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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

Phase 4 evaluation of Chile: Additional written report

The Working Group discussed this report on 8 March 2023.

Chile has submitted several attachments with its written report. They can be obtained on request to the Secretariat.

For further information, please contact:
Elisabeth Danon, +33 1 45 24 92 50, elisabeth.danon@oecd.org
Corinna de Vathaire de Guerchy, +33 1 85 55 47 79, corinna.devathairedeguerchy@oecd.org
Louise Lecaros de Cossío, +33 1 45 24 78 99, louise.lecarosdecossio@oecd.org

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PHASE 4 EVALUATION OF CHILE: ADDITIONAL WRITTEN FOLLOW-UP REPORT

Instructions

This document seeks to obtain information on the progress that Chile has made in implementing a number of outstanding recommendations of its Phase 4 evaluation. Further details concerning the written follow-up process is in the Phase 4 Evaluation Procedure (paragraphs 51-59).

Please submit completed answers to the Secretariat on or before **3 February 2023**.

Name of country:	CHILE
Date of approval of Phase 4 Report:	13 December 2018
Date of approval of Phase 4 Two-Year Follow-Up Report:	12 March 2021
Date of information:	10 February

Part I: Recommendations for Action

Regarding Part I, responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.

Recommendations regarding the detection of foreign bribery

Text of recommendation 1(a):

1. With regards to the **detection of foreign bribery**, the Working Group recommends that Chile:

(a) Adopt as a matter of priority an appropriate regulatory framework to protect private sector employees who report suspicions of foreign bribery from discriminatory or disciplinary action [2009 Recommendation IX.iii and Phase 3 Recommendation 11(c)].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Law N° 21.314**

On 13 April 2021, Law N° 21.314 (former Bulletin N° 10.162-05) was published in the Official Gazette. This law amended Legislative Decree N° 3.538 (Organic Law of the Financial Market Commission or CMF in Spanish) to regulate the anonymous whistleblower. The whistleblower may voluntarily collaborate with investigations by providing further information for the detection, verification or accreditation of violations of the laws that are within the competence of the CMF, for which a whole regulatory protocol is established to its actions.

Law N° 21.314 states that the identity of the whistleblower is confidential and the violation of this obligation could be sanctioned with a fine. If the offender of this obligation performs functions in the CMF or any other public agency, such infraction shall also be punishable with the penalty of imprisonment. It shall also give rise to administrative liability and shall be punishable by removal from office. In addition, service agreements cannot be terminated because of the information provided by the whistleblower.

- **Bill that "Establishes a new statue of protection in favour of the complainant of acts against administrative probity" (merged Bulletins N°s 13.565-07 and 13.115-06)**

The bill (merged Bulletins N°s 13.565-07 and 13.115-06) that stablishes the new protection statute in favour of the whistleblower, submitted to Congress on 4 June 2020, is currently in the third and last stage of legal discussion (mixed committee of lower and higher chambers), where the discrepancies from the previous stages of the parliamentary procedure, in which each chamber considered the bill individually, are being discussed.

As stated before, the System for State Integrity is a complex network of institutions and procedures for complaints and protection of private interests that will be reinforced and duly coordinated thought this bill that creates the statute of whistleblower protection. This system contemplates mechanisms for direct and indirect protection of the whistleblower, both in the criminal and administrative procedures, and regarding public servants as well as private individuals.

The provisions of the bill aim to facilitate the enforcement of the complaint mechanisms existing in our legal system, strengthening at the same time other general channels for submitting complaints – in addition to the new channel for complaints of the Comptroller General of the Republic (CGR) – creating protection measures that apply to different levels.

The bill modifies article 485 (related to the procedure for the protection of workers' fundamental rights) of the Labour Code to explicitly acknowledge the use of the labour protection action in case of retaliation against the workers when a claim has been submitted, regardless of the events denounced or the institution where it was submitted. Specifically, it adds the expression "for the filing of complaints", to extend the protection of the indemnity guarantee, which translates into an extension of the judicial action for the protection of the workers' fundamental rights. Additionally, in agreement with modifications previously introduced to the Law N° 21.280 in this matter, this action might be used regardless of the kind of whistleblower, private individual or public servant.

The bill aims to modify the Code of Criminal Procedure to establish a new protection mechanism for the whistleblower and his/her family in the criminal justice spectrum. The bill establishes the duty of the Public Prosecutor's Office (PPO) to enact the general instructions, protocols, and mechanisms necessary to provide protection measures to the whistleblower, using them when the entity, the nature of the events or the specific condition of the whistleblower show that because of the complaint he/she might be at plausible risk of suffering harassment, threats or other attacks against him/her or his/her family. This change represents the enactment of an innovative protection statute for the whistleblower in the criminal justice system, that, in the same way that the labour protection action, does not distinguish between the whistleblower's legal status or the nature of the events denounced. These measures complement the protection norms in favour of the victims and witnesses already present in the criminal justice law.

Even though the bill reinforces and creates a new mechanism of protection for public servants, it also establishes mechanisms of sanction and control aimed to avoid acts of retaliation or harassment by public servants involved in this type of procedure of complaint, creating an indirect mean of protection for the interests and integrity of people.

Although the bill promotes the filing on complaints of a broad spectrum of irregular behaviours, it particularly aims to capture complaints on corruption. To do that, it incorporates a non-criminal concept of corruption. This definition seeks to incorporate an all-encompassing of the corruption phenomenon within the Public Administration, including the anticipate capture of wrong doings (misbegotten meeting, unfear gift, etc), and the reception of evidence that, without constituting a crime, have the potential to enable the detection of anomalies committed within the public administration.

Additionally, even though the bill enacts the creation of a special protection statute in favour of those who act as public servants – who are obliged to file any anomaly that gets to know in the exercise of his/her position – it also includes protection measures in favour of every whistleblower, including the private sector worker. Among these measures we can find:

1. The identity confidentiality in the filing of a complaint thought the digital channel of the CGR.
2. Sanction in case of harassment against a whistleblower or witness, or their family.
   The sanction is the destitution of those public servants who take action in harassment against any person who files a complaint or witness in an administrative or judicial investigation or take actions of this nature against the relatives of the above described, being this situation qualified as serious contravention to public probity.
3. Crimes
   The existing regulation is complemented on the matter of breach of secrecy to better protect the confidentiality of information within the complaints system and the procedures that could start on its regard, particularly, on the matter of identity confidentiality when the whistleblower has asked for it.

- **Complaints Portal of the Office of the Comptroller General of the Republic of Chile (CGR)**

Through the Complaints Portal (link: https://www.contraloria.cl/web/cgr/denunciar-en-linea3), the CGR receives complaints against any state agency or civil servant under its control according to the law, including numerous companies. To comply with this mandate, the website of the CGR allows any citizen or civil servant to submit complaints with confidentiality of identity. Such complaints can also be presented at any of the regional offices of the CGR.

The main objectives of the portal are:

(i) Facilitate the filing of complaints, by any person, on events that constitute disciplinary infractions or administrative contraventions, and event constitutive of corruption or that affect public goods or means, using a digital and centralised channel for filing complaints controlled by the CGR.

(ii) Enable appropriate protection for the whistleblower from possible acts of retaliation or harassment.

The complaint is a statement through which any citizen or civil servant informs the CGR about one or more specific facts related to a possible irregular situation to investigate and determine its veracity. The suggestions and complaints should be focused on the acts of the administration, a field supervised by this institution that includes:

- Decentralized public services (Health, Housing, and Urbanism, State Universities, Internal Taxation Service, Social Security, among others).
- All municipalities in the country.
- Public companies created by law (ENAP, ENAMI, FAMAE, ENAER, ASMAR, Port Companies, and others).
- Public and private companies, corporations, or entities in which the State or its centralised or decentralised companies, corporations, or institutions have capital contributions (Metro, SERCOTEC, CONAF, among others).

