



# **PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CHILE**

**March 2014**

This Phase 3 Report on Chile by the OECD Working Group on Bribery evaluates and makes recommendations on Chile's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 13 March 2014.

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## EXECUTIVE SUMMARY

The Phase 3 report on Chile by the OECD Working Group on Bribery evaluates and makes recommendations on Chile's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country specific (vertical) issues arising from changes in Chile's legislative and institutional framework, as well as progress made since Chile's Phase 2 evaluation. The report also focuses on key Group wide (horizontal) issues, particularly enforcement.

While the Working Group welcomes Chile's efforts to implement the Convention, it is concerned that Chile has not sufficiently investigated several foreign bribery allegations. Some cases have been provisionally filed without adequate investigation. In one case, an investigation was not opened at all. Territorial links with Chile were often not sufficiently explored. In one major case, the Chilean authorities did not make efforts to obtain evidence in the US and made insufficient efforts in Chile, despite the case's strong and evident connections with both jurisdictions. In another case, poor co-ordination meant a decision not to investigate was made without thoroughly considering all relevant evidence. Chile's decision to re-open two of the investigations is welcomed. Nevertheless, Chile needs to ensure that foreign bribery allegations are thoroughly investigated and not prematurely closed. Information from diverse sources and foreign authorities should be proactively gathered to enhance detection and investigations.

Chile should also raise awareness of Art. 5 of the Convention among Chilean judges, prosecutors, investigators and relevant government officials, such as by adding references to the factors enumerated in Art. 5 to the relevant prosecutor instructions. The power to lift bank secrecy and to use special investigative techniques in foreign bribery cases should be aligned with those for other economic crimes.

The report makes further recommendations on reporting and corporate liability. Chile has issued circulars asking diplomatic missions to report foreign bribery to Chilean prosecutors. Yet, foreign missions did not report any of the six foreign bribery allegations since 2001 that had been widely circulated in the foreign media. Chile should analyse and rectify this significant shortcoming. Chilean companies may escape liability for foreign bribery if they have an "offence prevention model" at the time of the offence. Chile needs to clarify the existing law and provide additional guidance on what constitutes an effective model for preventing foreign bribery. The system of certifying offence prevention models raises further substantial concerns. There are widely divergent views on the legal effect of certification and the methodologies used for certification. Chile needs to remedy these problems immediately, given the pace at which companies in Chile are seeking certification.

The report also notes positive developments. Chile has improved its foreign bribery offence, and introduced corporate liability and nationality jurisdiction to prosecute. Efforts to raise awareness of foreign bribery appear successful. Many Chilean companies have put in place certain measures to address foreign bribery, though some of these may not meet best practices and international standards. Chile has also taken steps to protect whistleblowers though more could be done, particularly in the private sector. Chile's efforts to improve its implementation of the Convention through Penal Code reform are welcomed.

The report and its recommendations reflect findings of experts from Greece and Mexico and were adopted by the Working Group on 13 March 2014. It is based on legislation and other materials provided by Chile and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its on-site visit to Santiago on 22-24 October 2013, during which the team met representatives of Chile's public and private sectors, judiciary, civil society, and media. Within one year of this report's adoption, Chile will report to the Working Group in writing on its implementation of

certain recommendations and on its foreign bribery enforcement actions. It will report in writing within two years on the implementation of all recommendations and on its foreign bribery enforcement actions.

## A. INTRODUCTION

### 1. The On-Site Visit

1. On 22-24 October 2013, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Santiago as part of the Phase 3 evaluation of Chile's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention); 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation); and 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners (Greece and Mexico) and the OECD Secretariat.<sup>1</sup> Before the on-site visit, Chile responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the Chilean public and private sectors, judiciary, civil society, and media. (See Annex 2 for a list of participants.) The evaluation team expresses its appreciation to all participants for their openness during the discussions and to Chile for its co-operation throughout the evaluation.

### 2. Summary of the Monitoring Steps Leading to Phase 3

3. The Working Group previously evaluated Chile in Phase 1 (December 1999), Phase 2 (October 2007) and the Phase 2 Written Follow-Up Report (October 2009). As of October 2009, Chile had fully implemented 14 out of 26 Phase 2 Recommendations (see Annex 1 at p. 59). Additional Phase 1bis (October 2009) and Phase 1ter (December 2009) evaluations examined Chile's new legislation on the foreign bribery offence and corporate criminal liability, respectively.

### 3. Outline of the Report

4. This report is structured as follows. Part B examines Chile's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

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<sup>1</sup> Greece was represented by Mr. Dimosthenis Stigas, President, First Instance Court of Serres. Mexico was represented by Mr. Jorge Alvarez, International Affairs Administrator, *Servicio de Administración Tributaria* (SAT); Ms. Azyadeh Carla Bravo Joseph, International Affairs Deputy Administrator, SAT. Mr. Mario Enrique Velasco Torres de la Vega, then Director, Multilateral Cooperation and Human Rights, Attorney General's Office (PGR) participated in the on-site visit. Ms. Cindy Mendoza, Director Multilateral Cooperation, and Ms. Maria Fernanda Canovas, Deputy Director-General, both of the PGR Directorate General for International Cooperation, were involved in the preparation and discussion of this report. The OECD Secretariat was represented by Mr. William Loo, Ms. Leah Ambler and Mr. Julio Bacio Terracino, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

#### 4. Economic Background

5. Chile has a medium-sized economy among Working Group members. In 2013, Chile was the 26<sup>th</sup> largest economy among the 41 Working Group members. It was the 29<sup>th</sup> biggest exporter of merchandise in the Working Group in 2012, while trade in services ranked 33<sup>rd</sup>. The main export destinations were China, EU, US, Japan and Korea. Chile has signed 21 free trade agreements with 58 countries. In 2012, Chile had the 24<sup>th</sup> largest outward stock of foreign direct investment (FDI) among Working Group members. Outward investment is mainly in financial intermediation and resource sectors.<sup>2</sup>

6. Chile's economic ties to Latin America are strong. In 2012, 73% of Chile's outward FDI stock was in Central and South America. The three top investment destinations were Argentina, Brazil, and Peru. The Cayman and British Virgin Islands ranked 5<sup>th</sup> and 6<sup>th</sup>. Substantial amounts of FDI stocks are also found in Uruguay, Colombia, Panama, Mexico, United Arab Emirates, Netherlands, Bahamas, St. Kitts and Nevis, Bermuda and Venezuela.<sup>3</sup>

#### 5. Cases Involving Bribery of Foreign Public Officials

7. There have not been convictions of foreign bribery in Chile. Since Chile became a Party to the Convention in June 2001, six allegations of Chilean individuals and/or companies bribing foreign public officials have surfaced. A seventh allegation arose before the Convention entered into force in Chile. At the time of the on-site visit, one allegation was under investigation; all others had not been investigated, or had been "provisionally filed" without prosecution.<sup>4</sup> After the on-site visit, an investigation began in one additional case, and two of the provisionally filed cases were re-activated for investigation, bringing the number of on-going investigations to four. The alleged misconduct in some of the cases occurred before 2009 when Chile created corporate liability for foreign bribery and jurisdiction to prosecute its nationals for extraterritorial foreign bribery. Case names have been anonymised at the request of the Chilean authorities.

##### (a) *Foreign Bribery Investigations Not Opened or "Provisionally Filed" without Prosecution*

8. *Case #1 – Government Vehicles (Peru) Case:* VC is a Chilean company which incorporated a Peruvian subsidiary VP to handle the distribution of vehicles in that country. According to media articles,<sup>5</sup> in 2007 the Peruvian government cancelled contracts with VP for the purchase of police vehicles and ambulances. A report by the Peruvian authorities had found that these purchases were overpriced. VP agreed to return moneys received under the contracts to the Peruvian authorities. An anti-corruption judge in Peru opened proceedings for corruption against several Peruvian officials and two officials of VP.

9. Chile did not open an investigation into the case (see p. 28). The Chilean authorities learned of the case through media reports. They then contacted their Peruvian counterparts who stated that the bribery had been committed by the Peruvian manager of VP. At the time of the alleged bribery, legal persons could not be liable in Chile for foreign bribery or money laundering. Chile also did not have jurisdiction to prosecute nationals for extraterritorial foreign bribery. Chile thus provisionally filed the case for a lack of jurisdiction. No steps were taken to gather evidence in Chile, or in another jurisdiction via mutual legal

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<sup>2</sup> [OECD iLibrary](#); [UNCTADStat](#); [International Monetary Fund](#); [World Trade Organisation](#); and [ProChile](#).

<sup>3</sup> [OECD iLibrary](#).

<sup>4</sup> As further explained at p. 23, a case may be provisionally filed (*archivo provisional*) if there is insufficient evidence to prove the crime, which means an investigation is closed or suspended without trial. The case may be reopened if new information later surfaces (CPC Art. 167 and Phase 1 para. 77).

<sup>5</sup> [University of Chile Register of Corruption Cases No. 217](#); [Projusticia \(9 March 2007\)](#); [Todos Los Peruanos Corruptos \(7 March 2009\)](#); [La República \(15 August 2007\)](#).

assistance (MLA). The Chilean authorities did not determine whether Chilean companies or individuals were on the board of VP.

10. The decision to not to open an investigation overlooked evidence of involvement by Chilean individuals. Peru sent MLA requests and obtained statements from two officers of VC in Chile in October 2009 and May 2010. Information relating to these MLA requests suggests that the VP officials in Peru provided statements to the Peruvian authorities alleging that VC executives in Chile were aware of the bribery of Peruvian officials. Chilean prosecutors who filed the case in Chile were not aware of this evidence or Peru's MLA requests (see p. 32). The Chilean authorities added that they had requested Peru to inform them if Chilean citizens were implicated in the case. The Chilean authorities stated that they have not received such notification, but this overlooks the information contained in Peru's MLA requests.

11. After the on-site visit, Chile continued to decline to open an investigation. The two VC executives in Chile gave statements pursuant to the Peruvian MLA requests. After reviewing the statements, the Chilean authorities decided not to open an investigation because both executives denied knowledge of the alleged bribery. However, the Chilean authorities have not taken steps to interview the VP officials in Peru to ascertain their claim that the VC executives knew of the alleged crime. Nor have any additional investigative steps been taken in Chile.

12. *Case #2 – Travel Company (Cuba) Case:* The brothers M1 and M2 are Chilean nationals who reportedly had extensive business interests (including a travel company) in Cuba and Chile. According to media articles,<sup>6</sup> in 2010 the Cuban authorities began investigating the brothers for various offences including bribery of Cuban public officials. In 2011, the Cuban courts convicted and sentenced the brothers *in absentia* to prison terms of 20 and 15 years. Numerous Cuban government officials, including a former Minister and a Deputy Minister, were also convicted and jailed. Both brothers are currently at large in Chile. Cuba has not sought their extradition. Under its law, Chile may extradite its nationals.

13. The Chilean authorities did not open an investigation when the allegations initially surfaced. In July 2010, the Cuban authorities sent an MLA request to question M1. The Chilean authorities returned the request and sought further information. They also inquired whether Cuba would like Chile to commence proceedings against the brothers. Cuba did not reply but instead withdrew the request.

14. After some delay, the Chilean authorities considered investigating M1 for money laundering and false accounting but ultimately provisionally filed the case. In 2011, UAF (*Unidad de Análisis Financiero*, Chile's financial intelligence unit) received a suspicious money laundering transaction report involving M1. The Chilean authorities then sent an MLA request to Cuba for a copy of the brothers' convictions in June 2011. Cuba provided the requested information in April 2012. The Chilean authorities concluded that there was insufficient basis for a money laundering or false accounting investigation. They did not explain the basis for this conclusion or whether investigative steps were taken in Chile. They did not consider foreign bribery charges because Chile did not have jurisdiction to prosecute its nationals for extraterritorial foreign bribery at the time of the alleged bribery. The authorities also did not consider prosecuting M2 for foreign bribery or money laundering.

15. *Case #3 – Pasta Company (Peru) Case:* PC is a prominent Chilean businessman and the owner of a pasta company. According to media articles,<sup>7</sup> in the late 1990s, PC planned to build a pasta factory in a

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<sup>6</sup> [La Habana \(21 July 2010\)](#); [La Tercera \(7 October 2010\)](#); [Cristóbal Peña \(3 November 2010\)](#); [El Mercurio \(27 March 2011\)](#); [BBC \(5 May 2011\)](#); [La Tercera \(6 June 2011\)](#); [Emol \(6 June 2011\)](#); [AFP \(9 June 2011\)](#); [CubaDebate \(9 June 2011\)](#).

<sup>7</sup> [UPI \(2 October 2001\)](#); [EFE \(26 October 2005\)](#); [Clarín \(26 October 2005\)](#); [EFE \(27 October 2005\)](#); [Cooperativa \(1 December 2005\)](#); [EFE \(6 February 2006\)](#); [La Segunda \(7 February 2006\)](#).

part of Lima, Peru that had been declared a nature reserve. The city opposed the construction. In 1998, PC and two senior company executives met X, who was the head of Peru's secret service and a close aide to the Peruvian President. X reportedly agreed to influence a court decision that would allow the construction of the pasta factory to proceed. In return, PC allegedly would contribute USD 2 million to the President's re-election campaign. PC and the two executives were charged in Peru in 2001. In 2005, X was convicted and sentenced to four years in prison. In 2006, the Peruvian Supreme Court ruled that the charges against PC and the executives were barred by the statute of limitations. Chile did not open an investigation into this case. It states that foreign bribery was not an offence or a predicate offence for money laundering at the relevant time. It also takes the position that it was not obliged by the Convention to investigate this case since the alleged bribery took place before the Convention entered into force in Chile in 2001. Nevertheless, this case is included in this report for the sake of completeness.

**(b) On-Going Foreign Bribery Cases**

16. *Case #4 – Airlines (Argentina) Case:* Company X is a major Chilean airline. In August 2006, the Argentine government decided that Airline X could operate flights in Argentina through a minority-owned subsidiary. Media reports beginning in 2010<sup>8</sup> alleged that Airline X may have secured this deal by bribing S, Argentina's then Secretary of Transport, and his associate A. The bribe was allegedly hidden in a USD 1.15 million consulting contract dated 16 October 2006 between Company Y and Company Z. Company Y was Argentine. Company Z was incorporated in Delaware, US and was used by Airline X as a vehicle to make investments. Under the contract, Company Y was to assist Airline X to optimise its routes in Argentina.<sup>9</sup>

17. Numerous details about the alleged bribe payments have been published in the media. The contract between Company Y and Company Z was reportedly paid in three instalments from October 2006 to January 2007. All three payments were deposited into a US account controlled by the associate A and his wife. The first two instalments were paid by Airline X in Santiago, Chile and its investment vehicle Company Z respectively. Bank documents for the third payment published in the media showed that Company Z ordered the transfer of funds from the account of Company X in Santiago, Chile. Published documents for the second and third payments showed that another individual M made the payments on behalf of Company Z. M was reportedly a Chilean national residing in Miami, US and a senior executive of X-Cargo, a subsidiary of Airline X incorporated in Chile. He had led Airline X's negotiations to expand into Argentina in 2005 and was named as Company Z's representative in the consulting contract with Company Y. According to the Chilean authorities, M held dual US and Chilean nationalities.

18. The Chilean authorities provisionally filed the case after an insufficient investigation. They opened an investigation in January 2011 after receiving a complaint on 2 December 2010 from a Chilean parliamentarian who had learned of the allegations through the Argentine press. A Chilean prosecutor ultimately decided that Chile did not have jurisdiction to prosecute, since the suspected briber M represented "subsidiaries of Airline X domiciled in the US" and the payments in question were conducted from New York bank accounts. The alleged offence predated Chile's 2009 legislation introducing corporate liability and nationality jurisdiction over extraterritorial foreign bribery. For these reasons, the case was provisionally filed (*archivo provisional*). As described at p. 27, the Chilean authorities did not make efforts to obtain evidence in the US and made insufficient efforts in Chile before filing the case. They also did not fully explore the case's evident links with Chile before concluding they lacked jurisdiction to prosecute (see p. 30). Chile did not report the case during the Working Group's meetings.

