

2. Are enforcement agencies particularly focused on any specific industries or crimes?

As we have said, the federal agencies are particularly focused in those sectors such as the construction industry, where unknown companies with no experience may have benefited from billions of illegal overcharges. In that regard, all industries with which the state hires are under observation.

The Argentine Criminal Code (ACC) is the main regulation that governs and punishes behaviours related to bribery and corruption, in particular Title XI (Crimes Against the Public Administration) that contains in Chapter VI various rules concerning bribery and corruption. In particular, it prohibits a public officer, either personally or through a third party, from receiving money or any other gift, or accepting a direct or indirect promise to perform, delay or stop performing something related to his duties (*Section 256, ACC*).

The offence of offering a bribe is also punishable (*Section 258, ACC*). The perpetrator must have specific intent to commit wrongdoing, but damage is not necessary. It may be difficult to punish an attempt as the crime is generally carried out through accepting the promises or receiving the gift.

3. Are enforcement agencies more or less focused on pursuing cases against corporations or individuals?

Under Argentine Criminal Law, no company, whether domestic or foreign, can be prosecuted for foreign bribery. Historically, the ACC considered that only individuals can be held criminally liable, thus criminal liability in Argentine law is

“ Regarding new legislation [...] there is great expectation about the creation of a lenience programme specifically for anticorruption investigations, in line with the recent results of Brazilian proceedings experiences ”

personal. Criminal liability is only for physical persons and not for legal entities. As a result, there can be no criminal charge against a legal entity or an organ thereof, with the exception of certain crimes, but even with these exceptions the criminal law penalties always depend on natural persons individually considered as there is no possibility of strict liability in criminal matters.

Regarding these exceptions, penalties for legal entities are only intended for specific offences; for example in financial, tax, customs, foreign exchange and environmental areas.

In these cases, the penalties could include, for example, fines of 10 times the value of the offence, suspension of activities, suspension of the ability to participate in public tenders, cancellation of legal status, loss or suspension of governmental benefits, etc.

Nonetheless, a legal mechanism for the criminal liability of legal entities has yet to be established. However, a very important Law project (The Project) exists, which is prepared by the Anticorruption Office at the Minister of Justice and reforms the ACC and proposes radical changes in this matter. The new administration is strongly focused on the fight against corruption, which shows in a renewed effort to deliver better law enforcement mechanisms.

4. Does the legal framework concerning the prosecution of business crimes allow for extraterritorial enforcement? Are such matters being pursued?

The ACC mainly follows the territoriality principle, that is, it applies to all crimes committed in

Argentina, without distinguishing whether the criminal perpetrators are Argentine nationals or residents.

This general principle notwithstanding, Section 1 of the ACC sets forth two exceptions to the territoriality rule: it shall be applicable to any crimes whose 'effects must be produced in the territory of Argentina'; and it also applies to 'crimes committed abroad by agents or employees of Argentine authorities while performing their duties'.

However, Sections 303 and 306 of the ACC concerning money laundering and terrorist financing provide that they will apply even when those crimes were committed outside the scope of the ACC, when the fact that forms the basis for that crime had been punished in the place where it was committed.

Nevertheless, The Project of the Anticorruption Office includes a reform to Section 1 of the ACC, allowing extraterritorial enforcement in cases of foreign corruption.

5. What judicial or legislative developments have impacted the prosecution of business crimes in your jurisdiction in the last 12 months? Are there any significant proposals for reform of the legal framework that governs business crimes in your jurisdiction?

Regarding the Argentine foreign exchange regime, since 2011 the Argentine National Government has implemented various restrictions, both formal and informal, on transfers of funds abroad, in order to limit the outflow of funds from the country. In some cases, the violation of those restrictions constituted crime offences.

However, since December 2015, the Argentine Central Bank and the Ministry of Economy and Public Finance have introduced a series of new regulations to eliminate some of the restrictions which govern operation in the Local Foreign Exchange Market. Along with the new provisions, other entities (particularly, the Ministry of Production, the National Securities and Exchange



- Commission and the Argentine Federal Tax Administration – “AFIP”) have also issued regulations that affect how to operate in the FX Market.

This is why the old restrictions are no longer criminal offences and the authorities are closing cases by the application of the principle of “retro-activity of the most favourable criminal law”.

On the other hand, under international commitments assumed by the Argentine State, a draft law on criminal liability of legal persons in relation to public administration crimes and international bribery it is being analysed at the Ministry of Justice.

6. How common is it for enforcement agencies in your jurisdiction to exchange information and cooperate internationally with other agencies? What are the consequences of cross-border cooperation on prosecutions of entities and individuals in your jurisdiction?

The Argentine criminal justice authorities and administrative regulators cooperate closely with those in foreign countries. Law 24,767 has been in force in Argentina since 1997, and provides the foundation for the system of international legal cooperation on criminal matters. It provides the rules of procedure applicable for international legal assistance and extradition followed by Argentina.