In this manner, the CGR's Complaints Portal protects private sector employees making complaints through it, by maintaining the confidentiality of the identity of the employee, guaranteeing the use of data only to contact whistleblowers in case further information is required and for statistical purposes, and through the procedures established by this institution's current laws and regulations.

For more detail about the Complaints Portal of the CGR, see the answer to the recommendation 1(b), specifically, under title "*National Anti-Corruption Strategy*".

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 1(b):

1. With regards to the **detection of foreign bribery**, the Working Group recommends that Chile:

(b) Provide comprehensive and adequate protection to whistleblowers in the public sector [2009 Recommendation IX.iii and Phase 3 Recommendation 11(c)].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Law N° 21.480**

In September 2022, Law N° 21.480 entered into force, extending the sphere of protection to Armed Forces personnel, regarding complaints of breaches of probity and other crimes. This law introduces a series of modifications to the Armed Forces Personnel Statute.

This law provides that all Armed Forces personnel, regardless of their legal capacity, have the duty and obligation to report acts that are contrary to the principle of administrative probity. This includes “To request, make oneself promise or accept, by reason of the position or function, for oneself or for third parties, donations, advantages or privileges of any nature”. This encompasses domestic and foreign bribery.

The law also establishes that the complaints that are formulated must be founded, presented through the means and the form established by the respective institution, and must contain a series of formal requirements, which may be subject to identity confidentiality if requested by the complainant.

In turn, this law provides that the institutions of the Armed Forces must have a system for presenting and entering complaints, through which the procedure regulated in the administrative summary investigations of the Armed Forces regulation will apply. This procedure must ensure due process, confidentiality and avoiding delays in resolving the complaint. In addition, the complaint procedure and the terms associated with it are established.

Finally, this law introduces a rule to protect the complainant from unjustified disciplinary measures, harassment, bullying or any other type of retaliation. These situations, as well as the non-adoption of measures to protect the complainant, constitute a serious offense to disciplinary norms.

In addition, the complainant will always have the option to present the complaint on these matters before the CGR. This allows, for the first time, to skip the chain of command that is inherent to the institutionality and functioning of the Armed Forces.

- **National Anti-Corruption Strategy**

The Office of the CGR is part of the Chilean anti-corruption system and its role on the fight against corruption is recognised by the Chilean institutions as well as by citizens. One of the goals of the CGR's Strategic Plan is to "align all the work of the CGR towards the promotion of integrity and the fight against corruption."

As part of the anti-corruption efforts of the CGR, in 2021, the institution presented its National Anti-Corruption Strategy (NACS).

The NACS was constructed through a participatory process and aims to contribute to improving transparency and integrity in the State Administration through coordinated actions to prevent and control corruption. Its specific objectives are:

- To conceptualise the phenomenon of corruption in Chile, highlighting the role of the CGR in the matter.
- To diagnose the perception that different actors have about corruption in Chile.
- To identify national actions to strengthen the role of the CGR in the fight against corruption.
- To identify local anti-corruption actions that respond to each region's reality and specific needs.

Measure 14 establishes "To promote the establishment of a reporting system with gender perspective as a tool to detect irregularities in the public and private sector through:

The articulation of whistleblower's protection system with high information security standards and based on multichannel, that provide information about the alert follow-up, legal and financial assistance, if applicable, and protection against possible reprisals."

- **Complaints Portal of the Office of the Comptroller General of the Republic of Chile (CGR)**

The CGR receives complaints against any state agency or civil servant under its control according to the law, including numerous companies. To comply with this mandate, the website of the CGR allows any citizen or civil servant to submit complaints with confidentiality of identity. Such complaints can also be presented at any of the regional offices of the CGR.

Visits from citizens and civil servants to this website increased by 96% between 2019 and 2020, generating 20.027 out of 39.219 complaints in matters such as disciplinary infractions, administrative offenses, and acts constituting corruption, among others.

The complaint is a statement through which any citizen or civil servant informs the CGR about one or more specific facts related to a possible irregular situation to investigate and determine its veracity. The suggestions and complaints should be focused on the acts of the State Administration, a field supervised by this institution that includes:

- Decentralized public services (Health, Housing, and Urbanism, State Universities, Internal Taxes, Social Security, among others).
- All municipalities in the country
- Public companies created by law (ENAP, ENAMI, FAMAE, ENAER, ASMAR, Port Companies, and others).
- Public and private companies, corporations, or entities in which the State or its centralized or decentralized companies, corporations, or institutions have capital contributions (Metro, SERCOTEC, CONAF, among others).

The form to present a complaint to the CGR requests personal data to communicate the complaint's status or audit suggestion to whistleblowers. It maintains the confidentiality of the identity, guaranteeing the use of data only to contact whistleblowers in case further information is required and for statistical purposes.

It is important to note that the protection of whistleblowers involves the treatment of their identity once the complaint is filed. The CGR has defined the following user profiles depending on the stage of the process:
- Planner, who can visualize the contact information and e-mail;
- Analyst, who reviews the content; and
- Administrator, who can visualize all the information and data of the whistleblower and must keep strict confidentiality.

In conclusion, although the process of presenting a complaint to the CGR is not anonymous, the whistleblower is protected through the procedures established by this CGR's current laws and regulations.

Link of the Complaints Portal: https://www.contraloria.cl/web/cgr/denunciar-en-linea3

- **Bill that "Establishes a new statue of protection in favour of the complainant of acts against administrative probity" (merged Bulletins N°s 13.565-07 and 13.115-06)**

The bill that establishes a new statute of protection in favour of the whistleblower (merged Bulletins N°s 13.565-07 and 13.115-06) is currently under discussion in Congress. Since 2021, this bill has progressed well in its processing, currently in its third and final stage of discussion.

The provisions of the bill aim to facilitate the enforcement of the complaint mechanisms existing in our legal system, strengthening also other general channels for submitting complaints – in addition to the new Channel for Complaints of the CGR – creating protection measures that apply to different levels.

Finally, even though the bill reinforces and creates a new mechanism of protection for public servants, it also stablishes mechanisms of sanction and control aimed to avoid acts of retaliation or harassment by public servants involved in this type of procedure of complaint, creating an indirect mean of protection for the interests and integrity of people.

For more detail about this bill, see answer to the recommendation 1(a).

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Recommendations regarding the enforcement of the foreign bribery offence

Text of recommendation 2(d):

2. With regards to **investigations and prosecutions**, the Working Group recommends that Chile:

(d) (i) Ensure that it assesses credible allegations of foreign bribery when they surface, and seriously investigate this offence in Chile and abroad; and (ii) use proactive steps to gather information from diverse

sources to increase sources of allegations and enhance investigations [Convention Art. 5, 2009 Recommendation V and Annex I.D].

Actions taken as of the date of the follow-up report to implement this recommendation:

Chile carefully assesses each and every allegation of foreign bribery that comes to its attention, including those that have arisen between March 2021 and to date, both in Chile and abroad. Likewise, various sources of information are sought and all possible channels of communication, both formal and informal, are used with a view to obtain broad and high-quality information, to facilitate and strengthen the investigation and prosecution of foreign bribery and the crimes commonly associated with it.

These proactive actions by Chile have complemented the efforts to fully investigate allegations of foreign bribery, in line with the recommendation made.

Details of the investigative procedures carried out in each of the foreign bribery investigations are contained in Part II, Enforcement.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 3(a):

3. With regards to **conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs)**, the Working Group recommends that Chile, as a matter of priority:

(a) Ensure that SCPs and ABPs remain available for natural persons in all foreign bribery cases [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D].

Actions taken as of the date of the follow-up report to implement this recommendation:

During the period 2019 – 2022 there has not been any acquittal or conviction, neither in ABPs nor in oral trials, of natural or legal persons for foreign bribery. Therefore, the following data refers only to domestic bribery.