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<sup>8</sup> [Clarín \(26 November 2010\)](#); [LaPolíticaOnline \(27 November 2010\)](#); [The Clinic \(23 May 2011\)](#); [airlineinfo.com](#); [The Clinic \(26 September 2011\)](#); [iProfesional.com \(12 August 2013\)](#); [Perfil \(25 August 2013\)](#).

<sup>9</sup> [El Mostrador \(23 May 2011\)](#).

19. After the on-site visit, during which the evaluation team expressed concerns about the limited investigation that had been conducted in this case, the Chilean authorities re-opened this case. At the time of this report, the investigation was on-going.

20. *Case #5 – Cement (Bolivia) Case:* According to media articles<sup>10</sup> and the Chilean authorities, two Bolivian nationals claiming to represent a Chilean cement company allegedly attempted to bribe P, the President of the Bolivian Highway Administration (ABC) in September 2010. The two individuals proposed a sale of cement to ABC at USD 1 050 per tonne. ABC would pay a commission of USD 25 per tonne, of which USD 10 per tonne would be pocketed by the three individuals.

21. The two Bolivians reportedly had documentary proof that they acted on behalf of the Chilean cement company. They presented to P two letters on the cement company's letterhead that were signed by the company's commercial manager. The first letter stated that the cement company had authorised one of the two Bolivians to market its products in Bolivia. The second letter offered the sale of cement to ABC in the terms described above. It also detailed the product name, delivery location, and the contact name, telephone number and email address of a company representative in Chile. Also enclosed was a two-page document describing the technical specifications of the product that was offered for sale.

22. The Chilean authorities provisionally filed the case citing insufficient evidence and the lack of co-operation by the Bolivian authorities. They learned of the allegations through the Bolivian media and obtained a copy of the letter presented by the alleged bribers. They then contacted the Bolivian authorities who stated that Chilean nationals were not involved in the case. Chile sent an MLA request to Bolivia in November 2010 that was partially executed in September 2012. What evidence was provided by Bolivia is unclear. In any event, the Chilean authorities did not take significant steps in Chile to verify the allegations. The alleged bribery occurred after Chile had passed legislation to hold companies liable for foreign bribery committed by someone acting under the direction or supervision of the company's managers (see p. 15). However, the Chilean authorities did not make efforts to ascertain whether the company was liable on this basis. They did not verify the authenticity of the letter reportedly presented to P, or interview the cement company manager who purportedly signed the letter (see p. 29).

23. After the on-site visit, the Chilean authorities re-opened the investigation in November 2013. A new MLA request pursuant to the UN Convention against Corruption (UNCAC) was sent to Bolivia. The Chilean authorities also interviewed the two managers of the cement company who stated that the company had not authorised the alleged bribe payments. The managers, however, confirmed the authenticity of the letters presented to P which authorised one of the Bolivians to market its products in Bolivia and to sell cement at specified terms. The Chilean authorities stated that they would conduct an investigation into the liability of the cement company under Chilean law (see p. 15).

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<sup>10</sup> La Patria (18 September 2010); EJU (18 September 2010); Radio Patria Nueva (2008).

24. *Case #6 – Military Equipment (Korea) Case:* According to the media<sup>11</sup> and Chilean authorities, a retired Chilean military official MA and a Chilean national MB allegedly bribed KO, an employee of Korea’s embassy in Chile. One of KO’s roles was to promote Korean companies operating in Chile. In 2005-2007, MA and MB paid KO approximately CLP 600 000 (USD 1 000) monthly, totalling CLP 29 million (EUR 43 500 or USD 58 000). The payments were channelled through CC, a company controlled by MB. In return, KO facilitated contact between MA and MB and Korean companies, one of which was KC. KC then allegedly bribed another Chilean military official to obtain confidential information that was used to win a USD 3 million demining equipment contract with the Chilean military.

25. The Chilean authorities discovered the case when they were wiretapping MB in a separate investigation. MB is now deceased. MA has been charged with foreign bribery because of the payments to KO and some of his assets have been frozen. He is currently serving a sentence for conspiracy to commit murder in an unrelated case. KC has not been charged in Chile. Chile did not report the foreign bribery charges against MA during the Working Group’s meetings.

26. *Case #7 – Airport (Venezuela) Case:* A Chilean company was the majority shareholder in a joint venture UC with a Swiss company. According to media reports,<sup>12</sup> UC obtained in 2004 a 20-year concession to improve and operate an airport in Venezuela. The contract, which was awarded without tender, was ultimately revoked by the Venezuelan authorities. In 2009, the Venezuelan authorities began to prosecute Venezuelan officials for alleged corruption in the award of the concession.

27. The evaluation team became aware of this case through independent research after the on-site visit. It was thus unable to discuss the matter with the Chilean authorities while in Chile. The Chilean authorities learned of this allegation only when informed by the evaluation team. Initially, the Chilean authorities stated again that there was an absence of territorial link between the case and Chile, and that the alleged crime occurred before Chile had nationality jurisdiction to prosecute foreign bribery. Just before the adoption of this report, the Chilean authorities stated that this case was being investigated.

### ***Commentary***

***The lead examiners are seriously concerned that the Chilean authorities have not sufficiently investigated some allegations that Chilean individuals and companies bribed foreign public officials. The Working Group notes the various explanations of the Chilean authorities of why many of these foreign bribery investigations were not opened or were “provisionally filed”. Nevertheless, as described below, some cases were not thoroughly investigated. In other instances, links between cases and Chile were not fully explored. Efforts to gather evidence abroad and to co-ordinate Chilean authorities were also insufficient.***

***After the on-site visit, the Chilean authorities have re-opened investigations into two of the foreign bribery allegations that had been provisionally filed. The lead examiners welcome this development.***

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<sup>11</sup> [The Clinic](#) (9 November 2011); [El Patagonico](#) (5 October 2012); [BioBioChile](#) (17 October 2012); [The Clinic](#) (17 October 2012); [The Clinic](#) (22 October 2012); Biblioteca del Congreso Nacional de Chile Transparente, “*Informe de Prensa sobre Defensa Nacional – Del 1 al 8 de octubre de 2012*”.

<sup>12</sup> [Terra](#) (3 August 2009).

## **B. IMPLEMENTATION AND APPLICATION BY CHILE OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

28. This part of the report considers Chile's approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from Chile's progress on weaknesses identified in Phase 2, or from changes to Chile's domestic legislative or institutional framework.

29. Just before the adoption of this report, Chile provided to the Working Group a copy of a draft Bill replacing the current Penal Code that had been submitted to Congress on 10 March 2014. According to Chile, the Bill addresses several issues covered in this report, including *media prescripción*, confiscation, jurisdiction, corporate liability, and penalties for foreign bribery and failure to report offences. Consistent with established Working Group practice, this Phase 3 Report will refer to some aspects of the Bill but will not give them the same level of scrutiny as the present law. In assessing Chile's implementation of the Convention, the Working Group will also only take into account legislation that has entered into force. The Working Group will assess any relevant new legislation only if and when it is enacted. Nevertheless, the Working Group welcomes Chile's efforts to improve its implementation of the Convention.

### **1. Foreign Bribery Offence**

30. In 2009, Chile amended its foreign bribery offence by replacing Penal Code (PC) Arts. 250bisA and 250bisB with Arts. 251bis and 251ter. The Phase 1bis evaluation examined the amended offence. This Phase 3 evaluation considers outstanding issues from the previous evaluations.

31. Chile's foreign bribery offence differs from Art. 1 of the Convention by not expressly limiting the offence to "undue" pecuniary or other advantages to a foreign public official. There was concern that the offence thus criminalised legitimate payments seeking proper official action (Phase 2 para. 143). The 2009 amendment did not add the word "undue" to the offence. It did, however, change the offence to expressly limit it to payments to an official to obtain "improper" business or advantages. Chile explained that this has the same effect as adding the word "undue": a payment to obtain an improper advantage is necessarily undue. The Working Group decided to revisit this issue in Phase 3 (Phase 1bis paras. 14-15 and 83). Since that time, the Chilean courts have not considered the issue. Prosecutors stated that the current offence is easier to prove because it does not require proof that an advantage given to an official is undue.

32. Adding the word "improper" introduced a possible inconsistency with the Convention, however. Art. 1 of the Convention requires a Party to criminalise bribery to obtain or retain "business or other improper advantage." PC Art. 251bis prohibits bribery to obtain or retain "improper business or advantage"; on its face, the offence does not cover bribery to obtain *proper* business. This suggests that the offence might not cover bribes to induce an official to perform his/her duties. It also might not cover bribery by a company that was the best-qualified bidder or could properly have been awarded the business, contrary to Commentary 4 of the Convention. In Phase 3, Chile's questionnaire responses appeared to support this conclusion by explaining that PC Art. 251bis covers "a business, a contract or benefit that would never have been awarded or maintained if the bribe had not been paid." Chilean authorities made similar statements at the on-site visit. Jurisprudence on this issue was not provided. Judges, however, unanimously stated that the offence covers a best-qualified bidder and bribery to induce an official to perform his/her duties.

33. Unlike Art. 1 of the Convention, PC Art. 251bis and its predecessors do not expressly cover foreign bribery committed “directly or through intermediaries” (Phase 2 Follow-up Issue 9(b)). In Phase 2, Chile contended that under PC Art. 15 a person who induces another party (e.g. an intermediary) to commit a criminal act would be guilty as a principal offender. In Phase 3, the Chilean authorities reiterated that intermediaries can be convicted of foreign bribery. Judges agreed with this view and added that a briber who uses an unwitting intermediary would be liable as the immediate perpetrator. The Chilean authorities did not provide jurisprudence on this issue. In the *Salmones Colbún Case* (which resulted in the first corporate conviction for domestic bribery; see p. 22 for the facts of the case), two individuals were convicted of using their company’s lawyer to bribe a Chilean court official. The Chilean authorities stated that the case has jurisprudential value even though it was resolved through a settlement. Nevertheless, it is evident that the court reached its decision without the benefit of opposing arguments between the defence and the prosecution. Foreign bribery committed through the use of a related legal person (e.g. subsidiary) is discussed at p. 15.

34. There are concerns that the Chilean authorities interpret the definition of a foreign public official in PC Art. 251ter as not autonomous, i.e. requiring proof of foreign law. The text of PC Art. 251ter follows Art. 1(4) of the Convention. However, in the *Military Equipment (Korea) Case* (see p. 12) an individual allegedly bribed an official of the Korean embassy in Chile to obtain introductions to Korean companies. Prosecutors in the case sought from the Korean authorities proof of the embassy official’s duties and his status as an official under Korean law. They explained at the on-site visit that they believed that proof of these matters was essential to securing a conviction. After the on-site visit, other Chilean officials further explained that the request to the Korean authorities for proof of the embassy official’s status was a question of fact and not law.

35. The Phase 2 Report (para. 147 and Follow-up Issue 9(c)) referred to a media article in which Chile’s then Foreign Minister stated that the prevalence of bribery in a foreign jurisdiction could be a defence or “at least a mitigating factor”. Under Commentary 7 of the Convention, foreign bribery must be an offence irrespective of the “perception of local custom [or] the tolerance of such payments by local authorities.” In the current phase of evaluation, Chile stated that the “supposed declaration” of the then Foreign Minister “is not an official statement of the Chilean Government”.<sup>13</sup>

### *Commentary*

*The lead examiners recommend that the Working Group follow up these issues concerning Chile’s foreign bribery offence as cases emerge: (a) coverage of bribes to induce an official to perform his/her duty; (b) coverage of bribery by a company that was the best qualified bidder or otherwise could properly have been awarded the business; (c) whether the definition of a foreign public official is interpreted as autonomous; and (d) whether the prevalence of bribery in a foreign jurisdiction can constitute a defence or mitigating factor.*

## **2. Responsibility of Legal Persons**

36. Phase 2 Recommendation 5 asked Chile to provide corporate liability for foreign bribery. In 2009, Chile enacted Law 20 393 to create criminal liability of legal persons for foreign and domestic bribery, money laundering, and terrorism financing (see p. 66 for the full text of the Law). The Working Group’s Phase 1ter Report (para. 52) found that Law 20 393 was consistent with the standards in Art. 2 of the Convention. It also identified several issues for follow up in Phase 3.

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<sup>13</sup> Letter to the OECD Secretariat from the Permanent Representative of Chile to the OECD (6 February 2014).

37. This Phase 3 evaluation is the Working Group's first formal opportunity to consider non-governmental views (i.e. those of academics, the private sector and civil society) of the Law. This section also considers the limited practice under the law. There have been no corporate prosecutions in Chile for foreign bribery and two convictions for domestic bribery, both of which were resolved by settlement and not litigated in a full trial. The *Salmones Colbún Case* was resolved through an expedited procedure and the *Ceresita Case* through a conditional suspension (see p. 26 for an explanation of these procedures). Two formal investigations and at least three prosecutions for domestic bribery are on-going.

### ***Commentary***

***The lead examiners congratulate Chile for commencing corporate prosecutions and securing convictions under Law 20 393. However, this observation is tempered by concerns that corporate foreign bribery charges may not have been fully considered in the Cement (Bolivia) Case before the case was first provisionally filed (see p. 29).***

#### **(a) *Applicable Statutory Provisions***

38. Art. 3 of Law 20 393 sets out the standard of liability. Three cumulative elements must be satisfied in order to hold a legal person liable for foreign bribery:

- (a) The offence is committed by an owner, controller, responsible officer, principal executive officer, representative, or those exercising activities of administration and supervision, or a person under the direction or supervision of one of the aforementioned persons.
- (b) The offence is committed directly and immediately in the interest or for the benefit of the legal person.
- (c) The offence resulted from a breach of the legal person's direction and supervisory functions. An entity will have discharged these functions if it had adopted and implemented a model to prevent offences.

39. Art. 4 of the Law then describes in very general terms the minimum requirements of an offence prevention model. It also states that a legal person may obtain a certification that its offence prevention model meets all of the requirements in the Article. These aspects are further discussed below.

40. The Phase 1ter Report (paras. 16-17) elaborated on the individuals whose conduct could trigger corporate liability. Liability can be imposed for foreign bribery committed by the individuals listed in Art. 3; the legal person's manager; someone under a manager's direction or supervision; a director acting beyond his/her rights, duties or obligations; the legal person's employees; and subcontractors, depending on the contractual terms and the existence of a direct hierarchical relationship with a person listed in Art. 3.

#### **(b) *Directly and Immediately***

41. The Working Group has decided to follow up whether Law 20 393 allows for liability for foreign bribery committed by a legal person's subsidiary. Under Art. 3, liability arises only if foreign bribery is committed "directly and immediately" in the interest or for the benefit of the legal person. The Chilean authorities stated that the parent legal person could be liable if there is a "direct hierarchical link" between the parent company's managers and persons acting for a subsidiary. Liability would thus arise if someone in the parent company ordered a person in the subsidiary to commit the crime. The Working Group concluded that this interpretation needed to be tested in practice (Phase 1ter Report paras. 17 and 20).

42. The Working Group also decided to follow up whether corporate liability arises for an individual who commits foreign bribery principally in his/her own interest (Phase 1ter paras. 21 and 53). For instance, a company employee may bribe a foreign public official to win a contract to earn a bonus for him/herself. Arguably, the crime is directly and immediately in the interest of the employee and not the company, even if it ultimately benefitted the latter. If there is no corporate liability in this situation, then this would be a significant loophole in Law 20 393.

43. The discussions of these issues in Phase 3 were largely theoretical and inconclusive given the lack of practice. The *Salmones Colbún* and *Ceresita Cases* did not deal with these situations. (See pp. 22 and 23 for the facts of these cases.) In any event, they are of limited jurisprudential value because they were not litigated at trial. Chilean legal academics at the on-site visit opined that foreign bribery committed in the “shared interest” of the individual and the company might be sufficient for corporate liability. Prosecutor Instruction 440/2010 likewise states that offences committed in the “shared or dominant interest” of the individual but which benefits the company would suffice. Whether Chilean courts ultimately accept these interpretations remains to be seen.

