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Global Practice Guides

Anti-Corruption

Law and Practice – Peru

Contributed by
Payet, Rey, Cauvi, Pérez Abogados

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PERU

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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PERU LAW AND PRACTICE

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Payet, Rey, Cauvi, Pérez Abogados was founded in 1996 in order to establish a law firm in Peru with the highest professional standards and a significant international perspective. Today, Payet, Rey, Cauvi, Pérez Abogados is regarded as one

of the most important law firms in the country, providing counsel in the various areas of law related to corporate activity.

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1. Offences

1.1 Legal framework for offences

Legislative Decree N° 635 dated 8 April 1991, known in Peru as the Criminal Code, is the main legislation relating to anti-bribery and anti-corruption.

In Peru's criminal justice system there are no interpretation guidelines of criminal laws, since criminal judges have autonomy for the interpretation. However, the Supreme Court of Justice issues from time to time, in order to standardise the interpretation criteria of the criminal law, "Plenary Resolutions" which are binding upon judges when applying the criminal law.

Peru has signed and ratified the Inter-American Convention against Corruption of 29 March 1996.

1.2 Bribery

Bribery in Peru is typified in the Criminal Code under the name of "Corruption of officers." The crimes considered as acts of corruption, which may be performed by individuals are the following:

- Passive bribery committing an illegal act (Cohecho pasivo propio) [Art. 393];
- International passive bribery (Soborno internacional pasivo) [Art. 393-A];
- Passive bribery not necessarily committing an illegal act (Cohecho pasivo impropio) [Art. 394];
- Specific passive bribery (Cohecho pasivo específico) [Art. 395];

- Passive corruption of court staff (Corrupción pasiva de auxiliares jurisdiccionales) [Art. 396];
- General active bribery (Cohecho activo genérico) [Art. 397];
- Transnational active bribery (Cohecho activo transnacional) [Art. 397-A];
- Specific active bribery (Cohecho activo específico) [Art. 398];
- Incompatible negotiation (Negociación incompatible) [Art. 399];
- Influence peddling [Art. 400]; and
- Unjust enrichment [Art. 401].

In our legislation, legal entities have no criminal liability, but they do have administrative liability which is imposed by a criminal judge. The sanctions for a legal entity include the fine, of undeniable criminal content. The corruption crimes in which a legal entity could be involved are:

- General active bribery (Cohecho activo genérico) [Art. 397];
- Transnational active bribery (Cohecho activo transnacional) [Art. 397-A]; and
- Specific active bribery (Cohecho activo específico) [Art. 398].

Bribery is an act of corruption. It occurs when a public officer accepts any object of pecuniary value or any benefit in exchange of the performance or omission of any act within his/her public duties to benefit someone.

Hospitality expenses are not regulated in our legislation.

Expediting expenses is not regulated in our legislation. But, if a person gives money to a public officer to expedite a process it is considered as an act of bribery or corruption.

The receipt of a bribe is indeed a crime in our jurisdiction when the person who receives it is a public officer and he/she is aware that he/she is receiving a bribe to perform or omit an act inherent to his/her duties.

The failure to prevent a bribe is not considered a crime.

Bribery between private parties is not considered a crime in Peru.

1.3 Accounting provisions

There are crimes related to the accounting system of companies.

In the first place, the crime of parallel accounting is sanctioned by Article 199° of the Criminal Code, which establishes imprisonment of no less than four years. This crime involves keeping a different parallel account from the one required by law. Then, Article 5° of the Criminal Law on Taxes sanctions with imprisonment of no less than two years and no more than five years the crime of failure to perform tax accounting duties, which has four modalities: i) Total failure to keep accountings; ii) Failure to enter operations; iii) Presenting false accounting records; and iv) Failure to conserve accounting records.

1.4 Intermediaries

Among the different ways of participation in a crime in our justice system, Article 25^a in the Criminal Code sanctions the person who: “intentionally helps the commission of the typified crime.” This way of participation is called “complicity,” which may be sanctioned with a sentence equal to the one given to the “offender.” The accomplice is the intermediary that co-operates with the public officer in the act of corruption.

1.5 Corruption

The relevant evidence for corruption crimes include: i) expert evidence; ii) testimonial evidence; and iii) documentary evidence (audio, video, writs, etc), and circumstantial evidence.

Regarding the public officer and the private party, each of them want to obtain an advantage or a benefit for themselves or for a third party.

1.6 Scope

In general, the statute of limitations of crimes occur when a period of time equal to the maximum period of time of the sentence established in the Criminal Code for the specific

crime has elapsed. In addition, in cases where the crimes committed by public officers cause an equity damage to the state, the statute of limitations is doubled.

In theory, the Criminal Code applies to all crimes committed within the scope of the Peruvian territory. However, our Criminal Code has extraterritorial scope, according to its Article 2, when:

- The crimes are committed abroad by public officers in the exercise of their position;
- When the crimes are committed abroad against the Peruvian State;
- In case of a crime of money laundering; and
- When the crime is committed abroad and it is against the public security of the Peruvian State.

In crimes of the corruption of officers, the parties liable for the crime are those who perform the prohibited act described in the Criminal Code and those who intentionally co-operate with public officers to commit the crime. Corruption crime is considered as a bilateral crime because there is convergence of two wills of two intervening persons. For its commission, the presence of a corruptor (person who offers the gift), and, on the other hand, a corrupt officer (person who receives the offering or accepts it) is required.

Each person is liable for the act in which he/she has intervened. Vicarious liability does exist in our system, but it only occurs for the purpose of payment of civil damages in favour of the state.