In order to demonstrate that SCPs and ABPs have remained available for both natural and legal persons in all bribery cases, data has been collected for the abovementioned period on the number of SCPs adopted and ABPs ruled (convictions and acquittals), as shown in the following tables:

Total of SCPs and ABPs for natural and legal persons	
Year	**Number of relations***
2019	156
2020	125
2021	325
2022	259
TOTAL	**865**

* A relation is the link between a defendant, the offence and the associated victim.

The same information as above is shown below, disaggregated between natural and legal persons:

Total of SCPs and ABPs for natural and legal persons		
Year	**Natural persons (per relations)**	**Legal persons (per person)**
2019	155	1
2020	124	1
2021	319	6
2022	256	3
TOTAL	**854**	**11**

Below is shown the information disaggregated according to the type of termination in all bribery cases, for both natural and legal persons:

Year	SCPs	Convictions (ABPs)	Acquittals (ABPs)
2019	59	96	1
2020	20	105	0
2021	85	239	1
2022	91	168	0
Subtotal	255	608	2
TOTAL	**865**		

The same information as above is shown below, only for natural persons:

Year	SCPs	Convictions (ABPs)	Acquittals (ABPs)
2019	58	96	1
2020	19	105	0
2021	80	238	1
2022	89	167	0
Subtotal	246	606	2
TOTAL	**854**		

Regarding the information on the type of termination in all bribery cases for legal persons, given that there are no convictions or acquittals in ABPs, the figures for convictions in oral trials have been included to provide an adequate overview of the national situation:

Year	SCPs	Convictions (ABPs)	Acquittals (ABPs)
2019	1	0	0
2020	1	0	0
2021	5	1	0
2022	2	1	0

Subtotal	9	*2	0
TOTAL	**11**		

The above SCPs and ABPs statistics need to be compared with the information on all types of termination in all bribery cases during the period 2019-2022, disaggregated by year, as shown below:

	2019	**2020**	**2021**	**2022**	**Subtotal**
Reparatory agreement	0	0	0	4	4
Grouping to another case	177	70	80	68	395
Administrative annulment	35	4	3	4	46
Provisional filing	121	139	130	114	504
Decision not to pursue the investigation	123	103	58	63	347
Power of non-initiation of investigation	9	3	1	3	16
Incompetence	1	1	0	0	2
Opportunity principle	2	0	0	0	2
Acquittal judgement (ABPs)	**1**	**0**	**1**	**0**	**2**
Acquittal judgement (Oral Trial and Simplified procedure)	26	11	14	15	66
Conviction judgement (ABPs)	**96**	**105**	**239**	**168**	**608**
Conviction judgement (Oral Trial, Simplified and Admonition procedure)	101	51	68	84	304
Definitive dismissal	43	56	30	25	154
Definitive dismissal (article 240)	73	78	22	30	203
Provisional dismissal	10	13	24	36	83
SCPs	**59**	**20**	**85**	**91**	**255**
Other grounds	2	8	12	6	28
TOTAL	**879**	**662**	**767**	**711**	**3019**

In percentage terms, ABPs with convictions and acquittals represent 20.2% of the total number of cases terminated in the period, while SCPs represent 8.4%.

Therefore, with the statistics provided, it is clearly demonstrated that both SCPs and ABPs remain fully and completely available for natural persons in all bribery cases.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 3(b):

3. With regards to **conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs)**, the Working Group recommends that Chile, as a matter of priority:

(b) Improve transparency and accountability by (i) establishing more detailed criteria that prosecutors must consider when deciding whether to use an SCP/ABP; (ii) making public, as necessary and in compliance with the relevant rules, the essential elements of resolutions, in particular the reasons for using an

SCP/ABP, the main facts of the case, the party(s) to the agreement, and the sanctions; and (iii) increasing judicial oversight of SCPs/ABPs, including the decision to use these measures and the terms of a resolution [Convention Arts. 3 and 5, 2009 Recommendation III.i and Annex I.D].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Regarding recommendation 3(b) (i)**

On 8 April 2022, Prosecutorial Instruction N° 278/2022 was issued, which contains the current text of the General Instruction that sets out the criteria for prosecutors to follow, in the investigation of corruption offences, replacing the previous Prosecutorial Instruction N° 472/2020.

This new Prosecutorial Instruction maintains the restrictions contained in the previous version (N° 472/2020), so that both SCPs and ABPs remain as available tools to prosecutors, to be applied in an exceptional, limited and prudent manner (in the case of SCPs) and in a prudent and restrictive manner (in the case of ABPs).

Likewise, Prosecutorial Instruction N° 278/2022 maintains the obligation for prosecutors to express the reasons for the application of ABPs, either when formalising the investigation or subsequently at any stage of the procedure, up until the oral trial preparation hearing.

To date, there have been no foreign bribery cases in which these guidelines have been applied and interpreted.

- **Regarding recommendation 3(b) (ii)**

In the context of our institutional order, the courts are governed by the same general duty of publicity of the acts and decisions of all state agencies (article 8 of the Political Constitution of the Republic of Chile, CPR). Also, in the case of the Judiciary, this constitutional duty is reinforced at legislation level, in article 9 of the Organic Code of the Courts, Law N° 20.285, and article 2 letter c) of Law N° 20.886. This general rule has specific exceptions, based on the constitutional (article 19 N° 4 CPR), legal (Law N° 19.628) and regulative (Act 44-2022 of the Supreme Court) level.

Without prejudice to this normative framework, the following specific actions should be mentioned:

(a) Real-time availability is ensured, through web consultation, of convictions, acquittals, NTRs, resolutions referring to SCPs and ABPs, and the respective minutes of hearings. All this, through the website: https://oficinajudicialvirtual.pjud.cl.
(b) The right of access to the audio recordings of the hearings in which the aforementioned matters were discussed. Any interested party can access not only the specific resolution, but also to the complete details of the debate that preceded them, including all the background information discussed in the hearing (article 44 of the Code of Criminal Procedure). For this purpose, and except for exceptions (like reserved hearings), any interested party may make a specific request to the competent court. In fact, in each court there are officials explicitly in charge of providing copies of those audio records. Specific details on how the Judiciary ensures the recording and delivery of these audio files can be found in the following document https://academiajudicial.cl/wp-content/uploads/2022/03/06_TOP-funciones-basica-de-organizacion-y-funcionamiento.pdf.

In some cases of greater social interest, the Judiciary broadcasts the content of hearings in video format through its web television channel (https://www.poderjudicialtv.cl/) and YouTube (https://www.youtube.com/@pjudicialchile).

- **Regarding recommendation 3(b) (iii)**

Article 237 of the Code of Criminal Procedure does not allow the judge to question the terms and conditions of a SCP agreed by the intervening parties, but they have to be established in a well-founded manner. Nevertheless, the judge may request the PPO to provide the background information he/she deems necessary to take a decision, and the legal requirements for granting the SCP must be met. The decision on the SCP may be appealed by the accused, the victim, the PPO or the complainant.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 3(c):

3. With regards to **conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs)**, the Working Group recommends that Chile, as a matter of priority:

(c) Amend its legislation to ensure that all appropriate measures (especially the requirement that a legal person implement an OPM) and confiscation are equally available under an SCP and a conviction [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Bill that "Establishes a New Criminal Code" (Bulletin N° 14.795-07)**

The bill of the New Criminal Code considers an additional consequence to the penalty applicable to legal persons, which is the "supervision of the legal person" (article 136, N° 2). According to article 141, such additional consequence to the penalty consists in subjecting the legal person to a supervisor appointed by the court. The supervisor will oversee, in collaboration with the legal person's management, the elaboration, implementation or improvement of an adequate crime prevention system and control such elaboration, implementation, or improvement. The execution of the measure is regulated in article 155.

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If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 3(d):

3. With regards to **conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs)**, the Working Group recommends that Chile, as a matter of priority:

(d) Provide guidance on the choice of terms for an SCP, including on the use of charitable donations [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D].