### ***Commentary***

***The lead examiners recommend that the Working Group continue to follow up the interpretation of the term “directly and immediately” in Law 20 393 Art. 3.***

#### ***(c) Offence Prevention Model Defence***

44. Law 20 393 provides an offence prevention model defence that raises several issues. The defence’s definition is general and vague, resulting in considerable uncertainty over the requisite elements of an adequate offence prevention model. Additional issues regarding the burden of proof and the independence of the corporate compliance officer in certain companies remain unresolved.

45. Law 20 393 Arts. 3-4 define the offence prevention model defence. A company is not liable for foreign bribery if, when the crime was committed, it has discharged its “functions of direction and supervision”. The legal person will have met this requirement if it had adopted and implemented an offence prevention model before the offence was committed. For the defence to succeed, the offence prevention model “shall contain at least the following elements” (Art. 4(1)-(3)):

- (a) The appointment of a prevention officer for renewable terms of up to three years.
- (b) The prevention officer is provided with sufficient means and faculties for performing his/her functions. He/she must have direct access to the legal person’s administration.
- (c) The prevention officer and the company’s administration establish an offence prevention system with the following elements: (i) an assessment of the risks of the company committing offences; (ii) rules and procedures to allow persons involved in risk areas to prevent offences; (iii) a system of financial administration and audit; (iv) procedures for reporting and punishing breaches of the model; (v) communication of the offence prevention system to all workers and in contracts with the company’s service suppliers.

46. These provisions purport to specify the “minimum requirements” of the offence prevention model defence but in practice doubts may linger. Art. 4 states that the model shall contain “at least” the specified elements. Prosecutors and most other on-site visit participants therefore agreed that meeting the requirements in Art. 4 is a necessary but not sufficient condition for the defence to succeed. Additional elements may be needed in the model, depending on the circumstances of the case. The model must also be

effectively implemented if the company is to benefit from the defence. However, one judge stated that the defence succeeds if a prevention model meets the requirements specified in Art. 4.

47. Accepting that Art. 4 only specifies minimum requirements, a further concern is uncertainty over what additional elements are required for the defence to succeed. The Chilean authorities have not provided any guidance. Prosecutor Instruction 440/2010 on corporate prosecutions is also silent on this point. It does not instruct prosecutors to consider whether a company's model should have additional elements, or suggest what those elements should be. The problem is aggravated because the minimum requirements described in Art. 4 are not targeted at preventing foreign bribery. For instance, they include almost none of the components identified in the Working Group's Good Practice Guidance on Internal Controls, Ethics, and Compliance (2009 Anti-Bribery Recommendation Annex II). There is thus no explicit requirement that an effective offence prevention model must include appropriate policies on gifts; hospitality and entertainment; third party agents and intermediaries; political contributions, etc.

48. A further problem is that, even for the minimum requirements that are listed in Art. 4, the provision does not articulate the standard that must be met. For instance, the offence prevention model must have a procedure for reporting breaches, but it is unclear whether this procedure must have features such as protection of confidentiality, independent review of complaints, etc. A prosecutor from the Specialised Anti-Corruption Unit (UNAC) wrote an article in a journal published by the Public Prosecutor's Office (PPO) which fleshed out elements that may be necessary to meet the minimum requirements in Art 4.<sup>14</sup> This is useful, but the article is not official guidance. It is also not widely known; none of the on-site visit participants referred to it.

49. Given the lack of guidance, on-site visit participants unsurprisingly had very different views on the elements of an effective model for preventing foreign bribery. Prosecutors, lawyers, compliance professionals and external auditors referenced a wide range of materials. Some mentioned foreign bribery laws and governmental guidance from other jurisdictions, e.g. US, UK, Canada, Spain and Australia. The article by the UNAC prosecutor mentioned above did likewise. Other on-site visit participants referred to international industry standards. UNAC was conducting an internal study on this subject as of October 2013. The convicted companies in the *Salmones Colbún* and *Ceresita Cases* did not have prevention models; the cases thus do not provide guidance.

50. A further issue is the burden of proof. Prosecutors must prove that a company failed to properly design and implement an offence prevention model. This would be challenging since the legal person, not the judiciary, is much more familiar with its internal organisation. The Working Group has identified this issue for follow up (Phase 1ter Report para. 32). In the absence of practice, this concern remains.

51. Another issue identified for follow up is the independence of the prevention officer who oversees the offence prevention model (Phase 1ter Report paras. 25 and 54). Law 20 393 Art. 3 stipulates that this person must be autonomous from the company's administration, shareholders, partners and controllers. However, the company's owner, partner or controlling shareholder may serve as the prevention officer if the company's annual income does not exceed 100 000 *unidades de fomento* (CLP 2.3 billion or USD 4.2 million).<sup>15</sup> This threshold is the Chilean statutory definition of small- and medium-sized enterprises (SMEs) (Law 20 416 Art. 2). In 2013, just 3.5% of Chilean companies exceeded this threshold. A more flexible rule taking into account a company's other features and risk profile may be more suitable.

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<sup>14</sup> Fernandez Aracena, H. "Elementos Mínimos del modelo de prevención de delitos al interior de una empresa", *Revista Jurídica del Ministerio Público*, N° 54, Marzo 2013, pp. 83-107.

<sup>15</sup> This threshold was EUR 2.8 million in Phase 1ter. *Unidades de fomento* (UF) is a unit of account whose value is set daily by the Chilean tax authorities (SII). The UF was 23 479.96 as of 11 February 2014.

52. At the time of this report, Chilean prosecutors were preparing additional internal guidance on Law 20 393. The guidance would not be disseminated externally, such as to the private sector.

#### *Commentary*

*The lead examiners are concerned about the definition of the offence prevention model defence. There are some doubts over whether the defence succeeds if a prevention model merely meets the requirements stipulated in Law 20 393 Arts. 4(1)-(3). If so, then the threshold for the defence to succeed is far too low. Furthermore, even if prevention models are required to meet additional requirements not specified in the Law, there is substantial uncertainty about what these requirements are. The lead examiners recognise that the defence is of general application to companies of all industries and sizes, and to other offences such as money laundering and terrorism financing. It is therefore inherently impossible to define with complete precision in the statute the requisite elements of a prevention model. Nevertheless, the current lack of guidance would lead companies to adopt highly different definitions of the defence resulting in prevention of models of uneven quality. This would undermine the Law's goal of promoting effective corporate compliance measures to prevent foreign bribery.*

*The lead examiners therefore recommend that Chile provide guidance on the elements of an effective model for preventing foreign bribery as required by Law 20 393. Chile should also ensure that under Art. 3 the requisite independence of prevention officers is determined based on all relevant factors, and not solely the size of the company's revenues.*

*Given the lack of practice, the lead examiners also recommend that the Working Group follow up the application of the offence prevention model defence by Chilean courts, including the burden of proof for the defence.*

#### *(d) Certification of Offence Prevention Model*

53. Law 20 393 allows a legal person to seek a certification of its offence prevention model. The Phase 1ter Report (para. 54) encouraged Chile to ensure that the certification process is robust and leads to actual compliance by legal persons with the requirements in Law 20 393. During Phase 3, several issues have surfaced concerning certification, including its legal effect and implementation.

54. Law 20 393 Art. 4(4)(b) describes the certification process. A legal person may obtain a certification that its offence prevention model meets the minimum requirements set out in Art. 4(1)-(3) (see above). Certificates may be issued by “external auditing companies, risk rating societies or other entities registered with the Securities and Insurance Superintendence (SVS)”. SVS Instruction 302/2011 adds that certificates may be issued by “companies established in Chile in which 50% or more of their property belongs to its main partners, or persons in charge of managing the certification process or the subscription of certificates” A certificate may be valid for a maximum of two years. In 2011-2012, 236 companies were certified. The figure for 2013 was not yet available at the time of this report.

55. There are conflicting opinions over the legal effect of certification, i.e. whether a company with a certified prevention model will necessarily escape liability. Law 20 393 does not clearly spell this out. Divergent opinions were expressed at the on-site visit. One private sector lawyer stated categorically that a certificate had no value and that “everything has to be scrutinised” at trial. Corporate counsel of financial institutions agreed. At the other end of the spectrum, some judges would not say that certification conclusively exculpates a defendant but they expressed reluctance to look behind a certificate. This would raise substantial concerns given questions over the robustness of the certification process (see below).

56. Between these two extremes, more nuanced views were also expressed. One judge said a defence that relies solely on a certificate would be “very fragile”. The SVS and one corporate counsel said certification creates a rebuttable presumption of compliance. The State Defence Council agreed, and noted that different wording is used in other Chilean legal provisions which establish presumptions that could not be displaced. After the on-site visit, the Chilean authorities referred to the Civil Code to support the position that certification raised a rebuttable presumption. It is difficult to see how provisions in the Civil Code would apply to a criminal offence, however. Nor did any of the on-site visit participants refer to the Civil Code. Some prosecutors also said vaguely that the presence of a certificate would require a prosecution to meet “higher criteria”. Prosecutor Instruction 440/2010 described a certified model as “one of the biggest challenges for the prosecution, as it becomes more complex to prove that the company had breached its duty of supervision and direction”. It is difficult to draw any conclusions about certification’s legal effect from these statements, apart from the obvious fact that there is no consensus on this issue.

57. Equally unclear is the standard and methodology for certification. As described at p. 17, Chile has not provided guidance on an effective model to prevent foreign bribery. Entities that perform certification are left to develop their own standards and methodologies. Variation is predictable, but there is no verification that appropriate standards and methodologies are applied. SVS Instruction 302/2011 requires certifying entities to establish and update internal rules of procedure and a certification methodology, and produce them to competent authorities (and companies undergoing certification) upon request. They must also prepare a report with a limited description of the methodology when issuing a certificate. However, they are not required to submit these materials to SVS for scrutiny or approval. SVS also maintains that it is not mandated to evaluate certification methodologies. Some of the certifying entities at the on-site visit have never refused a request for certification, including one that had certified over 100 companies in about two years. As well, many of the models that have been certified may have focused mostly on preventing money laundering and not bribery. Several registered certifiers at the on-site visit had backgrounds in anti-money laundering. Also, a much higher proportion of financial institutions have been certified than companies in other sectors.

58. Concerns about the quality of certifications are compounded by the inability to hold certifying entities accountable. Without a recognised standard and methodology, it would be difficult to hold certifying entities liable for improper or negligent certifications. SVS said that it cannot de-register an entity for inappropriate certifications. Persons performing certifications are considered to be performing a “public function” for the purposes of Penal Code offences that apply to public officials (Law 20 393 Art. 4(4)(c)). However, certifying entities are not subject to the administrative disciplinary measures like Chilean civil servants for mere negligence or other inappropriate behaviour, according to on-site visit participants.

59. The qualifications of certifying entities also raise questions. Certifying entities are required to register with SVS. As of January 2014, 19 entities had registered, though none of the major international audit firms that provide significant anti-bribery consulting services had done so. To register, individuals involved in the certification process must meet technical qualifications specified in SVS Instruction 302/2011. The requirements are not onerous. For instance, persons performing actual certifications need only have a degree from a programme that provided him/her with “knowledge related to process assessments and the controls associated thereto, sufficient to adequately exercise the individual’s work.” Expertise in foreign bribery-related corporate compliance measures is not a stated prerequisite. Furthermore, SVS does not verify whether the requirements are met; applicants are merely required to provide sworn statements to that effect.<sup>16</sup> Chile maintains that there is no empirical evidence suggesting

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<sup>16</sup> Applicants are also required to provide a sworn statement that (a) they have not been sanctioned or convicted, or are not under indictment, for a criminal offence in Chile or abroad that harms the public trust or the property of third parties, and (b) its registration with Crime Prevention Model Certification Bodies, Stock Exchange and Security Dealers, Commodity Brokers, External Audit Companies, Risk Classification

that higher qualifications are needed for certifying entities. But by the same token, Chile has not verified that the present qualification requirements have produced certifications of acceptable quality.

60. Conflict of interest is a further concern. Under SVS Instruction 302/2011, an entity cannot certify the model of another company in its corporate group. The prohibition also applies if an entity has advised on the design or implementation of the model whose certification is sought, or of the model of another entity in the same corporate group as the company seeking certification. SVS does not enforce these rules, however, even though Instruction 302/2011 allows SVS to cancel the registration of a certifying entity for failure to meet the Instruction's requirements. One entity at the on-site visit worked with a company for two years before issuing a certificate. This casts doubts over whether the ban against designing and certifying the same model was observed.

### *Commentary*

*The lead examiners have substantial concerns over the certification of offence prevention models. Law 20 393 does not clearly describe the impact of certification on the offence prevention model defence, leading to widely divergent views among judges, prosecutors and practitioners. Furthermore, entities that perform certifications are not sufficiently regulated. Whether the certificates that are issued are of a consistent, acceptable quality is thus uncertain. This is of particular concern since ambiguities in Law 20 393 mean that certification could substantially affect whether the offence prevention model defence succeeds in a particular case.*

*The lead examiners therefore recommend that Chile take steps to (a) clarify the legal effect of certification of an offence prevention model under Law 20 393, and (b) strengthen and enforce rules and standards that apply to certifying entities, including those regarding qualifications, certification requirements and methodology, and conflicts of interest. Chile should take remedial action immediately, given the pace at which companies in Chile are seeking certification.*

### **3. Sanctions**

61. This section considers the sanctions against natural and legal persons for foreign bribery. Additional sanctions such as debarment and denial of other public advantages are considered at p. 50.

#### **(a) Sanctions against Natural Persons for Foreign Bribery**

62. Sanctions against natural persons for foreign bribery raise several issues, including outstanding Phase 2 Recommendations regarding mandatory sentence reductions, different levels of sanctions for domestic and foreign bribery, and the level of sanctions applied in practice.

63. Chile has not implemented Phase 2 Recommendation 6(b)(i) to eliminate sentence reductions for solicited foreign bribery. A person who pays a bribe after being solicited by a foreign public official is punishable by confinement of 61 days to 3 years. Unsolicited foreign bribery is punishable by confinement of 541 days to 5 years (PC Arts. 56 and 251bis).<sup>17</sup> (Additional sanctions such as fines are also available;

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and External Auditors and Accounts Inspectors has not been cancelled because of a failure to comply with relevant laws or regulations.

<sup>17</sup> In Chile, sanctions resulting in the deprivation of liberty include imprisonment (*presidio*), confinement (*reclusión*) and prison (*prisión*) (PC Art. 21). Prison, temporary imprisonment and confinement are either long-term or short-term in the minimum, medium or maximum degree (PC Art. 56). Bribery is always sanctioned by short-term imprisonment, the degree for which depends on the type of bribery.

see below.) The Working Group has voiced several concerns over this provision. Alleged bribers of foreign public officials will frequently, if not invariably, claim solicitation to benefit from the lower sanctions. Disproving this claim may be difficult for prosecutors because – unlike in domestic bribery cases – the foreign official will often be unavailable (Phase 2 Report para. 144). Chile justifies the reduction on the grounds that solicited bribery is less serious and the distinction has a didactic purpose (Phase 1bis Report para. 28). The Working Group has noted that “a rigid rule requiring substantially lesser penalties in every case of solicitation, no matter how casual, should be seriously reconsidered.”<sup>18</sup>

64. Sentences may also be reduced due to *media prescripción*. This principle applies when an accused surrenders to the authorities or is apprehended after the halfway point in the statute of limitation for the offence (PC Art. 103). In cases of foreign bribery, this would be two and a half years after the offence was committed. When *media prescripción* applies, the maximum sanction for solicited and unsolicited foreign bribery is 60 days and 540 days respectively (Phase 1bis Report para. 31).