In addition, in cases where there is no treaty binding Argentina with the requesting government, it establishes the conditions under which the assistance will be awarded, which are, in general terms: (i) the crime that motivates the extradition process cannot be a political crime; (ii) the crime that motivates the extradition process cannot be exclusively envisaged by the military criminal law; and (iii) the process that motivates the extradition could not show persecutory purposes for reasons of political opinions, nationality, race, sex or religion.

Criminal assistance will be provided even if the offence that motivates the extradition process has not been provided in Argentine law.

Furthermore, several bilateral and regional international treaties have been entered into which provide rules for mutual assistance on criminal matters, including, for example, obtaining evidence.

As previously mentioned, The Project of legal entities’ criminal liability includes concrete benefits for self-reporting and collaboration with enforcement agencies and criminal investigations which reduce penalties against the company.

7. What unique challenges do entities or individuals face when enforcement agencies in your jurisdiction initiate an investigation?

Even if a legal mechanism for the criminal liability

“ [S]ince December 2015, the Argentine Central Bank and the Ministry of Economy and Public Finance have introduced a series of new regulations to eliminate some of the restrictions which govern operation in the Local Foreign Exchange Market ”

of legal entities has yet to be established, in recent times the need for corporations, and especially their directors, to have compliance programmes for the purpose of preventing the commission of crimes within them, have increased.

Compliance practices are used to limit criminal liability, both individuals and corporations can face an investigation.

To avoid or minimise the risk of corporate fraud or acts of corruption, companies have begun to:

- Establish codes of ethics with clear anti-corruption and transparency policies.
- Establish controllable and transparent processes for high-risk sectors of the companies such as the purchase department, financial department or institutional relationships.
- Practise due diligence concerning suppliers, and require the same processes and controls in accordance with the standards of transparency and quality of the company.
- Designate and grant high powers to compliance officers that regularly report to headquarters.
- Conduct regular internal and external audits through leading companies.

- Have privacy policies in relation to work tools (e-mails, computers, and so on) that legally enable them to monitor and review those items without breaching constitutional rights.
- Provide internal training courses, and hire external consultants to provide legal and regulatory updates on emerging issues.

If penalties are imposed on a legal entity as an accessory to a crime, the judge may take into account the implementation and monitoring of compliance programmes as a mitigating (although not exonerating) factor (Section 304, ACC). Therefore, having a code of ethics, policies and procedures of integrity, although is not currently a legal requirement in criminal matters (except for certain obligations on the prevention of money laundering and terrorist financing) it appears to be a prerequisite for facing criminal proceedings to which the entities have begun to adapt.

In this sense, The Project Anticorruption Office of the Minister of Justice includes strong recommendations for legal entities to implement effective compliance programmes with concrete effects that mitigate criminal liability in cases of corruption.

“ The Project [...] includes strong recommendations for legal entities to implement effective compliance programmes with concrete effects that mitigate criminal liability in cases of corruption ”

8. Do enforcement agencies in your jurisdiction provide incentives for individuals or entities to self-report a business crime or otherwise provide assistance to the government? If so, what factors should individuals or entities consider when assessing whether to self-report a business crime or cooperate with a government investigation?

In the Argentine legal system, the Narcotics Law (Law 23,737), the Customs Code (Law 22,415), the regulation of terrorist offences (Section 41C, ACC) and Money Laundering (Law 26,683) provide the possibility of reducing the penalty on any natural person accused or convicted who self-report a business crime or cooperate with a government investigation.

To afford this benefit, the information that the “repentant” provides must contribute to preventing the start, stay or consummation of a crime, provide evidence, disclose the identity of the authors, or make any significant contribution to the investigation.

Moreover, the Criminal Tax Procedure (Law 24,769), establishes in Section 16 that whoever is bound to pay the tax and spontaneously faces the payment of the unpaid taxes, shall be released from criminal liability, provided there is not a tax inspection or requirement from the Tax Authority which is linked directly or indirectly with the unpaid tax. As long as the payment is actually spontaneous, the release shall be effective. Whether the conduct is considered spontaneous is a matter of how the judges construe the rule.

9. Do enforcement agencies in your jurisdiction use non-prosecution agreements (“NPA”) or deferred prosecution agreements (“DPA”) ? If so, how do such agreements work in practice and what can entities or individuals do to reach an NPA or a DPA with enforcement agencies? If not, do you believe it is likely that such agreements will become part of the legal framework in the next five years?

The Argentinean legal framework does not provide non-prosecution agreements or deferred prosecution agreements. Nevertheless, the existence of some draft laws regarding that issue, allow us to presume that they will shortly become part of Argentinean law.

A legal entity’s liability project includes both alternatives of non-prosecution and deferred agreements implemented by the Prosecutor and the Defence Attorney but controlled by the Judge in the case.

As we know, the governance authorities are very interested in The Project of the Anticorruption Office and they are pressing for it to be sent to Congress and implemented as soon as possible, so we are optimistic that all these important changes will soon be included. ➔

➤ Acknowledgment

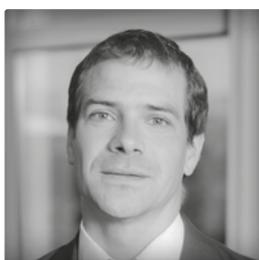
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