Actions taken as of the date of the follow-up report to implement this recommendation:

As already explained in previous phases of evaluation, article 238 of the Code of Criminal Procedure (CPP) sets out taxatively the possible conditions that can be agreed in SCPs, although article 238(h) contains a general condition whose description is quite broad (*"Other condition that may be adequate in consideration of the circumstances of the particular case in question, reasonably proposed by the PPO"*).

Article 238 of the CPP, as well as all those referring to SCPs, are of general application in the Chilean criminal procedure system, therefore any modification made in this regard would affect not only foreign bribery, but all existing offences under Chilean law.

As its previous version, Prosecutorial Instruction 278/2022 provides guidance on the choice of terms for a SCP when one of the conditions to be fulfilled consists in the payment of a sum of money, in accordance with either article 238(e) or article 238(h) of the Code:

- Prosecutors must first verify the suitability, prestige and transparency of the NGOs that will be the recipients of such sums of money.
- Regional Prosecutor's Offices are suggested to maintain a register of NGOs within their jurisdiction that meet the above-mentioned requirements.

• Prosecutorial Instruction 278/2022 also establishes new conditions that prosecutors must include in SCPs where one of the conditions consists in the payment of a sum of money:

- The defendant, whether a natural or legal person, cannot use any benefit or tax credit that may exist, based on a payment made as a condition agreed in a SCP, nor reduce it as an expense, cost or any other concept; and.
- For the proper transparency and supervision of the fulfilment of the condition, the court should be requested to formally notify the Auditing Sub-directorate of the Internal Taxation Service (SII) of the fact that a SCP has been adopted and the terms of it.

As verifiable document, please find attached a copy of the formal notification sent by the Court to the SII in the *"Ministry of Housing and Urbanism Case"*, which is described in detail in the response to Recommendation 3(f).

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 3(e):

3. With regards to **conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs)**, the Working Group recommends that Chile, as a matter of priority:

(e) Take greater steps to verify that OPMs implemented by companies pursuant to an SCP are adequate [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Draft Prosecutorial Instruction that replaces Prosecutorial Instruction N° 440/2010**

This draft, which provides performance criteria for the investigation and criminal prosecution of legal persons, addresses this aspect as follows:

When it is decided to impose as a condition of a SCP the implementation of an OPM, or its modification or updating, another condition must also be imposed on the legal person, which is that the OPM must be assessed by an entity registered in the Financial Market Commission's Public Registries for Certifying Entities of OPM, which must be appointed by mutual agreement between the PPO and the defendant, and at the expense of the entity. This certifier must inform the Court, within the period of observation of the SCP, whether the OPM implemented complies in its opinion with the requirements of article 4 of Law N° 20.393.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 3(f):

3. With regards to **conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs)**, the Working Group recommends that Chile, as a matter of priority:

(f) Where conditions for foreign bribery under an SCP include donations, (i) ensure that such conditions are effective, proportionate and dissuasive, (ii) include as a term of the SCP that the offender shall not seek a tax deduction with the donation, and (iii) verify in all cases the appropriateness of charities that receive donations [Convention Art. 3].

Actions taken as of the date of the follow-up report to implement this recommendation:

The "*Ministry of Housing and Urbanism Case*" (Investigation Number 1801154645-1, North Central Metropolitan Regional Public Prosecutor's Office; Case Number 1868-2019, 7th Guarantee Court of Santiago) shows in practice how conditions consisting in payments as compensation for damages, adopted in the context of a SCP, comply with recommendation 3 (f).

The case involves a series of public bids for the elaboration of IT developments for the Ministry of Housing and Urbanism, which were awarded to companies related to public officials of this same ministry and which also involved the payment of money to those in charge of the bidding processes. In addition, the investigation determined that the IT developments were not executed according to the bidding terms and that a number of working hours, much higher than the real, was reported.

The legal persons involved were indicted for (domestic) bribery of public officials and, to date, regarding two of them a SCP has been agreed:

- In relation to Business Technology Solutions JSC ("*Soluciones Tecnológicas de Negocios SpA*", Altiuz), on 4 December 2020, the following conditions were imposed: To certify its OPM within 10 months from the date of the SCP and in the following months; to pay to the Treasury the sum of CLP 81.017.485 (approximately USD 98,800), corresponding to the total amount invoiced by the company as a result of the commission of the offence; and to not deduct this payment for the determination of the tax base of the first category tax. Both the PPO and the defence requested the court that as part of the fulfilment of this condition, the Internal Taxation Service (SII) be notified and informed of the terms on which this condition has been agreed. Finally, the company was required to provide two courses or training on specific technologies to public institutions, which were valued at CLP 11.600.000 (approximately USD 14,150), in the event that they were not carried out.

- In relation to Emergya Chile Agency ("*Emergya Agencia en Chile*"), on 14 December 2021, the following conditions were imposed: To pay the State Defence Council (CDE), as representative of the Treasury, the sum of CLP 350.000.000 (approximately USD 426,830); to not deduct this payment for the determination of the taxable base of the first category tax; to develop an OPM and obtain certification by a suitable company within 8 months; and finally, that if the company wished to make publications in relation to the present judicial proceedings and the fact that it has not been convicted, the text should contain an explanation on what a SCP consists of, indicate that its legal representative will have to face an ABP and, in the event of being convicted, it should inform of this result, as well as indicate the amounts paid to the Treasury in this SCP; and that the content of the text must be authorised by the PPO before its publication.

As can be noted, the condition consisting on the payment of a sum of money to the Treasury imposed to both companies contemplated the explicit prohibition to deduct those payments as expenses for the determination of the tax base of the first category tax, and in one case the court notified the Internal Taxation Service (SII) on the terms of the SCP, as an additional control of its fulfilment.

In this way, the conditions imposed are considered to be effective and proportionate, insofar as they relate to services that the company can provide in accordance with its line of business or with the elaboration of an OPM, and given that the payment of a sum of money to the Treasury corresponds to the amounts invoiced by the companies as a result of the commission of the offence; and they are also dissuasive, given both the payment of large sums of money and the prohibition of tax deductions, and the consequent limitation and denial of further benefits derived therefrom.

As indicated in the previous answers to Recommendations 3(d) and 3(e), Prosecutorial Instruction 278/2022 provides guidance on the choice of terms for a SCP when one of the conditions consists in the payment of a sum of money:

- Prosecutors must first verify the suitability, prestige and transparency of the NGOs that will be the recipients of such sums of money. Regional Prosecutor's Offices are suggested to maintain a register of NGOs within their jurisdiction that meets the above-mentioned requirements.

- The defendant, whether a natural or legal person, cannot use any benefit or tax credit that may exist, based on a payment made as a condition agreed in a SCP, nor reduce it as an expense, cost or any other concept; and

- For the proper transparency and supervision of the fulfilment of the previous condition, the court should be requested to formally notify the Auditing Sub-directorate of the Internal Taxation Service (SII) of the fact that a SCP has been adopted and the terms that have been approved.

Since March 2021 (Phase 4 Two-Year Follow-Up Report), the communication channel between the PPO and the SII has consolidated, with regular coordination meetings. In addition, since 2021 a specific module on domestic and foreign bribery has been incorporated as part of the training programme for all SII officials, with a first theoretical module led by a lawyer of the PPO's Specialised Anti-Corruption Unit (UNAC), and a practical case second module led by a UNAC financial analyst. During 2021, three training sessions were held on July 6th, August 4th and September 8th, with a total participation of 269 SII officials. Three sessions were also held in 2022, on October 12th and 26th, and November 23rd, with 316 participants. The total number of SII officials trained in domestic and foreign bribery between 2021 and 2022 was 585. Four training sessions are planned for 2023, on dates to be defined jointly by the PPO and SII.

As verifiable documents, please find attached the following:
- Copy of SCPs hearings minutes regarding Business Technology Solutions JSC ("*Soluciones Tecnológicas de Negocios SpA*", Altiuz) and Emergya Chile Agency ("*Emergya Agencia en Chile*").
- Copy of the formal notification sent by the Court to the Internal Taxation Service (SII) in the *"Ministry of Housing and Urbanism Case"*,
- Excel files with the individualization of the SII officials who participated in each of the training sessions for the years 2021 and 2022.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 4(a):

4. With regards to **sanctions and confiscation**, the Working Group recommends that Chile:

(a) Take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases in practice [Convention Art. 3(1) and Phase 3 Recommendations 3(c) and 6(i)].