65. The Working Group has recommended that Chile eliminate *media prescripción* in foreign bribery cases (Phase 2 Recommendation 6(b)(ii)). The maximum penalties for foreign bribery after reduction by *media prescripción* have been increased since Phase 2. Yet, they are still too low, especially for solicited foreign bribery. Foreign bribery allegations often come to light long after they occur and the resulting investigations are lengthy. Reductions could therefore apply in most, if not all, cases. Chile explained that *media prescripción* is meant to expedite the work of prosecutors. However, prosecutors often cannot control pace of foreign bribery investigations as they require the co-operation of foreign or other Chilean authorities. Chile also argues that *media prescripción* applies to all offences. However, the particular features of foreign bribery investigations may justify an exception. Prosecutors at the on-site visit agreed that *media prescripción* leads to ineffective sanctions for misdemeanours with a short limitation period like foreign bribery. They also stated that *media prescripción* has resulted in cases with very low sanctions.

66. Chile also argues that the effect of *media prescripción* can be mitigated by suspending the statute of limitations, but this is doubtful. A criminal investigation in Chile begins with a preliminary investigation followed by a formal one (see p. 25). Chile states that the statute of limitations is suspended when a preliminary investigation is formalised. If formalisation occurs before half of the limitation period has elapsed, then *media prescripción* cannot be invoked. The difficulty with this position is that Chile also argues that prosecutors are unlikely to seek early formalisation because of other reasons (see p. 25). Prosecutor Instruction 39/2013 also asks prosecutors to argue that the limitation period is suspended when a request to formalise the investigation is filed, not when formalisation actually occurs. Even if this argument succeeds, it likely would not bring forward substantially the suspension of the limitation period.

67. An additional concern is that financial sanctions for foreign and domestic bribery are not comparable, contrary to Convention Art. 3(1). In addition to incarceration, foreign and domestic bribery is punishable by a fine and partial or absolute disqualification from public office for a fixed or indefinite period (PC Arts. 248bis and 251bis). The maximum fine for bribery to induce a Chilean official to commit certain listed crimes is three times the value of the advantage (PC Arts. 249 and 250 para. 4). The maximum fine for foreign bribery under similar circumstances is lower, i.e. only once to twice the value of the advantage. When the bribe is of a non-economic nature, the penalty is 100-1 000 *unidades tributarias mensuales* (UTM) (CLP 4.1-41 million or USD 7 400-74 000).<sup>19</sup>

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<sup>18</sup> See Spain Phase 2 Report para. 143 and Recommendation 6(c), and Phase 3 Follow-up Issue 16(d)(ii).

<sup>19</sup> UTM is unit of account whose value is set monthly by the Chilean tax authorities (SII). The UTM was CLP 41 181 as of February 2014.

68. Finally, there are concerns over the sufficiency of sanctions in practice. The Phase 2 Report (para. 178) stated that there is “no chance” that an average first offender would receive a prison sentence for foreign bribery. In Phase 3, sanctions have not been imposed for foreign bribery. Statistics on sanctions for domestic bribery, which could have offered some guidance, are not available. Nevertheless, prosecutors and judges believed that sanctions remain too low. The *Salmones Colbún Case* provides some support for this view. According to the court judgement,<sup>20</sup> bribes totalling between CLP 1 and 3.8 million (USD 1 800-6 800) were paid to a Chilean court official. In return, each of the two principal bribers would have netted CLP 5 million (USD 9 000) through a sale of land. Five accused were convicted and each received five years’ prison served through probation; absolute and indefinite disqualification of political rights; and a five-year ban from holding office. Fines imposed ranged from CLP 3-3.8 million (USD 5 400-6 800), which seem low compared to the value of the intended gains.

69. Just before the adoption of this report, Chile informed the Working Group that the draft Bill replacing the current Penal Code would eliminate *media prescripción* and increase the maximum fine available against natural persons for foreign bribery.

### **Commentary**

*The lead examiners remain concerned that Chile has not eliminated mandatory sentence reductions for solicited foreign bribery and “media prescripción”. They reiterate Phase 2 Recommendation 6(b) that Chile eliminate these mandatory reductions of sanctions for foreign bribery. Also, the maximum available fine for domestic bribery is higher than for foreign bribery in certain circumstances. The lead examiners therefore recommend that Chile amend the Penal Code to ensure equivalence between the fines applied to domestic and foreign bribery cases.*

*The lead examiners are also concerned that criminal sanctions imposed against natural persons in practice may be low, particularly in cases where the bribe is solicited by the foreign public official. They therefore recommend that Chile take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases in practice as required by Art. 3(1) of the Convention. Chile should maintain statistics on sanctions imposed against natural and legal persons in domestic and foreign bribery cases. The lead examiners also recommend that the Working Group continue following up the sanctions imposed against natural persons for foreign bribery.*

### **(b) Sanctions against Legal Persons for Foreign Bribery**

70. In 2009, Chile introduced sanctions against legal persons for foreign bribery to address Phase 2 Recommendation 6(d). The Working Group, however, has expressed doubts over whether these sanctions are effective, proportionate and dissuasive (Phase 1ter paras. 43-49 and 55).

71. Law 20 393 Arts. 9-16 provide for the following sanctions against legal persons for foreign bribery: (i) dissolution of the legal person or cancellation of its status (not applicable to public entities or public service providers); (ii) permanent or temporary debarment from acts and contracts with State organs (discussed further at p. 51); (iii) partial or total loss of fiscal benefits (e.g. tax breaks), or an absolute prohibition from receiving such benefits for a specified period; and (iv) a fine between 200 and 10 000 UTM (CLP 8.2 – 411 million or USD 14 825 – 741 258). The maximum rises to 20 000 UTM (CLP 824 million or USD 1.5 million) if there is a previous conviction for the same offence in the past five years. If there are mitigating and no aggravating circumstances, then only two of the penalties described

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<sup>20</sup> *Tribunal de Juzgado de Garantía de Talca* (12 August 2013) Case No. 9211-2012.

above can be applied, with one of them in the lowest degree. Ancillary penalties (i.e. publication of the judgment and confiscation) are automatically applied.

72. The principal concern is that fines available are too low. A maximum fine of only USD 741 258, even when doubled in the rare case of a second conviction, will rarely be effective, proportionate and dissuasive as required by the Convention. Confiscation is an additional financial sanction but it does not have sufficient deterrent effect. As the Working Group has pointed out, “[t]he confiscatory component, even when covering large amounts of money, only disgorges ill-gotten gains. The legal person is thus merely returned to the same financial position as if the crime had not been committed.”<sup>21</sup> The additional sanctions of loss of fiscal benefits and debarment have financial consequences but their value is uncertain.

73. Just before the adoption of this report, Chile informed the Working Group that the draft Bill replacing the current Penal Code would increase the maximum fine available against legal persons for foreign bribery.

74. Two cases have resulted in sanctions for domestic bribery and none for foreign bribery. In the *Salmones Colbún Case* (see p. 22 for the facts of the case) two companies were each sentenced to fines of 500 UTM (CLP 20 million or USD 37 000) and publication of the judgment. The companies also lost 40% of fiscal benefits for three years and their water use permit, but the economic value of these additional sanctions is unclear. The convictions also resulted in automatic debarment from public procurement contracts (see p. 51). The *Ceresita Case* involved a company bribing a Chilean official in order to conduct certain activities that were not allowed under local zoning laws. The case was resolved through a “conditional suspension” of proceedings (see p. 26). The defendant agreed to ten conditions, including a donation of land to the government, construction of a recreational park and implementation of an offence prevention model. The prosecutor accepted the settlement partly because its economic value of USD 2.5 million exceeded the maximum fine that could have been imposed at trial. This approach in the *Ceresita Case* arguably demonstrates the insufficiency of the available sanctions at trial under Law 20 393.

#### *Commentary*

*The lead examiners are concerned that the maximum fine available against legal persons for foreign bribery is not effective, proportionate and dissuasive. They recommend that Chile increase the maximum fine to a level that is effective, proportionate and dissuasive as required by Article 3(1) of the Convention. They also recommend that the Working Group follow up sanctions imposed against legal persons as case law develops.*

#### **4. Confiscation of the Bribe and the Proceeds of Bribery**

75. Chilean law allows for confiscation but not value confiscation. CPC Art. 348 and Law 20 393 Art. 13(2) provide for confiscation of the instruments and proceeds of foreign bribery against natural and legal persons. Confiscation is mandatory upon conviction. A significant deficiency is that the provisions do not provide for confiscation of property the value of which corresponds to that of the proceeds of the offence, or monetary sanctions of comparable effect, as required by Art. 3(3) of the Convention.<sup>22</sup> Just before the adoption of this report, Chile informed the Working Group that the draft Bill replacing the current Penal Code would provide for value confiscation.

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<sup>21</sup> Germany Phase 3 Report Commentary after para. 112.

<sup>22</sup> The [2010 GAFISUD Report on Chile](#) (pp. 44 and 47) identified the same issue.

76. In the absence of foreign bribery cases, domestic corruption cases provide an indication of how confiscation is applied in practice. Confiscation was ordered against natural persons in 688 out of 1 062 domestic corruption cases in 2008-2012. Chile was invited to but did not clarify whether both the instruments and proceeds of the offence were confiscated. Prosecutors did not seek confiscation against the convicted legal persons in the *Salmones Colbún and Ceresita Cases*. In the former case, however, water rights obtained through bribery were annulled. In addition, the size of the fine against the official took into account the value of the bribe but the bribe itself was not confiscated as it could not be located. As noted above, value confiscation is not available in Chile.

### *Commentary*

*The lead examiners recommend that Chile amend its legislation without delay to provide for confiscation of property, the value of which corresponds to that of the proceeds of a foreign bribery offence, where the bribe and the proceeds of foreign bribery cannot be confiscated, or monetary sanctions of comparable effect.*

## **5. Investigation and Prosecution of the Foreign Bribery Offence**

77. This section begins with an overview of Chile's framework for criminal enforcement of foreign bribery, including the commencement and termination of foreign bribery investigations and prosecutions, and the statute of limitations. This is followed by the key issue of enforcement in actual cases. The section ends with other enforcement-related matters such as Art. 5 of the Convention, bank secrecy, investigative techniques, resources and expertise.

### **(a) Conduct of Foreign Bribery Cases**

78. Prosecutors in local prosecution units are responsible for investigating and prosecuting specific cases, including those involving foreign bribery. The Public Prosecutors' Office (*Ministerio Público or Fiscalía de Chile*, PPO) is headed by the National Prosecutor (*Fiscal Nacional*) and is subdivided into 18 regional prosecutor offices and local prosecution units. Each region is headed by a Regional Prosecutor and staffed by Assistant Prosecutors. Prosecutors in these local units may receive support from the Specialised Anti-Corruption Unit (UNAC) in Santiago.<sup>23</sup> The Special Unit for Money Laundering, Economic Crimes and Organized Crime (ULDDECO) provides similar support in money laundering cases.

79. Just before the adoption of this report, Chile stated that competence for all foreign bribery cases would soon be reallocated from local units to Regional Prosecutors, in co-ordination with UNAC and the international co-operation unit in the PPO (*Unidad de Cooperación Internacional y Extradiciones*, UCIEX). Chile explained that Regional Prosecutors are generally more experienced than local prosecutors.

80. There are some questions over whether prosecutor instructions on corruption cases apply only to domestic bribery cases. The National Prosecutor can issue general instructions on categories of offences. Instruction 39/2013 covers corruption cases, which is defined in Section I.1 as offences that "affect property and personal aspects of the administration". This could arguably be interpreted to limit the Instruction's application to domestic corruption cases only (Phase 2 Report paras. 94-95).<sup>24</sup> The Instruction then lists a series of applicable offences which includes foreign bribery in PC Art. 251bis. However, a later section defines a "public official" for the purposes of the Instruction by referring only to the definition of a

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<sup>23</sup> In 2007, UNAC replaced the Specialised Unit for Offences by Officials and Public Probity referred to in the Phase 2 Report (paras. 79-82).

<sup>24</sup> The current Instruction 39/2013 replaced Instructions 29/2007 and 59/2009 which were considered in the Phase 2 and Phase 2 Written Follow-Up Reports respectively.

Chilean public official in PC Art. 260. There is no mention of the definition of a foreign public official in PC Art. 251ter. Despite these ambiguities, the Chilean authorities maintain that the Instruction applies to foreign bribery cases, given its direct reference to PC Art. 251bis.

81. Prosecutors direct and supervise the police to conduct criminal investigations. The *Policía de Investigaciones de Chile* (PDI) is the principal police body responsible for investigating crimes. Investigations are generally conducted by the *Brigada de Investigación Criminal* (BRICRIM). PDI's economic crime unit (*Brigada Investigadora de Delitos Económicos*, BRIDEC) is involved in corruption investigations, though their role in foreign bribery cases was not fully explained. PDI also has specialised brigades for other crime types such as money laundering and organised crime. A second police body, the *Carabineros de Chile*, focuses mainly on crime prevention but could also investigate a crime if requested by a prosecutor. In practice, it investigates only alongside the PDI.

**(b) Commencement of Investigations and Statute of Limitation**

82. A prosecutor who receives information about a crime may open a preliminary investigation. The information may arrive in a report (*denuncia*) by someone with knowledge of an offence. It may result from a complaint (*querrela*) by a victim or his/her representative to a Guarantee Judge. (Guarantee Judges (*Jueces de Garantía*) are responsible for ensuring due process during an investigation and prosecution.) There are conflicting views in Chile over whether foreign bribery is a crime with a victim, e.g. a competitor that lost business to a briber (Phase 2 Report para. 91). Investigations may be opened based on allegations in media reports, such as in the *Government Vehicles (Peru)* and *Cement (Bolivia) Cases*.

83. A preliminary investigation is converted into a formal investigation when the prosecutor, in the presence of a Guarantee Judge, informs the accused that he/she is under investigation (CPC Art. 229). The investigation must be formalised when, among other things, the prosecutor seeks judicial intervention for certain investigative measures (CPC Art. 230). Investigative measures that affect an individual's constitutional rights generally require prior judicial authorisation (CPC Art. 9). However, they may be available during a preliminary investigation if the measure is indispensable to the investigation, having regard to the gravity of the offence and the nature of the investigative measure (CPC Art 236).

84. The formalisation of an investigation suspends the statute of limitation but triggers a second limitation period. A foreign bribery investigation and prosecution must be concluded within five years from the date of the offence (PC Arts. 93-105; Law 20 393 Art. 19). The limitation period is suspended for a maximum of five years if the alleged offender is abroad. It is also suspended when a preliminary investigation is formalised (PC Art. 96). However, the formal investigation must then be concluded within two years (CPC Art. 247). This two-year limitation period is suspended under limited circumstances, e.g. if the proceedings have been temporarily dismissed because the defendant has absconded or become insane, or because of pending related civil proceedings; if the proceedings have been conditionally suspended (see p. 26); or if the defendant has agreed to but has yet to pay a victim reparations (CPC Art. 252). The short, two-year limitation period is meant to ensure speedy trials, according to Chilean authorities.

85. However, the Phase 2 Report (paras. 162-165) expressed "serious concerns" that the two-year period for formal investigations is insufficient and "ill-adapted" to foreign bribery cases. Many such investigations will be time-consuming because of their complexity and the need to gather evidence abroad. The limitation period is not suspended while an MLA request to a foreign state is outstanding. Phase 2 Recommendation 3(f) therefore asked Chile to ensure that the overall limitation period for the foreign bribery offence is sufficient to ensure adequate investigation and prosecution, including that the two-year period for formalised investigations can be extended as necessary.

86. This Recommendation has not been implemented. Some Chilean officials stated that the two-year limitation period has not posed problems in domestic and foreign bribery investigations. Prosecutors delay

formalisation as long as possible to allow most of the investigative work to be done during the preliminary phase. However, this would not completely address the Working Group's concerns because some investigative measures may not meet the test in CPC Art. 236 and would have to be taken after formalisation. Postponing formalisation also runs counter to Chile's approach of seeking early formalisation to limit the application of *media prescripción* (see p. 21). Chile could not provide statistics on cases that have been barred by the two limitation periods.