2. Defences & Exceptions

2.1 Defences

In our justice system there are several grounds that release the persons involved in the commission of a crime from any liability, and which may be invoked as a defence argument during proceedings. In that sense, Article 20.8 of the Criminal Code sets forth that it is released from any criminal liability: “The person who acts under a provision of the law, in the performance of a duty or in the exercise of a legitimate right, occupation or position.”

2.2 Exceptions

There are no exceptions that prevent the parties involved from invoking the abovementioned defence arguments.

2.3 De minimis exceptions

There is no exception for minimal seriousness of the act of bribery.

2.4 Exempt industries/sectors

There are no sectors or industries that are exempt from the crimes of bribery.

2.5 Safe harbour or amnesty programme

There are no amnesty programmes based on self-statements or on efforts of compliance of procedures. The most similar procedure in our legislation is the procedure of collaboration in exchange for benefits (*colaboración eficaz*) which the defendants for acts of corruption may recourse to, but they must meet the requirements established by criminal procedural law, eg, the submission of suitable evidence to clarify acts of corruption, among others.

3. Penalties

3.1 Penalties on conviction

In all the crimes indicated, the persons involved are exposed to be convicted with imprisonment sentences that may range from four years to 35 years, depending on the seriousness of the crime and the summation of sentences that may result from several crimes in which the intervening offenders may be involved.

3.2 Guidelines applicable to the assessment of penalties

There is no guide to evaluate the application of any sentences imposed. However, the Criminal Code, in Articles 45 and 46, establish presumptions for the judges to support and determine the sentence such as, for instance, culture and customs, criminal record and voluntary remediation of the damage by a convicted person, among others.

4. Whistle-blowing

4.1 Protection afforded to whistle-blowers

Legislative Decree N° 1327, dated 6 February 2017 establishes protection measures for a person reporting acts of corruption. The rule guarantees absolute confidentiality regarding the identity of the informant.

4.2 Incentives for whistle-blowers

Article 15 of Legislative Decree N° 1327 sets forth that persons who report acts of bribery and corruption will be benefited with the refund of administrative costs generated for them by said procedure.

4.3 Location of provisions

Article 7 of Legislative Decree N° 1327 indicates the content and form of the report of irregularities. A similar definition is also found in Article 7 of Law 29542 – Law of Protection of the informant.

5. Enforcement

5.1 Enforcement body

In our criminal justice system, there are two bodies in charge of conducting proceedings against any offences: the Public Prosecutor's Office and the Judiciary. On one hand, the Public Prosecutor's Office is in charge of the criminal prosecution of the crime and it is the one that indicts the accused before a criminal judge. On the other hand, the Judiciary is the body in charge of rendering the criminal judgment.

5.2 Guidance for enforcement bodies

The Political Constitution of Peru and Legislative Decree N° 957 – Criminal Procedural Code establishes and delimits the duties of the Public Prosecutor's Office and the Judiciary. The Public Prosecutor's Office is the one that conducts investigation of the crime, it establishes the events that will be investigated, it has the burden of proof and files the public prosecution accusation. The criminal judge judges the events based on evidence and finally decides. His work must be independent.

5.3 Jurisdiction for the enforcement body/bodies

The competent judges to decide on cases of corruption are the criminal judges of each judicial district in which the act of corruption was committed. Exceptionally, in serious cases, the criminal judges of the National Criminal Court, with an office in Lima, are the ones who decide on corruption cases under the scheme of a criminal organisation, being competent to decide on cases committed in any part of the Peruvian territory.

5.4 General powers and limitations of the enforcement body/bodies

The stage of execution of the judgment is conducted by the court that decided on the criminal proceeding of corruption. The competences of this court include granting or prohibiting penitentiary benefits to the persons convicted for acts of corruption.

5.5 Powers of the enforcement bodies to require documentation

In a criminal investigation, the Public Prosecutor's Office may request the provision of documents from individuals and public or private entities, provided that said documents do not contain confidential or sensitive information. The Public Prosecutor's Office makes the request through an official letter indicating therein that, if the information is not provided, the person from whom it is requested will be accused for the crime of disobedience of the authority established in Article 368 of the Criminal Code.

5.6 Process of application for documentation

There are two possible processes to apply for information or documentation. On one hand, if the request of documents

contains information qualified as confidential or sensitive, the Public Prosecutor's Office must, previously, request an authorisation from a criminal judge. Once the Public Prosecutor's Office obtains the judicial authorisation, it sends an official letter to the person requested, attaching the authorisation and requesting the information. On the other hand, if the documents do not contain confidential or sensitive information, the Public Prosecutor's Office directly sends an official letter to the person requested requiring said information.

5.7 Discretion for mitigation

Under a criminal proceeding the Public Prosecutor's Office may sign with the accused an agreement of collaboration in exchange for benefits. The accused may recourse to this procedure provided that: i) he/she acknowledges the commission of a crime; and ii) provides evidence that helps the Public Prosecutor's Office to identify other accused. If there is an agreement between the accused and the Public Prosecutor's Office, a document is signed, in which the accused acknowledges the commission of the crimes and, in exchange,

the Public Prosecutor's Office grants the accused a reduction or exemption of the applicable sentence. Said agreement is submitted to a criminal judge for approval.

5.8 Jurisdictional reach of the body/bodies

The jurisdictional scope corresponds to a criminal judge only. This scope includes the limitation of fundamental rights of the accused, such as imprisonment, confiscation of assets obtained through illegal activities, search warrant and seizure of documents, among others.

6. Future changes

6.1 Likely changes to the applicable legislation or the enforcement body

There is a chance that at any time the Criminal Code may be modified to develop more adequately the problem of criminal liability of a legal entity and the acts of corruption between private parties.

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