Actions taken as of the date of the follow-up report to implement this recommendation:

Law N° 21.121, of November 2018, known as the "Anti-Corruption Statute", increased the penalty for the crime of bribery of a foreign public official from an abstract penalty of 541 days to 5 years, to an abstract penalty of 3 years and one day to 10 years, in addition to the fine and deprivation of rights. The imposition of the penalty is subject to the substitution system of Law No. 18.216.

The bill of the New Criminal Code, currently in Congress, incorporates the crime of Bribery of Foreign Public Official that punishes whoever with the purpose of obtaining or maintaining for himself/herself or for a third party any business or advantage in the context of an international economic relationship or an economic activity performed abroad offers, gives or consents to give a foreign public official an undue advantage for the benefit of the latter or a third party so that he/she omits or executes or for having omitted or executed an action in the exercise or occasion of his/her functions, with a penalty of imprisonment of 1 to 3 years or confinement. This confinement shall be served in a public institution during the day, at night or on weekends for a term of between 18 and 30 months.

Unlike the current framework, once the judge has imposed one or the other penalty and its magnitude, it may not be substituted by any other penalty.

Along with the corporal penalties of imprisonment or confinement, it will be possible to impose the penalty of fine under a system of day-fines, which will be applied in conjunction with them, not instead of them. Therefore, in this case, the monetary sanction is not an alternative but an additional sanction.

Regarding the suspension of the expiration of the penalty, Law N° 21.121 introduced article 260 bis to the Criminal Code, which provides that with respect to the crime of foreign bribery (Bribery of Foreign Public Officials, article 251 bis in its paragraph 9 bis) and other crimes, the period for the expiration of the penalty would start to run from the moment the public official involved in the commission of the crime ceases to hold office. However, if in the following 6 months he/she assumes a new position with powers of direction, supervision or control over the previous one, the period for the expiration would start to run from the moment he/she ceases to hold such position. The same rule is enshrined in the bill of the New Criminal Code.

Along with this, in 2018 the sanction for foreign bribery was increased, and now it is considered a crime. According to article 94 of the Criminal Code, this also increased the expiration time from 5 years to 10 years and resulted in a "half expiration" period of 5 years. In this regard, it is necessary to add that the bill of the New Criminal Code does not contemplate the "half expiration", so if a person is convicted for bribery of a foreign public official he/she will not have his/her sentence reduced if he/she presents himself/herself or is found before completing the time of expiration of the crime or of the penalty, but having already passed half of the time required.

Finally, regarding the effectiveness of sanctions, our current system allows that, in the case of persons with no previous convictions, the custodial sentence may be substituted by a less restrictive sanction based on Law N° 18.216. This is a provision of general application in the current system of sanctions. Nevertheless, the New Criminal Code will allow the court to impose effective sanctions even on those who have no previous convictions. Therefore, the penalties imposed under the new Criminal Code should be stricter than those resulting from the application of the current Code.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Recommendations regarding the liability of, and engagement with, legal persons

Text of recommendation 6(a):

6. With regards to the **liability of legal persons**, the Working Group recommends that Chile:

(a) Bring Law 20 393 in line with Annex I of the 2009 Anti-Bribery Recommendation by eliminating the OPM defence where bribery is committed by an individual with the highest-level managerial authority in a legal person [Convention Art. 2, 2009 Recommendation Annex I.B].

Actions taken as of the date of the follow-up report to implement this recommendation:

Chile has serious concerns regarding this recommendation, since its implementation would lead to the following practical and regulatory difficulties:

1. It would create a hypothesis of objective criminal responsibility. That is a presumption of criminal responsibility against which the accused could not prove the contrary. Therefore, it would be inconsistent with many continental systems and the Chilean Constitution.
2. This recommendation is inconsistent with the regulatory frameworks of many OECD members, whose practice in the area of corporate responsibility has served to provide regulatory content to several systems, including the Chilean. Furthermore, this recommendation goes against what was decided in the emblematic “Morgan Stanley” Case.
3. The incentive of having an effective OPM would be undermined. This is because many of the crimes committed by a legal person, especially foreign bribery, often involve its high administration.

- **Current legal framework**

Our legislation (Law N° 20.393) attributes criminal liability to the legal person when the commission of certain crimes, perpetrated by certain people in the interest or benefit of the legal person, is a consequence of the contravention of their direction and supervision duties. This is what constitutes the description of the typical (fact-crime) behaviour. The vigilance and supervision required are materialised in a self-regulation system based on the establishment of controls. This is meant to compensate the risks of the ordinary processes of the company, through the prevention and detection of certain illicit conducts, imposing on companies the obligation to organise themselves to avoid the use of their processes for the commission of crimes. In that way, the responsibility of a legal person is based on the action of the company itself. Indeed, the crime of the legal person consists in not having done what is required of it to prevent the commission of the criminal offense by a natural person within its organisation.

An adequate OPM is built taking into consideration the specific operation of the company (certain processes, certain risks, certain controls), and they must be differentiated according to the profile and incidence of the person carrying out the process. Likewise, its level of development or complexity must be proportional to the size and complexity of the legal person's operations (fundamental principle in the standardization norms N° 19.600 and 37.001 of International Organization for Standardization, ISO). All the above indicates that an efficient OPM will determine that only certain people within the company may have (in the case of the “borne” risk) contact with public officials and that the controls related to highest-level managerial authority will be more important in the case of senior management employees, in addition to the ordinary preventive controls for the rest of the employees.

However, the implementation of this recommendation would not provide the opportunity to reply based on the Chilean constitutional provision that prohibits the possibility of presuming responsibility by law, since in the case there is not even a "fact" (legal description of a criminally conduct) to which a certain result can be attributed causally. The implementation of the recommendation would create responsibility even for a diligent legal person for the actions of a third party.

The recommendation confuses the reality principle, where it is easier in a trial for the prosecutor to determine the organisational deficit of the company through the breach of its management and control duties when the crime is committed by a high-level managerial authority, with the idea that the company will always be responsible for a crime if it is committed by certain people (using the "*res ipsa loquitur*" legal principle as a reason of criminal conviction).

- **"Morgan Stanley" Case**

In this regard, the "Morgan Stanley" case in 2012 should be considered. In this case, the bank was exempted from responsibility for the bribery by one of its high-ranking employees (Managing Director) to foreign authorities. In his Managing Director's guilty plea, he admitted to having circumvented the company's internal controls required by the Foreign Corrupt Practices Act (FCPA).

In that case, it was confirmed that Morgan Stanley had a system of internal controls aimed at ensuring controls and reports to prevent its employees from committing bribery. Thus, "*According to court documents, Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners*" [https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required].

This verification of the system and its suitability allowed the company not to be prosecuted for the actions of its Managing Director. Thus, "*After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct*"

- **"CORPESCA" Case**

At the same time, the CORPESCA[1] case shows that in Chile the sole fact of having an OPM does not exempt the legal person from criminal liability. It is always necessary to prove the OPM is effective, that the natural person who committed the offence evaded all the controls indicated in numbers 1 to 3 of article

[1] Investigation Number 1410025253-9, North Central Metropolitan Regional Public Prosecutor's Office; Case Number 309-2018, Third Oral Criminal Court of Santiago.

4 of Law N° 20.393, to be exonerated of culpability, since the legal entity complied in establishing the rules, supervising them and disseminating them to its human component.

The judgment begins by stating that what the legal person is criminally liable for is *"more than a particular fact or not having an OPM, it is the failure to organise itself in terms of preventing unlawful conducts, so that it is guilty of a defective state of affairs or organisation. This defective administration or "organisational defect" is the concept accepted by most of the national doctrine and in comparative law as a basis for the liability of legal persons"* (page 2769 of the judgment).