### ***Commentary***

***The lead examiners remain concerned over the statute of limitations for the foreign bribery offence and the two-year limitation period for the conclusion of formal investigations. These limitation periods are too short, considering that foreign bribery investigations are frequently complex and time-consuming. The lead examiners acknowledge Chile's position that it is obliged under Article 7(5) of the American Convention on Human Rights to ensure that investigations conclude within a reasonable time. Nevertheless, this obligation can be met while still ensuring that adequate time is allowed for proper investigations of foreign bribery allegations. The lead examiners therefore reiterate Phase 2 Recommendation 3(f) and recommend that Chile take steps to ensure that the overall limitation period for the foreign bribery offence, including the two-year period for formalised investigations, is sufficient for proper investigation and prosecution.***

#### **(c) *Termination or Suspension of an Investigation or Prosecution***

87. A prosecutor has several means of closing or suspending an investigation or prosecution without trial. A case may be provisionally filed (*archivo provisional*) if there is insufficient evidence to prove the crime. The case may be reopened if new information later surfaces (CPC Art. 167 and Phase 1 para. 77). A prosecutor may decide not to pursue a case after an investigation (CPC Art. 248). A decision not to pursue a corruption case covered by Prosecutor Instruction 39/2013 requires the approval of a Regional Prosecutor unless the case involves "active, low complexity bribery". The CPC also provides for prosecutorial discretion ("opportunity principle"). A prosecutor can decline or terminate an investigation if the facts in question do not seriously compromise the public interest and the offence meets the conditions set out in CPC Art. 170. Art. 24 of Law 20 393 excludes prosecutorial discretion in corporate foreign bribery prosecutions. Prosecutor Instruction 39/2013 purports to do likewise in prosecutions of natural persons.

88. Criminal proceedings may be resolved through an expedited procedure (*procedimiento abreviado*). This method is available if the prosecutor seeks a sentence of 5 years' imprisonment or less, and if the accused agrees to the procedure (CPC Art. 406-412; Law 20 393 Art. 27). By accepting this procedure, the accused also accepts the facts as presented by the prosecution and is sentenced by a judge on the agreed facts. The sentence imposed cannot be higher than that sought by the prosecutor.

89. Criminal proceedings may also be "conditionally suspended" and eventually terminated without trial if the offence is punishable by deprivation of liberty (*privación de libertad*) of three years or less. The measure is thus available to solicited foreign bribery. A suspension is available only if the accused accepts the procedure and does not have a previous conviction or conditional suspension. If suspension is ordered, the accused must fulfil certain conditions, such as the payment of compensation. A corporate accused may be required to pay a fine, perform community service, and/or implement an offence prevention model. Conditions may be imposed for up to three years. The suspension may be lifted due to serious or repeated breaches of the conditions, or if the accused is subject to another formal investigation. If the accused observes the conditions for the duration of the suspension, the criminal charges are dismissed (CPC Arts. 237-240; Law 20 393 Art. 25).

90. The use of these measures in corruption cases has attracted comment. Instruction 39/2013 and its predecessors ask prosecutors to apply conditional suspensions on an “exceptional, limited and prudent basis” in corruption cases. A decision to seek a conditional suspension must be approved by a Regional Prosecutor, except in cases of “flagrant low-complexity bribery”. Despite this instruction, 21% of cases involving offences by public officials in 2008-2012 were concluded with conditional suspensions. The 2013 MESICIC Report (paras. 62-70) recommended that Chile analyse this situation.

### *Commentary*

*The lead examiners recommend that the Working Group follow up the application of conditional suspensions and expedited procedures in foreign bribery cases.*

#### *(d) Issues Arising from Specific Foreign Bribery Enforcement Actions*

91. In Phase 2, the Working Group decided to follow up the enforcement of Chile’s foreign bribery offence because of recent legislative reforms and the lack of cases (Follow-up Issue 9(d)). This section thus considers issues arising from the six known allegations of foreign bribery committed by Chilean individuals and/or companies. Four particular concerns emerge: (i) inadequate investigation before a case is provisionally filed; (ii) jurisdiction to prosecute; (iii) lack of proactivity in seeking the co-operation of foreign authorities; and (iv) co-ordination among Chilean authorities. Case summaries are at p. 8.

##### *(i) Inadequate Investigation before Provisional Filing of Cases*

92. There are substantial concerns that Chilean authorities have provisionally filed some foreign bribery cases without a thorough and complete investigation. In these cases, the authorities conducted little or no investigation into the allegations in Chile. Efforts to seek evidence abroad were also sometimes inadequate.

93. In the *Airlines (Argentina) Case*, the Chilean Airline X allegedly committed foreign bribery in order to expand its business into Argentina. The bribe was allegedly paid through a Chilean national residing in the US who was employed by a subsidiary of the company. The payments were drawn from US bank accounts, and found their way into the US account of an Argentine official’s associate. However, bank transfer documents allegedly linked the payments to the airline company in Chile.

94. Chilean prosecutors collected some information before provisionally filing the case. Some evidence was provided by the authorities in Argentina. Additional information was gathered from open sources and Chilean government agencies, such as travel records of the persons involved, copies of certain emails, and information on some aspects of Airline X’s corporate structure. The prosecutors then provisionally filed the case, citing insufficient evidence and a lack of a territorial nexus between the crime and Chile. At the time of the offence, Chile did not have corporate liability for foreign bribery or nationality jurisdiction to prosecute foreign bribery.

95. Nevertheless, much more could have been done to ascertain whether individuals in Chile were responsible for the crime. The alleged bribery was to allow Airline X to operate in Argentina. The airline’s decision to expand operations into a significant, neighbouring market would have been a decision taken in Airline X’s headquarters in Chile. Evidence of the crime might therefore be located there. Nevertheless, the Chilean authorities did not interview witnesses in Chile, or gather documents beyond those described above. They did not ascertain whether payment instructions or the source of the funds originated in Chile. No efforts were made to inquire whether the USD 1.15 million contract between Airline X and another company to optimise its flight routes produced a genuine work product, or whether it was a sham contract to hide the alleged bribes. When asked at the on-site visit whether an investigation plan had been drawn up, Chile replied no.

96. Steps to gather evidence in the US were also conspicuously absent despite the case's evident connections with the country. After the allegations surfaced in December 2010, no efforts were made to obtain documents relating to the US bank accounts through which the alleged bribe payments flowed. Prosecutors did not seek to interview the employee of the US-based subsidiary who allegedly transferred the bribes, or any other employee of the subsidiary. Chile initially also did not inform the US of the allegations, which could have allowed the authorities there to commence a parallel investigation under US foreign bribery laws.

97. After the on-site visit, the Chilean authorities stated that they had re-opened the investigation into the *Airlines (Argentina) Case*. Foreign authorities would be contacted to remedy some of the concerns described above. The Chilean authorities added that a May 2012 media article suggested that there may be concerns regarding the continuity of the evidence that had been seized by the Argentine authorities.

98. The decision not to investigate the *Government Vehicles (Peru) Case* was also made without sufficient inquiries. The case involved the Peruvian subsidiary of a Chilean company allegedly bribing public officials in that country. Shortly after the allegations surfaced, Chilean prosecutors contacted their Peruvian counterparts, who informed them that the alleged bribers were Peruvian nationals. The Chilean authorities then decided not to open an investigation. They did not take investigative steps in Peru or Chile. For instance, they did not seek statements from the alleged bribers in Peru who apparently allege that executives of the Chilean company knew of the bribery. The Chilean authorities also did not trace the origin of the bribe payments. They did not ascertain the corporate structure of the Peruvian subsidiary to determine whether executives of the Chilean parent company had knowledge or influence over the business decisions in the subsidiary. Chile argued that the alleged crime occurred before the legislation providing corporate liability and nationality jurisdiction for foreign bribery entered into force. Nevertheless, the additional investigative steps described above ought to have been taken to ascertain whether Chile had territorial jurisdiction to prosecute the case.

99. As mentioned at p. 9, after the on-site visit Chile continued to decline to open an investigation into the *Government Vehicles (Peru) Case*. The two VC executives in Chile gave statements pursuant to the Peruvian MLA requests. After reviewing the statements, the Chilean authorities decided not to open an investigation because both executives denied knowledge of the alleged bribery. However, the Chilean authorities have not taken steps to interview the VP officials in Peru to ascertain their claim that the VC executives knew of the alleged crime. Nor have any additional investigative steps been taken in Chile.

100. The Chilean authorities also did not investigate the allegations in the *Travel Company (Cuba) Case* when they first surfaced. The brothers M1 and M2 are Chilean nationals who had extensive business interests in Cuba and Chile. The Cuban authorities charged them in 2010 with various offences, including bribery of Cuban officials. After receiving an MLA request in 2010, the Chilean authorities initially did not investigate the matter in Chile to determine whether proceedings should also be commenced in Chile. In 2011, Chile finally opened an investigation and requested MLA from Cuba after the brothers had been convicted *in absentia* in Cuba, and after the Chilean financial intelligence unit received a suspicious money laundering report. After reviewing the materials received from Cuba, the Chilean authorities opened an investigation for money laundering and false accounting before filing the case again for lack of evidence.

101. Even when investigative steps in Chile were taken, these efforts have been limited. In the *Cement (Bolivia) Case*, two Bolivian nationals in 2010 allegedly attempted to bribe a Bolivian public official to secure a contract to sell cement to the Bolivian government. The two individuals stated that they represented the Chilean cement company. They presented two letters on the company's letterhead that were signed by the company's commercial manager. The first designated one of the individuals as the company's representative in Bolivia. The second letter detailed the terms and conditions of sale, and product specifications. An MLA request to Bolivia was partially executed. The Chilean authorities then verified that the Chilean cement company had not exported to Bolivia previously. Attempts to ascertain whether the two Bolivians had visited Chile were inconclusive as there were no direct flights between the two cities in question. The case was then provisionally filed.

102. The involvement of Chilean nationals and the cement company in the crime were thus not fully explored. The alleged crime occurred after Law 20 393 on corporate liability entered into force. This allowed a company to be held liable for foreign bribery committed by someone acting under the direction or supervision of its managers, and if the crime was directly and immediately in the company's interest or benefit (see p. 15). The letters presented by the two Bolivians appeared to be *prima facie* proof that they represented the company. Yet, the Chilean authorities did not initiate an investigation into whether the company could be held liable under Law 20 393. No efforts were made to ascertain the authenticity of the letters presented to the Bolivian official or verify the numerous facts stated therein. There was no information on whether the Chilean commercial manager who signed the letters or other Chilean company employees visited Bolivia or communicated with the two Bolivian individuals. The Chilean prosecutor stated that she did not interview the manager since the manager could then apply to a judge for disclosure of the investigation file. This was a curious decision, given that the alternative was to file the case altogether. Statements of other company employees (such as the contact person named in the letters) were also not sought.

103. After the on-site visit, the Chilean authorities re-opened the investigation in the *Cement (Bolivia) Case* in November 2013. A new MLA request was sent to Bolivia. The Chilean authorities also interviewed two managers of the cement company. The managers did not travel to Bolivia, nor did the Bolivian individuals visit Chile. The managers did not meet the Bolivian individuals personally but spoke to them on the telephone. The managers denied authorising the alleged bribe payment but confirmed the authenticity of the letters presented by the Bolivian nationals to the Bolivian official. As the Chilean authorities concede, the letters "reveal that the said Bolivian nationals could represent the company in business". This finding should have at least triggered an examination of the liability of the cement company. For instance, inquiries should have been made to ascertain whether the offence resulted from a breach of the company's direction and supervisory functions, and whether the company had a model to prevent the offence. The Chilean authorities replied that the new evidence does not prove "an unlawful relationship between the Bolivian [nationals] and the Chilean company", or that the company was "used as a means to pay bribes to foreign public officials". These factors, however, are not relevant to the company's liability under Law 20 393.

#### *Commentary*

***The lead examiners are seriously concerned that Chile has provisionally filed some foreign bribery investigations without a thorough and complete investigation. In certain cases, the Chilean authorities rely principally on seeking evidence abroad through MLA. The cases are then filed when the foreign evidence sought is not fully obtained, or when the evidence does not reveal an overwhelming connection to a Chilean individual or company. Few or no investigative steps were taken in Chile to determine whether there was evidence of criminality in Chile, or to substantiate or refute the allegations that had surfaced.***

*The lead examiners are also particularly concerned about insufficient efforts to investigate the Airlines (Argentina) case. Before the case was provisionally filed, the Chilean authorities did not take any steps to gather evidence in the US and made insufficient efforts in Chile, despite the case's strong and evident connections with both jurisdictions. The lead examiners welcome Chile's decision to re-open the investigation after the on-site visit, and urge the authorities to thoroughly investigate this case to a satisfactory conclusion. They also welcome the decision to re-open the Cement (Bolivia) Case.*

*For these reasons, the lead examiners recommend that Chile periodically review its laws implementing the Convention and its approach to enforcement in order to effectively combat foreign bribery. Furthermore, Chile should take steps to ensure that foreign bribery allegations are thoroughly investigated and not prematurely filed, and that corporate liability is fully explored. The Chilean authorities should use proactive steps to gather information from diverse sources to increase sources of allegations and enhance investigations. This includes proactively seeking co-operation and MLA from foreign countries whenever appropriate. The lead examiners also recommend that the Chilean authorities take appropriate steps to further investigate the foreign bribery cases that have been provisionally filed or where a decision had been taken to not open an investigation.*

(ii) *Jurisdiction to Prosecute*

104. Chile has nationality (since 2009) and territorial jurisdiction to prosecute natural persons for foreign bribery but the Working Group has decided to follow up the application of territorial jurisdiction in practice (Phase 1bis paras. 52-64 and 85). Natural persons may be prosecuted for foreign bribery that takes place wholly or partly in Chile, and not only offences that begin in Chile as suggested in Phase 2 (paras. 150-132). The place where an offence begins only determines which court in Chile hears the case (Organic Court Code Art. 157).

105. In practice, the Chilean authorities do not appear to have fully considered the territorial links between several foreign bribery cases and Chile. The alleged bribery in the *Airlines (Argentina) Case* occurred before 2009; Chile thus cannot invoke nationality jurisdiction to prosecute the individual in US who allegedly transferred the bribe. The payments were also transferred between US bank accounts. On this basis, Chile claimed that it did not have jurisdiction over the case. However, as described above, this overlooks the case's substantial ties with Chile. In particular, Airline X's decision to expand into Argentina was most likely made in company headquarters in Chile. Bank documents relating to the transfer of the alleged bribes linked the parent company in Chile. The US-based individual who transferred the bribe payment was also employed by Cargo-X, an Airline X subsidiary incorporated in Chile.

106. Other cases were also provisionally filed or not investigated without a full exploration of territorial links with Chile. The authorities decided not to investigate the *Government Vehicles (Peru) Case* after it was determined that the individuals who allegedly committed foreign bribery were not Chilean nationals. Statements of the alleged bribers in Peru that individuals and the parent company in Chile knew of the crime were not considered or investigated. In the *Travel Company (Cuba) Case*, the alleged bribers had substantial assets and business in Chile. Greater and more proactive efforts could have been made to determine whether the alleged foreign bribery or related offences such as money laundering were committed at least partly in Chile. In the *Airport (Venezuela) Case*, the media reported an allegation that a joint venture involving a Chilean company may have bribed Venezuelan officials to obtain a contract in 2004. The Chilean authorities again indicated that there was an absence of territorial link between the case and Chile, and because the alleged crime occurred before Chile had nationality jurisdiction to prosecute foreign bribery. Just before the adoption of this report, the Chilean authorities stated that this case was being investigated.