The judgment then analyse each of the elements of the criminal liability of legal persons, starting with the requirement that the predicate offence (domestic bribery) be committed by the *"natural persons indicated by law"*, stating textually that the CEO of Corpesca *" was the highest executive within the hierarchical structure -outside the Board of Directors- of the company and therefore, the most responsible for the administration and control of the company, and that in this capacity, he committed the crimes of bribery established in article 250 of the Criminal Code"* (page 2775 of the judgment).

In this context, in the case of Corpesca, it was possible to prove that *"the organisational and control deficiencies were not located at the middle levels for which the internal and external audits carried out by the company were intended, but at the very head of the administrative body after the Board of Directors, in the CEO of the company, who was contradictorily asked to exercise control and supervision over the rest of the company, and above him there was only the Board of Directors, who did not take any action in order to supervise the next in power in the hierarchical pyramid of administration of the legal person"* (page 3105 of the judgment).

Accordingly, for the judges of the Third Oral Criminal Court of Santiago *"the OPM must be effective and not purely formal, because if so, the legal person is equally liable, with or without an OPM, it must be proven that the natural person who committed the offence evaded all the controls indicated in numbers 1 to 3 of article 4 of the aforementioned law, in order to be exonerated of culpability, since the legal entity complied in establishing the rules, supervising them and disseminating them to its human component; but when, on the contrary, these controls have flaws and weaknesses, as we have seen above, or when this control is simply not exercised with respect to certain persons, as was the case with the CEO of Corpesca S.A., whose management was unquestionable and who was not supervised in any way by the highest body, the liability of the legal entity is established"* (page 3261 of the judgment).

Ultimately, the court explained that although the company had an OPM and a Prevention Officer, this system did not comply with the prevention and supervision measures required by law, there being a serious *"organisational deficiency"* incapable of preventing the commission of offences, basically because:
- The CEO did not have any supervision or control over him.
- The Prevention Officer did not have the necessary autonomy to supervise the CEO, nor did he have any real reach to the Board and other senior executives.
- The accounting control system was inefficient, since it allowed the CEO to authorise the emission of false receipts and invoices with which bribery was committed.
- In addition, it is pointed out that no ex-post measures were taken either (such as an internal investigation or corrective measures), but rather on the contrary, there were only expressions of thankfulness, compensations and continuation of work within the same controlling group.

In this context, the judgment demonstrates that the OPM is enforceable even over the top executives of a company, whose actions should be supervised, otherwise the direction and supervisory duties required by Law N° 20.3939 are not fulfilled.

* The full text of the judgement of the Corpesca Case, which is 3602 pages long, is available at the following link: https://www.pjud.cl/prensa-y-comunicaciones/docs/download/10557

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 6(b):

6. With regards to the **liability of legal persons**, the Working Group recommends that Chile:

(b) (i) Develop guidance on the elements of an effective OPM for preventing foreign bribery, including by referring to Annex II of the 2009 Anti-Bribery Recommendation; (ii) disseminate the guidance to the private sector (especially SMEs), investigators, prosecutors, and the judiciary; (iii) encourage Chilean companies, especially SMEs, to adopt models that conform to the guidance [Convention Art. 2, 2009 Recommendation Annexes I.B and II, and Phase 3 Recommendation 1(a)(ii)].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Guidance on "Elements of an Effective Offence Prevention Model for Foreign Bribery".**

The National Contact Point of Chile (NCP) developed a guidance on the elements of an effective OPM for preventing foreign bribery, with the collaboration of other ministries and state agencies (CMF, the judiciary, the PPO, the Ministry General Secretariat of the Presidency, and the Vice Ministry of Trade (SUBREI)).

Following recommendation 6(b), the guidance has been distributed to the private sector (especially SMEs), prosecutors, the judiciary and the certifiers of OPMs registered by the CMF. Chilean companies, especially SMEs, have been encouraged to adopt models that conform to the guidance.

This guidance was made with the objective of contributing with elements that favour the effectiveness of the OPM to prevent foreign bribery, taking into consideration the Chilean legal framework and international standards (especially the OECD Anti-Bribery Convention and its related documents). It provides recommendations that can be adapted to the specific circumstances of the legal person (e.g. size, line of business, legal structure and geographic and industry sector of operation, and other basic legal principles under which they operate).

- **Technical Document N° 78. "Basic Elements for an Offence Prevention Model in State-Owned Enterprises – Law N° 20.393".**

The Technical Document N° 78 was made by the General Internal Government Auditing Council (CAIGG). This document is intended to be a guidance for State-Owned Enterprises (SOEs) in the implementation, maintenance and continuous improvement of the OPMs, in accordance to Law N° 20.393.

The document provides an overview of the requirements of Law N° 20.393 and the minimum aspects to be considered in the structure of an OPM, with some examples and suggestions.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 6(c):

6. With regards to the **liability of legal persons**, the Working Group recommends that Chile:

(c) Amend Law 20 393 to ensure that the requisite independence of prevention officers is determined based on all relevant factors, and not only the size of the company's revenues [Convention Art. 2, 2009 Recommendation Annexes I.B and II, and Phase 3 Recommendation 1(b)].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Current legal framework**

Although Law N° 20.393 establishes a "size" criterion to determine whether the compliance function can be performed by a person from the company's high-ranking level managerial authority, in no case does the compliance officer lose the functional autonomy necessary to perform his/her duties. The aim of the standard is to indicate that, in smaller companies, therefore, in principle, with a lower level of complexity than large companies, there most probably be an identity between one of the members of the high-ranking level managerial authority and the compliance officer. This is only an effect of an objective scale of "complexity" of the company and, consequently, also of the operational costs that an independent figure would mean. However, the compliance officer must always have the necessary competencies to carry out the controls designed to reasonably prevent the risk from occurring.

This is consistent with the high standards in ISO compliance programs. By reviewing paragraph A.6.1 of ISO 37001, it can be seen that in small organisations the compliance function does not require a full-time job. Thus, in relation to its other functions, executive, audit, internal governance, it may not be functionally independent. However, in the case of its compliance function, the compliance officer requires the necessary functional independence to carry out its work, although this does not mean absolute organic independence within the organization.

At the same time, the absolute functional and organic independence, within an organisation, does not correspond to an international standard in the matter when it comes to compliance systems. That could only be achieved with some sort of "parallel CEO" or parallel board member, which is beyond any standard.

- **Bill that "Establishes a New Criminal Code" (Bulletin N° 14.795-07)**

The bill of a New Criminal Code in which the Ministry of Justice and Human Rights presented to Congress, has the following treatment regarding recommendation 6 (c):

The bill includes a complete regulation of the elements that an OPM should include. This regulation indicates that an OPM programme is effectively implemented by the legal person when, to the extent required by its size, complexity, resources and the activities it develops, it seriously and reasonably considers the following aspects:

a) identification of the legal entity's activities that involve risk of criminal conduct;
b) establishment of protocols and procedures to prevent and detect criminal conduct in the context of the activities referred to in the previous letter, which must necessarily consider safe reporting channels;
c) designation of persons responsible for the application of said protocols, endowed with effective powers of direction and supervision, and
d) establishment of periodic evaluations and mechanisms for improvement or updating based on such evaluations.

This regulation allows each company to establish the independence of the compliance officer in accordance with its own characteristics. In any case, the company must ensure the highest standard of independence and the provision of human and technical resources to perform the functions of a compliance officer. Otherwise, the company would not be complying with the requirements that are demanded of it, so the commission of a crime within the company would be attributable to the legal person itself.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 6(d):

6. With regards to the **liability of legal persons**, the Working Group recommends that Chile:

(d) (i) stipulate qualification requirements that ensure certifiers have sufficient expertise in anti-corruption corporate compliance; (ii) provide guidance to certifiers on the elements of an effective OPM for preventing foreign bribery; (iii) stipulate the methodology, procedure and criteria for the certification of OPMs; and (iv) ensure that the CMF enforces the rules concerning certifier qualifications, methodology and standards [Convention Art. 2, 2009 Recommendation Annexes I.B and II, and Phase 3 Recommendation 2(b)].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Regarding recommendation 6(d) (i)**

By virtue of the mandate conferred by Law N° 20.393, the CMF issued a series of instructions to the certifying companies of crime prevention models ("certifiers") contained in General Rule N° 302, among which are included those applicable at the time of their registration of certifiers and others directed to the obligations that assist them.

Regarding the registration process and the information required from the applicant, a sworn statement is included from the main partners of the certifier and also regarding those responsible for the certification process (Title II of General Rule N° 302), requiring "that the person has at least 5 years of work experience in activities or positions that require knowledge related to risk management, process assessment or related controls, or with the legal framework and regulation applicable to the crimes referred to in Law N° 20.393". In this regard, it should be noted that the 5-year work experience requirements include a broad spectrum

of matters associated with various forms of control linked to the list of crimes that give rise to the criminal liability of the legal person, which includes conduct related to bribery of a foreign public official.

- **Regarding recommendation 6(d) (ii)**

Within the instructions referred to the internal regulations of the certifiers, it is indicated that they must contain "the methodology to be applied to the legal persons, to determine whether the models implemented by them have, in all their significant aspects, the requirements established in N°s 1), 2) and 3) of article 4 of Law N° 20.393, in relation to their situation, size, business and level of income and complexity of each of them". It is clear from the above that the instruction is in accordance with the characteristics of the entity to be certified, which is why the mention of situation, size, etc., is understood.

Furthermore, as indicated in the answer to the recommendation 6(b), the NCP developed a guide that was distributed to the CMF, that accordingly was distributed to the enterprises certifiers registered by the CMF. This guide provides recommendations to contribute with elements that favour the effectiveness of the OPM to prevent, specifically, foreign bribery. For more details about this guide, see the answer to the recommendation 6(b).

- **Regarding recommendation 6(d) (iii)**

Regarding recommendation 6(d)(iii), it is relevant to point out that the certification of an OPM, according to the provided by the General Rule N° 302, must contain an express reference to the fact that the legal entity has an OPM. Moreover, it must state that this model is implemented and that it contemplates all the requirements established in numerals 1), 2) and 3) of article 4 of Law 20.393, considering the situation, size, line of business, level of income and complexity of the legal entity, in accordance with letter b) of number 4) of that article. Therefore, the certifying company must establish a methodology, procedure and criteria for the assessment of said OPM according to the factors mentioned above.

- **Regarding recommendation 6(d) (iv)**

The CMF is entitled to review compliance of certifying entities with the provisions of General Rule N° 302, which states that the CMF will maintain a registry of certifying entities, as required by article 4 of Law N° 20.393. Nonetheless, the CMF carries out periodic reviews of certifying companies to ensure that they comply with Section III of General Rule N° 302, which prohibits the provision of certain services.

Finally, it is worth pointing out that General Rule N° 302 provides that registration in the registry of certifying entities shall remain in force as long as the company complies with the requirements set forth in said rule, otherwise, the CMF may cancel its registration.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 6(e):

6. With regards to the **liability of legal persons**, the Working Group recommends that Chile:

(e) Ensure that prosecutors do not consider that certification creates a presumption that the legal person has successfully discharged its direction and supervisory functions, and that the court and the prosecutor have the sole responsibility of determining this issue when considering liability under Law 20 393, including through the amendment of Prosecutor Instruction 440/2010 and the 2014 UNAC Practical Guide [Convention Art. 2, 2009 Recommendation Annexes I.B and II].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **2019 UNAC Practical Guide**

The 2014 UNAC Practical Guide has been replaced by an updated version, entitled as "*Practical Guide for the Investigation of Criminal Liability of Legal Persons, with special reference to Bribery (December 2019)*", whose purpose is to address the challenges presented by criminal investigation when it is directed against a legal person, especially when the predicate offence committed is bribery, whether of a national or foreign public official. The guide is aimed at providing a catalogue of sources of information and investigative procedures that will make it possible to determine in practice whether the conditions for the criminal liability of a legal person are met, not only with respect to bribery but for other predicate offences of the criminal liability of legal persons. It offers tools and guidelines for the assessment of those in charge of directing the investigation, always bearing in mind that nothing replaces the prosecutor's judgement applied to the specific case.

Regarding this recommendation, it is relevant to highlight the following passages of the document:

- "Direction and supervision duties can be fulfilled by implementing an OPM, which in turn can be certified by a company registered with the Financial Market Commission (CMF). In this normative context, basically two scenarios can be distinguished:

First scenario: The legal person did not implement an OPM. In cases where a legal person has not implemented an OPM the investigative proceedings are somehow simplified, as the natural way of fulfilling direction and supervision duties has not been verified. In this scenario the investigation should focus on proving that an OPM was not implemented, as this will be a strong indication that it has not fulfilled the above-mentioned duties in other way.

Second scenario: The legal person implemented an OPM. If the legal person has implemented an OPM, the possibility to hold it liable does not disappear. In this case, the investigation should aim to establish whether the OPM complies with the requirements; whether the implementation is real, effective and not purely formal or apparent; and whether the OPM designed and implemented is effective."

- "The certification of an OPM should not fundamentally change the situation, as this does not imply that the legal person has satisfactorily fulfilled its direction and supervision duties, which is ultimately a matter for the court to determine. In such cases the investigation should be able to distort the indication of compliance based on the certificate, or to distort the professionalism and reliability of the certification, or its process, considering that it could be carried out with low standards."

- "The mere formal implementation of an OPM by itself is not sufficient to consider that the direction and supervision duties are satisfied by the legal person.

The investigation of an OPM, where the legal person claims to have one, cannot always be subject to the same investigative proceedings. On the contrary, it should generally focus on whether the OPM is effective (whether it has been constructed in a way that is appropriate to the legal person and its activity), and whether it has been effectively implemented (it is not just a paper OPM, but crime prevention permeates the functioning of the corporate structure)."

- **Draft Prosecutorial Instruction that replaces Prosecutorial Instruction N° 440/2010**

This draft which provides performance criteria for the investigation and criminal prosecution of legal persons, addresses this aspect in different sections.

Regarding the supervision and certification of the crime prevention system: "*It should be noted that the legal person is not exempted from liability simply because it has this certification, since the main obligation of the person in charge of prevention, together with the entity's management, is to ensure the effective and suitable application of the OPM, so there is a possibility that there is no OPM at all or that it is a formal OPM designed to appear to comply with the regulations, not corresponding to the entity's real business policy.*"

Regarding the subject matter of the investigation: "*With regard to the requirement linked to the violation of the direction and supervision duties to prevent the commission of the offence by the natural person, and in the event that, in accordance with article 4 final paragraph, the legal person has a certification of having adopted and implemented the current OPM, it will be the responsibility of the PPO to carry out the investigative procedures aimed at determining that the OPM adopted, even if certified, was not applied, or that its application was defective or deficient, in such a way as to allow an offence to be committed in the terms indicated above, even if it was certified, was not applied, or its application was defective or deficient, so as to allow the commission of an offence in the terms indicated above, or that the certification process was not conducted in accordance with the law, or was deficient due to flaws in its application or methodology, among other factors that would serve to discredit the certification.*"

- **CORPESCA Case**

The CORPESCA case as mentioned in the answer to recommendation 6(a), exemplifies that having a certified OPM is not enough to comply with the direction and supervision duties of a legal person. Thus, "*the legal entity is criminally liable not for the absence of an OPM at the time of the facts, but for the failure to comply with the direction and supervision duties that allowed the offence to be committed*" (page 2769 of the judgment). In this manner, is necessary that the legal person proves that its OPM is effective.