107. A final matter relates to a significant gap in the jurisdiction to prosecute legal persons. Law 20 393 established corporate liability for foreign bribery but did not clearly specify when Chile would have jurisdiction to prosecute. At the on-site visit, the Chilean authorities stated that they could prosecute a legal person for foreign bribery only when they also have jurisdiction to prosecute the natural person who committed the crime. Chile thus cannot prosecute a Chilean company when an employee of the company who is not a Chilean national or habitual resident commits foreign bribery wholly outside Chile (i.e. extraterritorially). This is a major loophole. One private sector lawyer contradicted this position, saying that there is jurisdiction to prosecute a legal person irrespective of jurisdiction to prosecute a natural person in the same case. No legal basis was cited for this position, however.

108. After the on-site visit, the Chilean authorities argued that the Organic Court Code Art 6(2) provides nationality jurisdiction to prosecute not only natural but also legal persons. However, this provision refers only to jurisdiction over “a Chilean or a person ordinarily resident in Chile”. Arguably, it only applies to natural persons. This provision was also enacted before Chile enacted Law 20 393 on corporate liability. None of the on-site visit participants raised this provision in the discussions with the evaluation team. The Chilean authorities also referred to Article 5 of Law 20 393, which states that a legal person may be convicted without the conviction of a natural person (though a court must still conclude that a natural person committed the crime). This provision, however, only applies if the conviction of a natural person is not possible due to certain grounds listed in the provision, e.g. death, expiry of statute of limitations. The provision does not apply when there is a lack of jurisdiction to prosecute the natural person. Just before the adoption of this report, Chile informed the Working Group that the draft Bill replacing the current Penal Code would explicitly provide for jurisdiction to prosecute legal persons.

#### *Commentary*

*The lead examiners note certain shortcomings concerning Chile’s jurisdiction to prosecute natural and legal persons for foreign bribery. In some foreign bribery cases, the Chilean authorities do not appear to have fully considered the territorial links between several foreign bribery cases and Chile. The Chilean law also does not clearly provide jurisdiction to prosecute legal persons for extraterritorial foreign bribery committed by a non-Chilean national or resident, contrary to the Convention. They therefore recommend that Chile take steps to ensure that its authorities thoroughly explore territorial links with Chile in foreign bribery cases, including by issuing guidance to law enforcement authorities on the jurisdiction to prosecute foreign bribery. They also recommend that Chile amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for the foreign bribery offence.*

#### *(iii) Lack of Proactivity in Seeking Co-operation from Foreign Authorities*

109. Chile should consider systematically seeking evidence from foreign authorities in foreign bribery cases. As noted above, in the *Airlines (Argentina) Case*, Chile sought evidence from Argentina but made no efforts to seek the substantial amount of evidence in the US. It also did not inform the US of the allegations, which could have allowed the authorities there to commence a parallel investigation under US foreign bribery laws. After the on-site visit, Chile stated that it would take steps to address these concerns. The Chilean authorities decided not to investigate the *Government Vehicles (Peru) Case* once it was determined the nationalities of the alleged bribers were not Chilean. Chile did not request statements from these individuals. As mentioned above, these individuals appear to have evidence incriminating Chilean companies and individuals. Chile reiterates that it did not have *nationality* jurisdiction to prosecute these two cases. Nevertheless, it should have sought evidence in Chile and from abroad to ascertain whether it could exercise *territorial* jurisdiction to prosecute.

110. Even when MLA has been requested, greater efforts could be made to secure the prompt execution of the request. In the *Cement (Bolivia) Case*, Chile requested court documents, witness statements, and other information from Bolivia through an MLA request in November 2010. The request was made under two OAS Conventions and a bilateral agreement with Bolivia.<sup>25</sup> Chile and Bolivia are also parties to the UN Convention against Corruption (UNCAC) which contain provisions on MLA. Bolivia provided Chile with only some of the information in September 2012. Chile then filed the case without pursuing the balance of its request. No efforts were made to pursue the matter in forums such as the UN or OAS. In the *Military Equipment (Korea) case*, Chile requested MLA from Korea in October 2011 and reiterated its request in February 2012. It ultimately discussed the request with Korea in the margins of the March 2013 Working Group meeting in Paris, after which the evidence sought was provided.

### *Commentary*

*The lead examiners understand that the co-operation of foreign authorities is often an obstacle in foreign bribery investigations. Nevertheless, the Working Group has noted that Parties to the Convention need to be more proactive in overcoming this challenge. The lead examiners commend Chile for using the Working Group as a forum for seeking MLA from another Party to the Convention. They suggest that Chile also take advantage of the Working Group's Informal Meetings of Law Enforcement Officials to facilitate international co-operation in foreign bribery cases. They encourage Chile to extend this approach to other fora such as the OAS and UN where appropriate. When difficulties with obtaining MLA arise, Chile should also seek the diplomatic assistance of Chilean embassies where possible.*

#### (iv) *Co-ordination among Chilean Authorities*

111. The *Government Vehicles (Peru) Case* raised concerns about co-ordination. An investigation was not opened after the Chilean prosecutor determined that the bribers had Peruvian nationality. Subsequent MLA requests from Peru to Chile sought the statements of two witnesses. The requests referred to information suggesting that managers and officers of the parent company in Chile may have known of or authorised the foreign bribery that took place in Peru. The requests were received by the international co-operation department of the PPO but the information was not forwarded to the Chilean prosecutor who decided not to open an investigation in Chile. In the end, there was no consideration of whether the investigation in Chile should have been opened based on the information in the MLA request. As the Working Group has noted, incoming MLA requests is an important source of information for starting foreign bribery investigations and should be systematically considered for this purpose.

112. There are additional indications that co-ordination in foreign bribery cases may be unsatisfactory. In the *Travel Company (Cuba) Case*, Chile did not mention in its response to the questionnaire that it had sent an MLA request to Cuba. The MLA request was also not mentioned during the initial discussions at the on-site visit with UNAC, the PPO's Specialised Anti-Corruption Unit, but only in a later session with the PPO's department for international co-operation. Chile also did not report key foreign bribery investigations such as the *Airlines (Argentina)* and *Military Equipment (Korea) Cases* to the Working Group. UNAC mistakenly believed that the Ministry of Foreign Affairs had conveyed the information.

113. The insufficient co-ordination is likely because of the absence of a central body with information on foreign bribery cases in Chile. As described at p. 24, prosecutors in local offices have conduct of foreign bribery investigations. They may – but are not obliged to – seek assistance from UNAC. It would also be helpful if UNAC is informed of all foreign bribery investigations in Chile and maintains a database

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<sup>25</sup> Inter-American Convention on Mutual Assistance in Criminal Matters; Inter-American Convention against Corruption, and an Inter-Agency Co-operation Framework Agreement between the Public Ministry of Bolivia and the Public Ministry of Chile.

of such cases. In addition, the PPO's international co-operation unit should be instructed to inform UNAC of incoming MLA requests that contain information of Chilean individuals or companies committing foreign bribery. UNAC should then consider whether to begin an investigation in Chile.

114. To improve co-ordination, Chile issued Prosecutor Instruction 64/2014 shortly before the adoption of this report. The Instruction requires prosecutors to inform a Specialized Unit of matters under the latter's competence. This development is encouraging. An additional instruction will soon be issued to reassign competence over foreign bribery cases to Regional Prosecutors. Nevertheless, additional efforts to specifically ensure that foreign bribery allegations, especially those contained in incoming MLA requests, are referred to UNAC would be useful.

#### *Commentary*

*The lead examiners recommend that Chile improve its internal co-ordination and intelligence gathering in foreign bribery cases by (a) ensuring that prosecutors and law enforcement authorities systematically inform the UNAC of any foreign bribery allegation which comes to their knowledge, including via incoming MLA requests; and (b) consider establishing a national database of all foreign bribery cases.*

#### *(e) Article 5 of the Convention*

115. As in other Parties to Convention, foreign bribery investigations and prosecutions in Chile must conform to Art. 5 of the Convention. The provision requires foreign bribery investigations and prosecutions to be governed by the rules and principles that apply generally to all cases. Furthermore, foreign bribery cases must not be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved. Commentary 27 on the Convention adds that foreign bribery cases must not be subject to political influence, and that allegations must be seriously investigated by adequately-resourced bodies.

116. Art. 5 is legally binding in Chile (Phase 2 Report para. 89). Art. 83 of Chile's Constitution states that the PPO is an autonomous institution. Chile states that its prosecutors consider "strictly criminal technical criteria" in making their decisions. Chile added in its questionnaire responses that the *Airlines (Argentina)* and *Government Vehicles (Peru) Cases* concerned major companies and neighbouring countries, and therefore showed the absence of influence by Art. 5 factors. The Chilean authorities state that Art. 5 factors played no role in the decision to file or not investigate these cases.

117. Raising awareness of Art. 5 is also important but Chile should do more. Prosecutors and investigators must be aware of Art. 5 to ensure that their decisions are not influenced by the three factors described in the Article. This is particularly important since Chilean prosecutors have discretion to negotiate and plea bargain (see p. 26). Furthermore, foreign bribery cases frequently implicate major companies, neighbouring countries and senior foreign public officials. A visible, unambiguous policy statement on Art. 5 would go some way to answering the enhanced scrutiny that typically accompanies cases of this nature. Unfortunately, Prosecutor Instruction 39/2013 (on corruption offences) and its predecessors do not remind prosecutors of Art. 5. There have also not been efforts to raise awareness of relevant government officials. Just before the adoption of this report, Chile stated that a new prosecutor instruction referring specifically to Art. 5 would soon be issued.

118. Chile should also raise awareness of Art. 5 among Chilean judges. Under Art. 25 of Law 20 393 (corporate liability), a judge may suspend a sentence for solicited foreign bribery against a company that is state-owned or which provides a “public utility service” the interruption of which might cause grave social and economic consequences or serious damage to the community. Sentences against other companies may also be suspended, having regard to the company’s staff size, net annual sales and exports. A suspension lasts six months, after which the case is dismissed if there are no new charges or formal investigations. On its face, a judge could conceivably consider factors such as Chile’s national economic interest or the identity of the legal person in considering a suspension. Prosecutor Instruction 440/2010 (corporate liability) discusses suspensions under Law 20 393 Art. 25 without mentioning Art. 5 of the Convention.

### *Commentary*

***The lead examiners recommend that Chile raise awareness of Art. 5 of the Convention among Chilean judges, prosecutors, investigators and relevant government officials, including by adding references to factors enumerated in Art. 5 to the relevant prosecutor instructions.***

### **(f) Bank Secrecy**

119. The ability to obtain bank information in foreign bribery investigations was a substantial issue in Phase 2 and remains so in Phase 3. Chile has not implemented Phase 2 Recommendation 3(b) to align the rules on bank secrecy that apply to foreign bribery investigations with those applicable in cases of domestic bribery and money laundering. To the contrary, the difference in the rules has widened.

120. For the purpose of access, bank information is divided into two categories. “Bank secrecy” covers a broad range of operations (e.g. deposits and transfers), accounts (current and savings accounts; time deposits, etc.), and information (movements and balances). Any other bank information not covered by bank secrecy is subject to “banking restraints” (referred to as “bank confidentiality” in the Phase 2 Report) (General Banking Law (GBL) Art. 154).

121. Access to information subject to bank secrecy (the first category) by prosecutors is generally limited. A Guarantee Judge may lift bank secrecy without notifying a suspect or formalising an investigation (CPC Art. 236). Apart from narrow exceptions that apply to investigations of certain offences (discussed below), bank secrecy is lifted only if (i) a *formal investigation* has been opened, (ii) the request relates to “*specific transactions*” performed by the accused, and (iii) the operation has a “*direct relationship*” with the investigation (GBL Art. 154). A second law (Bank Current Accounts and Cheques Law (BCACL) Art. 1) authorises disclosure of only “*determined financial items*” of a current account. The phrase “*determined financial items*” is meant to be interpreted broadly.<sup>26</sup>

122. Practitioners have consistently expressed concerns about this regime. In Phase 2, prosecutors, police officers and tax inspectors identified bank secrecy as one of the main problems in bribery and economic crime investigations. The requirements for lifting bank secrecy can be onerous. Guarantee Judges required large amounts of supporting evidence and time before granting access. Banks took a long time to provide the information (Phase 2 Report paras. 60, 109 and 115-117). In November 2008, the National Prosecutor stated that the difficulties identified in Phase 2 persisted. He called for a new legal framework that was adapted to the modern economic criminality and international standards (Phase 1bis Report para. 73). In Phase 3, some prosecutors and one judge did not identify bank secrecy as a major concern. Yet, others referred to continuing difficulties in obtaining court orders to pierce bank secrecy, particularly with requests that are broader in scope. One prosecutor cited substantial delays in getting

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<sup>26</sup> Updated Compilation of Rules, Commission of Banks and Financial Institutions, para. 9, Title II, Ch. 2-2.

banks to comply with disclosure orders. Some practitioners stated that the degree of specificity in the information required for lifting secrecy varied substantially among different judges.

123. Recognising these difficulties, Chile has eased access to bank information for investigations of domestic corruption but not foreign bribery. A special provision allows a Guarantee Judge to order disclosure of the full movements and balances of accounts in investigations of crimes *committed by Chilean officials* (BCACL Art. 1 last para.) Disclosure is not restricted to “determined financial items”. There is also no requirement of “specific transactions” or “direct relationship” (Phase 2 Report para. 113). UNAC indicated that it would attempt to apply BCACL Art. 1 to foreign bribery investigations. Given the clear language that the provision applies to crimes committed by Chile officials, it is highly questionable whether the courts would accept this argument.

124. Bank secrecy protection has also been lessened for investigations of tax offences and money laundering. Since Phase 2, the requirements in GBL and BCACL have been dispensed with in prosecutions of offences concerning the fulfilment of tax obligations (Tax Code Art. 62). The UAF (Chile’s financial intelligence unit) has similar powers to obtain a court order to completely lift bank secrecy when money laundering is suspected (Phase 2 Report para. 113). A Bill before the legislature (Bulletin 4426-07) if adopted would further weaken bank secrecy in money laundering investigations by eliminating the requirements in GBL and BCACL (Phase 2 Report para. 118). On-site visit participants and Chile’s questionnaire responses described successful attempts to lift bank secrecy but only in tax and money laundering inquiries.<sup>27</sup> These comments highlight the effectiveness of the measures to reduce bank secrecy in the investigation of these offences. They also underscore the importance of extending these measures to foreign bribery cases.

125. Chile has instead attempted to weaken bank secrecy in foreign bribery cases through Prosecutor Instruction 39/2013 but this is unlikely to be effective. Section II.4 of the Instruction asks prosecutors “to base the requests for the lifting of banking secrecy on the rules and regulations of the international conventions against corruption”. However, the rules on bank secrecy are founded in statute and cannot be overridden by a prosecutor instruction. Prosecutor instructions also do not apply to Guarantee Judges. In any event, the attempt to address bank secrecy through the Instruction is arguably recognition by the Chilean authorities of the difficulties in the existing regime.

126. Two final matters relate to information subject to bank confidentiality/restraint and delays from financial institutions. First, obtaining information subject to bank confidentiality/restraint (the second category of bank information) can also be problematic. Such information may be obtained without prior judicial authorisation if: (1) the person seeking the information has a “legitimate interest”, and (2) the request does not “cause monetary damage to the client” (GBL Art. 154). The bank is the sole decider of whether the test is met, according to the Chilean authorities. Fearing potential liability, banks tended to decline such requests in the absence of judicial authorisation (Phase 2 Report para. 116). The Bill before the legislature (Bulletin 4426-07) remedies this situation by expressly protecting banks from such liability. Unfortunately, the Bill applies to money laundering but not foreign bribery cases.

127. Second, financial institutions are sometimes slow in responding to judicial orders to produce bank information. The Phase 2 Report (para. 115) made this observation. Phase 2 Recommendation 3(b) thus asked Chile to ensure that financial institutions provide the required financial information promptly. In Phase 3, Chile’s questionnaire responses stated that Guarantee Judges generally order banks to provide information within ten days. In practice, banks take approximately one month to respond fully. “Unsystemized information” and difficulty in retrieving original documents were cited as reasons for the

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<sup>27</sup> See also the [2010 GAFISUD Report on Chile](#), p. 51.

delay. A prosecutor at the on-site visit said banks took 60-120 days to produce the requested information. Another prosecutor specialising in money laundering cases also recalled delays with some banks.

### *Commentary*

*The lead examiners remain concerned that bank secrecy rules may impede foreign bribery investigations in Chile. Chile has not aligned these rules for foreign bribery investigations with those applicable in cases of domestic bribery and money laundering. To the contrary, the gap has widened as tax investigations are now also eligible for enhanced access to secret bank information. Current legislative efforts would further lessen bank secrecy protection in money laundering investigations. Chile has not explained why it has not given the same treatment to the foreign bribery offence. Chile also has not taken steps to ensure that financial institutions provide the requested information without undue delay.*

*For these reasons, the lead examiners reiterate Phase 2 Recommendation 3(b) and strongly recommend that Chile align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in cases of domestic bribery, tax offences, and money laundering. They also recommend that Chile take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases.*

### **(g) Investigative Techniques**

128. As with bank secrecy, a recurring issue is that some investigative techniques are available for investigating money laundering and other crimes but not foreign bribery. Phase 2 Recommendation 3(d) asked Chile to consider aligning the available investigative tools.

129. Several investigative tools are either unavailable in foreign bribery cases or their availability is unclear. The Phase 2 Report (paras 102-104) noted that “special enhanced investigative techniques (e.g. undercover agents, informants, watched deliveries)” are not available. Whether other techniques like wiretapping and surreptitious video recording are available is unclear. A judge may order wiretapping if the act under investigation qualifies as a “crime” and the wiretap is essential to the investigation (CPC Arts. 222 and 226). Foreign bribery does not qualify because it is a “misdemeanour” and not a “crime”. In Phase 2, Chilean officials argued that wiretaps are available in foreign bribery cases because the “main sanction” of this offence is “disqualification from public office”. The Working Group doubted this position since the defendant in almost all foreign bribery cases will be private companies and individuals. “Disqualification from public office” is therefore unlikely to be the “main sanction”. In its Written Follow-Up Report (p. 25), Chile stated that there was no need to change the investigative powers and techniques available in foreign bribery cases.

130. By contrast, all of the above-mentioned investigative tools are available in money laundering investigations. Articles 33 and 33bis of Law 19 913 expressly provide for covert investigative techniques in these cases. When asked about the availability of these investigative techniques, Chile’s questionnaire responses referred only to provisions that applied to money laundering and drug trafficking cases.

### *Commentary*

*The Working Group is concerned that foreign bribery in Chile is only a misdemeanour and not a crime, and that consequently some special investigative techniques are not available in foreign bribery investigations. A 2013 MESICIC Report (paras. 57 and 74) recommended that Chile rectify this situation. The lead examiners therefore reiterate Phase 2 Recommendation 3(d) and recommend that Chile align the investigative tools available in*

*investigations of foreign bribery and money laundering, so that special and covert investigative techniques are available in foreign bribery investigations.*

**(h) Resources and Expertise**

131. Chile reported that it has provided general training on foreign bribery to law enforcement officials. The PDI trained 300 officers on foreign bribery-related issues. Representatives of the *Carabineros* also participated in the training. Chile added that all 92 special prosecutors and the 9 UNAC staff have been trained in this area.

132. A more pressing issue is the lack of expertise on forensic accounting and information technology. As described earlier, foreign bribery investigations are conducted by local prosecutors with support from UNAC in complex cases. UNAC has only two analysts with forensic accounting expertise which is insufficient. The PDI and *Carabineros* have experts on accounting and cybercrime. At the on-site visit, UNAC stated that its resources in this respect were not sufficient. That said, none of Chile's foreign bribery investigations had progressed to the stage where such expertise was necessary.

133. Of even greater concern is the lack of expertise in corporate investigations. Whether a legal person has implemented an offence prevention model is crucial to its liability for foreign bribery (see p. 16). Chilean prosecutors and judges have not, however, received training or guidance on how to assess such models. Prosecutor Instructions do not address this issue. The article in a journal published by the PPO discusses the minimum requirements of the offence prevention model defence. It did not cover models that specifically prevent foreign bribery. There is also no indication that budgetary resources have been set aside to retain external experts in this area when the need arises. As mentioned earlier, UNAC is preparing internal guidelines for prosecutors on corporate liability.

**Commentary**

*The lead examiners recommend that Chile take urgent steps to ensure that expertise in corporate investigations, evaluation of offence prevention models, forensic accounting and information technology is available in foreign bribery investigations. As mentioned at p. 18, Chile should provide guidance on the elements of an effective model for preventing foreign bribery. Judges, prosecutors and police should then be trained on the guidance.*

**6. Money Laundering**

**(a) Money Laundering Offence and Enforcement**

134. The Phase 2 Report (paras. 191-201) did not identify major deficiencies with Chile's money laundering offence in Law 19 913 Art. 27. Listed predicate offences include domestic and foreign bribery. Reduced sanctions apply to reckless or negligent money laundering. Offences committed outside Chile qualify as a predicate if the underlying conduct is a crime at the place where the act occurred (dual criminality). The offence covers the hiding or dissimulating of proceeds of crime and the illicit origin of proceeds. It also covers the acquisition, possession, and use of proceeds. The laundering of an instrument for committing an offence is not covered. A conviction for the predicate offence is not required. Natural persons are punishable by imprisonment of 5 years plus a day to 15 years, and a fine of 200 to 1 000 UTM (CLP 8.2-41 million or USD 14 825-74 125). These sanctions are much higher than those for foreign bribery.

135. Since Phase 2, Law 20 393 has been enacted to hold legal persons liable for money laundering. The maximum penalty for legal persons is the same as that for aggravated foreign bribery, i.e. 20 000 UTM (CLP 824 million or USD 1.5 million); dissolution of the legal person or cancellation of its status (not applicable to public entities or public service providers); permanent or temporary debarment from acts and contracts with State organs (discussed further at p. 51); partial or total loss of fiscal benefits (e.g. tax breaks), or an absolute prohibition from receiving such benefits for a specified period. Accessory penalties, such as publication of an extract of the judgment as well as the confiscation of the instrument and proceeds of crime are also available.

136. Data provided by Chile show strikingly few money laundering convictions, and even fewer convictions predicated on corruption offences. In the absence of foreign bribery cases, money laundering predicated on domestic corruption is a useful guide. Only 57 money laundering convictions have been recorded to date. Six were predicated on corruption-related offences, including two on domestic bribery. Four investigations of money laundering predicated on domestic bribery are on-going. These enforcement levels seem very low compared to the number of domestic bribery investigations (1 369 cases of passive bribery and 233 cases of active) and convictions (543 for passive bribery and 99 for active) in 2008-2012. GAFISUD noted similarly low figures on enforcement relating to all eligible predicate offences.<sup>28</sup>

137. The lack of convictions is because a sentence for bribery is usually served at large while money laundering convictions generally leads to incarceration, according to the Chilean authorities. Judges have “a certain tendency” to convict an accused only for bribery because it carries a lighter sentence. Chile concedes, however, that there is no legal basis to prevent the simultaneous conviction of both offences. A pending amendment to Law 19 913 would ensure that sanctions applied to money laundering would not be greater than those for the predicate offence. Whether this would increase simultaneous convictions for the predicate offence and money laundering remains to be seen. As the Working Group has noted, barring simultaneous convictions of money laundering and foreign bribery does not seem justified by fundamental principles of law. This approach also weakens the effective application of foreign bribery legislation.

#### *Commentary*

*The lead examiners are concerned that there are few money laundering convictions in Chile, especially in cases where the predicate offence is foreign bribery-related. They therefore recommend that Chile take appropriate measures to enforce the money laundering offence more effectively in connection with foreign bribery cases. In particular, Chile should ensure that its law provides that an individual is simultaneously convicted of money laundering and foreign bribery where appropriate.*

#### **(b) Prevention, Detection and Reporting**

138. Chile has not implemented Phase 2 Recommendation 2(c) to require appropriate non-financial entities to report suspected money laundering transactions. Law 19 913 requires a wide range of financial institutions and other entities to file suspicious transaction reports (STRs) to the Financial Analysis Unit (UAF). Accountants and lawyers are exempted due to confidentiality obligations that apply to these professions. Similar confidentiality standards in other countries have not prevented such reporting requirements.

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[2010 GAFISUD Report on Chile](#), p. 37.

139. Moreover, no foreign bribery case has been detected through STRs and only a limited number of STRs concern corruption. According to data provided by Chile, in 2009-2012 the UAF received 20 STRs that could be related to corruption of which 8 were referred to the PPO for investigation and 12 were kept in the UAF database. These figures over a four-year period are low. Chile should further encourage entities to make STRs.

140. UAF Circular 49/2012 prescribes measures to prevent money laundering by politically exposed persons (PEPs). Foreign PEPs are explicitly defined.<sup>29</sup> Regulated entities are required to determine whether a potential customer or final beneficiary is a PEP; obtain senior management approval for establishing business relationships; establish the source of a PEP's wealth; and conduct on-going due diligence during the business relationship. The Circular compiles all relevant UAF regulations and was issued together with the Commission of Banks and Financial Institutions, Commission of Securities, and Pension Commission. UAF stated that it has raised awareness PEP-related money laundering issues. Its website includes the definition of PEPs, training courses on PEP identification, a reporting template, and best practices for addressing PEPs.

141. The two money laundering typologies available from UAF do not specifically address foreign bribery or foreign PEPs. The 2010 typologies did not include corruption cases. The 2012 typologies had one case of domestic corruption and a second case involving corruption by an official of a Chilean SOE. UAF explained that their typologies are based on actual court cases in Chile which so far have not involved foreign bribery. UAF could, however, draw on foreign and international sources to develop typologies related to foreign bribery, as this would assist their detection of this crime. After the on-site visit, the Chilean authorities committed to developing money laundering typologies predicated on foreign bribery.

### *Commentary*

*The lead examiners are concerned that Chile continues to depart from established international standards by not requiring appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions, especially those related to foreign bribery. Chile has not demonstrated sufficient political will to remedy this deficiency. The lead examiners therefore reiterate Phase 2 Recommendation 2(c) and urge Chile remedy this deficiency. They also recommend that Chile develop typologies on money laundering related to foreign bribery and further encourage reporting entities to make STRs.*

## **7. Accounting Requirements, External Audit, Corporate Compliance and Ethics Programmes**

### **(a) Accounting Standards and the False Accounting Offence**

142. Chile has implemented Phase 2 Recommendation 7 concerning accounting standards. Chile's Generally Accepted Accounting Principles (PCGA) incorporated the International Financial Reporting Standards (IFRS) in 2009. SVS-registered companies and unregistered companies completed the implementation of IFRS in 2012 and 2013 respectively. Chile has also adopted a simplified IFRS Chile for SMEs, which entered into force in January 2013. As in Phase 2, legislation provides additional requirements of a general nature. All companies must prepare annual financial accounts in accordance with PCGA (Company Law Art. 73). A natural or legal trading person must keep a general journal, a ledger, a balance book and a copybook for accounting purposes. The general journal must set forth on a daily basis

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<sup>29</sup> Foreign heads of state or government, senior politicians (including members of political parties), public officials, judicial or military officials of senior hierarchy, senior executives of state enterprises, and their spouses, their relatives within the second degree of consanguinity, and individuals with whom he/she has entered into a joint action agreement with sufficient voting power to influence companies in Chile.

and in chronological order the business transactions undertaken by the person, and describe in detail the nature and circumstances of the transaction (Commercial Code Arts. 25 and 27).

143. Less satisfactory is Chile's implementation of the false accounting offence. False accounting offences must cover the full range of conduct described in Art. 8 of the Convention. In Phases 2 and 3, Chile referred to five provisions that apply to false accounting. Each provision has its own limitations:

- (a) The falsifying private instruments offence in PC Art. 197 was described as the “principal PC provision applicable to false accounting” in Phase 2 (para. 215). However, prosecutors said that this offence is difficult to prove because it requires proof of damage to a third party. In Phase 3, the Chilean authorities did not refer to this provision. The offence is punishable by incarceration (*presidio*) of up to 5 years. An additional fine of 11-15 UTM (i.e. up to USD 1 100) may be imposed where appropriate.
- (b) Company Law Art. 133 creates an offence for violations of Company Law Art. 73 which requires companies to prepare annual financial accounts in accordance with PCGA. However, this provision is insufficient to implement Art. 8 of the Convention because the books and records requirements of Art. 73 are very general. Moreover, damage to a third party is required (Phase 2 Report para. 217). Liability is up to the amount of the damage. In Phase 2, the Working Group decided that it would follow up the application of this provision (Follow-up Issue 9(e)). In Phase 3, Chile has not provided information in this regard.
- (c) Law 18 045 (Securities Market Law) Art. 59(a) prohibits the maliciously giving of false data or certifying of false facts to a stock exchange, the public or SVS (the securities market regulator). The offence does not apply to internal books and records of a company that are not provided externally. The crime is punishable by 541 days to 10 years jail.
- (d) Law 1 102 (Banking Act) Art. 157 creates an offence for directors and managers of a financial institution to falsify certain financial statements. The offence does not apply to books and records of non-financial institutions. The offence is punishable by imprisonment of 541 days to 5 years and a fine of 1 000 to 10 000 UTM (up to USD 741 258).
- (e) Law 830 (Tax Code) Art. 97(4) prohibits the falsification of documents to reduce taxes. Art. 8 of the Convention, however, is not limited to false accounting that has tax consequences (Phase 2 Report para. 218). The offence is punishable by a fine of 50-100% of the tax evaded and confinement (*presidio*) of up to five years.

144. Two further issues concern corporate liability and enforcement. Chile cannot impose liability against legal persons for false accounting, as it is not an offence covered under Law 20 393. Actual enforcement of false accounting offences was weak in Phase 2. Recommendation 7 thus asked Chile to “enforce accounting and auditing offences more effectively in bribery cases and develop relevant case law and standards”. In Phase 3, the Chilean authorities indicated that they considered but declined to open an investigation into false accounting in the *Travel Company (Cuba) Case*. No other information or statistics on actual enforcement of the false accounting offence was provided.

#### *Commentary*

***The lead examiners recommend that Chile 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. Chile should also vigorously pursue false accounting cases and take all steps to ensure such***

*cases are investigated and prosecuted where appropriate. Enforcement statistics should be maintained.*

**(b) Detection and Reporting of Foreign Bribery by External Auditors**

145. The classification of companies (*sociedades anónimas*) and their consequent financial reporting and auditing requirements have changed since Phase 2. Under Art. 2 of the Law 18 046 (Company Law), companies may be listed (*abiertas*), special (*especiales*) or closely held (*cerradas*). Listed companies are registered in the securities registry. Special companies are specified types of financial institutions, such as insurance companies. These two types of companies are externally audited by “external audit firms” (*empresa de auditoría externa*) (Company Law Arts. 52 and 129). All other companies are considered closed companies, whose accounts are examined annually by “account inspectors” (*inspectores de cuentas*) or independent “external auditors” (*auditores externos independientes*) (Company Law Art. 51).

146. Chilean external auditors and external audit firms should take greater account of the risks of foreign bribery in the companies that they audit. External auditors and audit companies apply Generally Accepted Auditing Standards (GAAS) which have incorporated International Standards on Auditing (ISAs) since 2012. Chilean auditing standard AU 240 (which is based on ISA 240) requires external auditors and external audit firms to detect material misstatements in a company’s financial statements caused by fraud. At the on-site visit, representatives of the auditing profession would not acknowledge that foreign bribery is often committed through fraud, or that attempts to detect foreign bribery could also lead to detection of fraud. In addition, AU 250 (which is based on ISA 250) requires external auditors and external audit firms to detect non-compliance with laws that could lead to material misstatements in a company’s financial statements. However, participants at the on-site visit considered that breaches of foreign bribery laws are not relevant to AU 250. In sum, few external auditors and external audit firms routinely look for red flag indicators of foreign bribery when conducting audits. One auditor at the on-site visit did so only when auditing clients that are subject to US FCPA jurisdiction.