* The full text of the judgement of the Corpesca Case, which is 3602 pages long, is available at the following link: https://www.pjud.cl/prensa-y-comunicaciones/docs/download/10557

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 6(f):

6. With regards to the **liability of legal persons**, the Working Group recommends that Chile:

(f) Amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for foreign bribery [Convention Art. 4 and Phase 3 Recommendation 5].

Actions taken as of the date of the follow-up report to implement this recommendation:

To comply with the provisions of article 4 of the Convention, through Law N° 20.371 of 2009, article 6 of the Organic Code of Courts was amended to grant jurisdiction to national courts over the crime of bribery of foreign public officials committed outside Chile by Chileans or foreigners with habitual residence in Chile. This legislative amendment is considered sufficient to comply with the provisions of the Convention.

Chile has consistently considered that Chilean law is clear regarding the rules of jurisdiction and competence in criminal matters. The basic rules on the territorial validity of criminal law are found in articles 5 and 6 of the Criminal Code. According to article 5 of the Criminal Code, which establishes the principle of territoriality of criminal law, *"Chilean criminal law applies to anyone who commits a crime in our territory, regardless of the nationality of the offender, the victim or the property or rights affected by the crime. It is an application of the principle of sovereignty"*. (Politoff, Matus and Ramírez, 2003: pp. 115 and 166). Thus, if a bribery crime is committed within the national territory, our courts will have jurisdiction to hear these crimes, regardless of the nationality of the perpetrator. Given this general rule, the knowledge of any bribery offense of a foreign public official whose execution is initiated or carried out entirely within the national territory is within the jurisdiction of the Chilean courts.

In addition to the general rule described above, there are cases in which Chilean courts may hear crimes committed outside the Chilean territory, which according to article 6 of the Criminal Code, must be determined by law. According to article 6 N° 2 of the Organic Code of Courts, when the crime of bribery of Foreign Public Officials is committed by a Chilean or by a person with habitual residence in Chile, they are subject to Chilean jurisdiction, even when they are perpetrated outside the territory of Chile. This rule is applicable to natural and legal persons, Chilean or foreign residents, given that article 54 of the Civil Code contemplates these two classes of persons in our legal framework. Additionally, Law N° 20.393 establishes criminal liability of legal persons in case of foreign bribery.

Taking all these elements into account, and reading them in conjunction, we can conclude that Chile already complies with the recommendation 6(f).

Furthermore, if the recommendation is implemented by expressly mentioning the legal person in the rule of extraterritorial jurisdiction, the following undesired consequence would be generated. Considering that that article 54 of the Civil Code has general application in our legal system, incorporating the express distinction between "natural person" and "legal person" in article 6 N° 2 of the Organic Code of Courts, could imply that those rules of general application that speak of "persons", without making the distinction, could be interpreted as applying only to natural persons.

Therefore, the express mention of "legal person" may generate this precedent, according to which, to have a provision applicable to both types of persons (natural and legal), all the relevant rules contained in our legislation that refer only to “persons” would have to be modified.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Recommendation regarding other measures affecting implementation of the Convention

Text of recommendation 8(a):

8. With regards to **anti-money laundering measures**, the Working Group recommends that Chile:

(a) Urgently require appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions related to foreign bribery [Convention Art. 7, 2009 Recommendation III.i, and Phase 3 Recommendation 7(b)].

Actions taken as of the date of the follow-up report to implement this recommendation:

On December 20, 2022, the Government of Chile launched the National Policy against Organised Crime 2022-2027 with the objective of reducing the activity of criminal organisations through the planned and coordinated action of 17 public institutions related to persecution of crime.

On its *Second Goal: Disruption of the economy of organized crime, Objective g)* establishes the implementation of measures to overcome the gaps detected by the Latin American Financial Action Group (GAFILAT) in Chile in the prevention and combat of criminal organizations.

Among the gaps to be corrected, stand out the actions recommended in the Mutual Evaluation Report of Chile of September 2021, regarding *Recommendation 22 DNFBPs: Customer due diligence, Recommendation 23 DNFBPs: Other measures* and *Immediate Outcomes 3 Supervision and 4 Preventive Measures*, which call for the inclusion of lawyers, accountants and corporate service providers as subjects of ML/FT prevention obligations.

In order to measure the success of this goal, two indicators of compliance have been stablished, first the number of updated regulations based on international standards in investigation of money and property laundering, and second, the increase in the number of subjects obliged to inform to Chile´s FIU.

The Financial Analysis Unit, as the coordinating entity of the National Anti-Money Laundering and Counter-Terrorist Financing System, will convene in 2023 to review and update the National Strategy for Chile and the generation of a third Action Plan, to incorporate the improvements proposed in the last evaluation of the GAFILAT of September 2021, including the recommendations on the inclusion of DNFBPs as subjects of obligation for the prevention of Money Laundering.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 9(a):

9. With regards to **false accounting**, the Working Group recommends that Chile:

(a) Amend its legislation to prohibit both natural and legal persons from engaging in the full range of conduct described in Art. 8(1) of the Convention, and subject such conduct to effective, proportionate and dissuasive sanctions [Convention Art. 8, 2009 Recommendation X.A.i, and Phase 3 Recommendation 8(a)].

Actions taken as of the date of the follow-up report to implement this recommendation:

- **Bill that "Establishes a New Criminal Code" (Bulletin N° 14.795-07)**

The bill of a New Criminal Code submitted to Congress in January 2022 has the following treatment with respect to recommendation 9 (a):

The system of attribution of liability to a legal person in the New Criminal Code establishes that, in principle, companies will be liable for crimes committed by a member of their organization if this could reasonably be foreseen according to the development of their ordinary processes. In this context, the legal entity will be liable for any type of falsification or alteration of its accounting and extra-accounting documents and controls committed by a member of its organisation within the framework of the economic activities that the company carries out.

Unlike Law N° 20.393, the New Criminal Code will not establish an exhaustive catalogue of predicate offences. Instead, in addition to a catalogue to ensure the prevention of certain crimes regardless of the activity that the company develops (including bribery of foreign public officials), the liability of the company may also derive from the commission of any crime related to its ordinary processes. Among these crimes, the new Criminal Code will include the crimes of falsification of public and private documents, it also punishes the submission of false information to the authority, and, in the case of companies subject to the supervision of a state agency, the falsification or adulteration of any document that may affect its assets or liability, the failure to keep documents required for inspection by the agency and the failure to submit relevant information required by the authorities. All of the above, without prejudice to the regulatory obligations between the company and the state agency.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Part II: Enforcement

Please describe any development in the detection, investigation, prosecution and/or resolution of any foreign bribery-related case since March 2021, including those cases listed in the Matrix over which Chile has jurisdiction.

Part III: Report on the status of the draft Criminal Code

At the time of the Two-Year Written Follow-up Report in March 2021, a bill to adopt a new Criminal Code was scheduled to be introduced before the Parliament. According to Chile, the new Criminal Code could possibly address some of the issues identified by the Working Group. Therefore, the Working Group agreed that Chile would provide a written report within two years (i.e. March 2023) on the status of the draft Criminal Code.

Report on the status of the draft Criminal Code
During 2021, the Chilean Government through its Ministry of Justice and Human Rights worked on perfecting the new Criminal Code draft, which was introduced before the Congress on 7 January 2022 (Bulletin N° 14.795-07). It was presented during a ceremony held at “La Moneda” Presidential Palace, by former President Sebastián Piñera. The current administration, headed by H.E. President Gabriel Boric, also through its Ministry of Justice and Human Rights, in a joint effort with the Congress, has decided to propel this bill, assigning one day a week to work on it. Consequently, on 9 January 2023, the Constitution, Legislation, Justice, and Regulation Committee of the Chamber of Deputies has started a general discussion of the bill, in the form of seminars given by distinguished academics linked to the criminal sciences, which will last until April this year. Then, the discussion of the bill in particular will begin. At the same time, a group of scholars (mainly women) was summoned by the Ministry of Justice and Human Rights to work on amendments to be introduced during the next legislative period.