147. The Chilean authorities could do more to enhance the external audit profession’s role in fighting foreign bribery. SVS Circulars 638/2010 and 496/2009) request – but do not require – audit firms to provide training; implement (unspecified) best practices or international standards; and establish reporting procedures. The Circulars do not describe any consequences for failing to implement such measures. Audit firms must inform SVS of measures taken but SVS does not assess their adequacy.

148. External auditors and external audit firms are required to inform the audited company of certain irregularities detected during an audit. Chilean auditing standards require auditors to report material misstatements due to fraud on a timely basis to “the appropriate level of management” or, in some circumstances, to persons charged with the company’s governance (AU 240(39)-(41)). Material misstatements due to non-compliance with law that are “not inconsequential” should also be reported to those responsible for governance. Non-compliance of an intentional nature should be reported “as soon as practicable” (AU 250(21)-(23)). SVS Rule 341/2012 further asks regulated companies to meet their audit firms twice per year to discuss any irregularities or explain why such meetings have not taken place. SVS Rule 275/2010 requires external audit firms to establish rules and policies on reporting irregularities.

149. Unfortunately, SVS considers that external audit firms that audit listed and special companies are no longer required to report foreign bribery to competent authorities. In Phase 2 (para. 66), Company Regulations Art. 59 required external auditors and account inspectors to inform judicial and administrative authorities of crimes and irregularities discovered during an audit. A similar provision is now in Art. 100 of the Company Regulations 2011 (HDA No. 702). However, as of 2009 listed and special companies are externally audited by external audit firms, not external auditors and account inspectors. The reporting obligation in Art. 100 continues to apply to external auditors and account inspectors but not external audit firms. The SVS could not explain the rationale for excluding external audit firms from the reporting

obligation.<sup>30</sup> It could not cite any evidence or study showing that the reporting obligation reduced the quality of audits, for instance. In 2007-2012, external auditors (but presumably not external audit firms) reported 116 crimes to the authorities. One auditor at the on-site visit was concerned that reporting would lead to disciplinary or legal action for breach of confidentiality.

150. Chile also has not fully implemented Phase 2 Recommendation 7 on improving audit quality standards with regard to certification and independence. Under SVS Rule 275/2010, an auditor in an external audit firm must have a degree in accounting and auditing or in business administration; and five years' experience auditing financial statements. These requirements are similar to those in Phase 2 (paras. 210-211).<sup>31</sup> SVS does not review the qualifications of auditors; it only requires an annual information form be submitted. Initiatives to rectify this deficiency described in Phase 2 (para. 211) did not bear fruit. Furthermore, external auditors and account inspectors of closed corporations continue to be allowed to own up to 3% of the capital of companies that they audit (Company Regulations 2011 Art. 97), a rule which falls below international best practices. Since 2009, external audit firms have been subject to different rules regarding independence (Law 18 045 Title XXVIII).

### *Commentary*

*The lead examiners are extremely concerned that Chile has reduced the scope of the duty on the external auditing profession to report crimes to competent authorities. Since 2009, listed and special corporations have been audited by “external audit firms”; all other firms are audited by “external auditors” and “account inspectors”. Only “external auditors” and “account inspectors” are required to report crimes such as foreign bribery to competent authorities. This is different from Phase 2, when auditors and audit firms of all companies were required to report. Chile could not explain the rationale for this change of position. This development runs counter to the 2009 Anti-Bribery Recommendation which encourages such a reporting obligation. Furthermore, “external auditors” and “account inspectors” have reported crimes to the authorities in practice, which amply demonstrates the importance and usefulness of such a reporting obligation. The lead examiners therefore recommend that Chile consider aligning the reporting obligations that apply to the external audit profession by requiring “external audit firms” to report crimes to competent authorities. Chile should also ensure that auditors who report suspected wrongdoing reasonably and in good faith to competent authorities are protected from legal action.*

*The lead examiners further recommend that the Chilean authorities take steps to encourage external auditors to take greater account of the risks of foreign bribery in the companies that they audit. They also reiterate Phase 2 Recommendation 7 and recommend that Chile improve audit quality standards, including with regard to certification and independence.*

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<sup>30</sup> The SVS referred to additional provisions but these do not impose a reporting obligation on external audit firms. External audit firms must promulgate internal regulations on reporting but these regulations need not mandate reporting to external authorities (SVS Rule 275/2010). External audit firms must include reports to the authorities in the audit documentation but only if the firm has made such a report (AU 240(63)). They must analyse their obligation to report breaches of law but are not required to report *per se* (AU 250).

<sup>31</sup> SVS adds that External Audit Firms must submit copies of the certificates of entitlement of partners to direct, conduct and sign audit reports. Managing partners that lead and sign audit reports of insurance and reinsurance companies must have five years of experience in auditing such entities. Account inspectors and external auditors must fill out an annual form (SVS Circular 2012/2013).

(c) *Corporate Compliance, Internal Controls and Ethics Programmes*

151. Many Chilean companies have some corporate compliance measures to deal with foreign bribery. This is largely due to the recent enactment of Law 20 393 which created corporate liability and the offence prevention model defence. When asked about their foreign bribery-related compliance measures, most companies at the on-site visit referred to their certified (or soon-to-be certified) offence prevention models. Corporate information available on the Internet also shows that many companies have prevention models. When asked about efforts to promote corporate compliance, the Chilean authorities likewise pointed to the enactment of Law 20 393 and the offence prevention model defence. Additional measures, such as SVS Rule 638/2010, are more relevant to corporate governance than fighting foreign bribery.

152. The drawback to relying on Law 20 393 is that companies have adopted compliance measures which do not necessarily meet best practices and international standards. As described at p. 16, there is minimal guidance under Law 20 393 on models for preventing foreign bribery, or the standard and methodology for certifying such models. Companies have thus adopted models of differing qualities. Some appear to be elaborate. Others, including those of some enterprises of substantial size and with international operations, appear to be less so and do not expressly refer to foreign bribery. Many also barely go beyond the statutory minimum requirements. For instance, all models provide for channels to report infractions as required by Law 20 393. Few go further to protect whistleblowers (see p. 50). Some do not contain specific anti-bribery measures, like policies on gifts and donations. Many SMEs also do not have sufficient compliance measures, according to civil society representatives.

*Commentary*

*The lead examiners reiterate their recommendation at p. 18 that Chile provide guidance on the elements of an effective model for preventing foreign bribery. Chile should then encourage Chilean companies, especially SMEs, to adopt models that conform to the guidance.*

**8. Tax Measures for Combating Bribery**

(a) *Non-Deductibility of Bribes and Enforcement*

153. There are some questions over whether Chile continues to deny the deduction of bribes to foreign public officials through an express, binding legal provision. In 2007, Chile's Internal Revenue Service (*Servicio de Impuestos Internos*, SII) adopted Circular 56 to make explicit that bribes are not tax-deductible. The Circular is legally binding and available on SII's website (along with the Convention). However, the Circular was not updated when the current foreign bribery offence in PC Art. 251bis and Law 20 393 (corporate liability) were enacted in 2009. It therefore continues to refer to the repealed offence in PC Arts. 250bis and 250bis A and B. The Circular's legal effect is therefore questionable given its reference to a non-existent provision. SII has stated that this is not an obstacle to implementation, since the Circular merely codified the law as understood. Nevertheless, SII has indicated that it would issue a new Circular to correct this error.

154. A further question is the enforcement of the non-deductibility of bribes, especially when bribery has been proven. SII may re-examine a tax return within six years of the date of filing. In the *Fragatas Case*, two Chilean military officials were bribed to facilitate a purchase of four frigates by the Chilean Navy. SII re-examined a tax return after being informed by the PPO that the taxpayer had been convicted of the bribery. This audit revealed that the bribes had been hidden as an expense. SII then retroactively disallowed the deduction. In the *Salmones Colbún Case*, however, SII was not informed of the bribery convictions and hence a post-conviction tax audit was not performed. As the Working Group has noted, tax authorities should be informed of foreign bribery convictions so that such audits can be systematically

performed. SII has indicated that it would contact the courts in order to be informed of foreign bribery convictions.

#### *Commentary*

*The lead examiners recommend that Chile update Circular 56/2007 to refer to PC Art. 251bis and Law 20 393. Chile should also take steps to ensure that SII is routinely informed of foreign bribery convictions. SII should then systematically re-examine the relevant tax returns of convicted taxpayers to determine whether bribes have been deducted.*

#### **(b) Detection and Access to Bank Information**

155. SII can strengthen its efforts to detect domestic or foreign bribery through tax audits. SII did not provide information on actual cases of detection. To enhance detection, the 2009 OECD Bribery Awareness Handbook for Tax Examiners is used to train new and current SII officials. The Handbook is also on SII's intranet site. The latest version from 2013 has yet to be circulated, although SII has committed to incorporating it into training plans for tax inspectors. A better practice would be to also incorporate the Handbook into the Standard Plan for Tax Audits, the SII reference manual for tax examinations. Tax examiners would then systematically include bribery in their risk assessments and audits. Detection might also be improved by reviewing existing practice and frameworks. In the *Fragatas Case* mentioned above, bribes hidden and deducted from taxes were detected only after the taxpayer had been convicted. It would be useful to analyse why SII failed to detect the bribes when the tax return was first filed.<sup>32</sup> A system-wide review of the detection framework could also be helpful. SII has indicated that it would carry out such a review.

156. As mentioned at p. 35, SII has been given greater access to information subject to bank secrecy and banking restraints. Under Art. 62 of the Tax Code, the SII does not have to meet the requirements for obtaining judicial authorisation to lift bank secrecy prescribed in the General Banking Law and Bank Current Accounts and Cheques Law. In addition, the SII Director may demand that a bank account holder authorise the release of bank information. If authorisation is withheld, the matter is resolved by the courts.

#### *Commentary*

*The lead examiners recommend that SII incorporate the essential elements of the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors into its Standard Plan for Tax Audits, and also examine why it failed to detect proven cases of bribery. Chile should also review the effectiveness of its frameworks and practices for detecting bribes, as suggested in the 2009 Tax Recommendation.*

#### **(c) Reporting and Sharing Tax Information**

157. Chilean public officials, including tax officials, are required to report offences (including foreign bribery) to law enforcement authorities. Reports are transmitted from the official to the head of his/her unit, the SII legal department, and finally the PPO. This reporting procedure has not been reflected in a written policy, which could make implementation and training difficult. SII has indicated that it would prepare a manual to regulate the reporting procedure. Foreign bribery cases have not been reported in practice. The SII must also provide information to courts and prosecutors upon demand unless the information sought is subject to legislative provisions on secrecy. If a prosecutor challenges a claim of secrecy, the matter will be decided by the courts (CPC Arts. 19 and 180).

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<sup>32</sup> The 2010 MESICIC Report (paras. 24-25 and 30) also recommended that Chile strengthen its efforts on detection.

158. In relation to sharing tax information with foreign authorities, Chile signed the multilateral Convention on Mutual Administrative Assistance in Tax Matters on 24 October 2013. Art. 22.4 of the Convention allows the sharing of information received for tax purposes with law enforcement authorities to combat corruption and other financial crimes under certain conditions. Chile has signed 29 Double Taxation Agreements (DTAs) and 1 Tax Information Exchange Agreement (TIEA). However, these bilateral treaties were negotiated before Chile became party to the Convention on Mutual Administrative Assistance. As such, none of these treaties contains the language in paragraph 2 of Art. 26 of the OECD Model Tax Convention (as amended in 2012). As with Art. 22.4 of the multilateral Convention, this provision allows information received to be used for non-tax purposes when (i) the information may be used for such other purposes under the laws of the country supplying the information, and (ii) the country supplying the information authorises such use. Information received can therefore be used in a non-tax criminal investigation involving foreign bribery. Chile has committed to including this language in future treaties.

### *Commentary*

*The lead examiners congratulate Chile on signing the multilateral Convention on Mutual Assistance in Tax Matters. They recommend that Chile promptly ratify the Convention. They also recommend that Chile consider systematically including the language of Art. 26 of the OECD Model Tax Convention in all future bilateral tax treaties with countries that are not parties to the multilateral Convention. SII should provide guidance on the reporting of foreign bribery to law enforcement, as suggested in the 2009 Tax Recommendation.*

## **9. International Co-operation**

159. This section discusses general issues concerning mutual legal assistance (MLA) and extradition in foreign bribery cases. Issues concerning specific enforcement actions are discussed at p. 31.

### *(a) Mutual Legal Assistance*

160. In Phase 2, the Working Group decided to follow up the functioning of Chile's MLA system, particularly regarding seizure and confiscation (Follow-up Issue 9(a)). The report further noted that bank secrecy was a significant issue.

161. Since Phase 2, Chile has become party to a bilateral MLA treaty with Italy; the Convention for Mutual Legal Assistance Concerning Criminal Matters with Mercosur, Bolivia and Chile; and the European Convention on Mutual Assistance in Criminal Matters and its two Additional Protocols. In the absence of a treaty, Chile can seek and provide MLA based on reciprocity and the principles of international law (Phase 2 Report para. 121). Dual criminality is not required. Chile is a member of *Red iberoamericana de cooperación jurídica internacional* (IBERRED), a network for international judicial co-operation consisting of 22 Ibero-American countries.

162. Chile does not have extensive domestic legislation to seek and provide MLA requests. CPC Art. 20bis merely states that a Chilean prosecutor executing an MLA request from a foreign authority "shall seek the intervention of a guarantee judge as necessary in the same manner as in domestic investigations". The CPC provisions on domestic investigations thus apply to the execution of MLA requests, with such modifications as necessary (Phase 1bis Report para. 71). MLA requests from foreign countries would be forwarded to the PPO for execution. For matters requiring judicial intervention (e.g. intrusive measures), a prosecutor would seek the authorisation of a Guarantee Judge. A PPO unit deals specifically with MLA requests (CPC Art. 20bis; Phase 2 Report paras. 119-120).

163. The Working Group concluded in previous evaluations that bank secrecy is of substantial concern. The same rules and procedure for lifting bank secrecy apply equally to domestic investigations and MLA requests. The Phase 2 Report (paras. 123-126) found that Chile's "bank-secrecy barriers to MLA in foreign bribery cases [were] non-compliant with the Convention". Recommendation 3(c) asked Chile to ensure that it would not deny MLA in foreign bribery cases on grounds of bank secrecy. The Phase 1bis Report (para. 87) identified this issue for continued follow up.

164. These concerns persist in Phase 3. The rules for lifting bank secrecy in foreign bribery cases have not changed and remain of concern (see p. 34). Chile's questionnaire responses refer to four MLA requests received in 2004-2007 in which bank secrecy was lifted. Delay in executing these four requests was substantial. Three of the requests were executed in 3, 8 and 10 months respectively, even though the information sought was not extraordinary (movement of funds, balances, and account information). The fourth request was received in 2007 and remains outstanding. Information provided after the on-site visit shows that only two judicial orders have been issued to lift bank secrecy since 2009. The delay in executing these MLA requests was 1 and 6 months. One additional request did not require a judicial order as it sought information subject to banking restraints and not bank secrecy. A fourth request was executed with the consent of the account holder.

165. There are also concerns over MLA requests for confiscation. According to a 2010 GAFISUD Report (p. 234), such requests are considered requests to execute a foreign criminal judgment and cannot be executed in the absence of a treaty (PC Art. 13). Chile disagrees with this view, however. The Phase 2 Report (para. 124) also referred to unresolved obstacles to confiscation. In Phase 3, Chile states that the Convention could be a basis for granting MLA in the form of confiscation to another party to the Convention in a foreign bribery case. Chile's questionnaire responses confirmed that it has not provided MLA of this nature. As with domestic cases, Chile cannot seize, freeze or confiscate property of equivalent value pursuant to an MLA request.

166. A final issue concerns delay and resources. Incoming and outgoing requests must go through the Ministry of Foreign Affairs (MOFA) and the diplomatic channel. Delay may be exacerbated by inadequate MOFA staffing.<sup>33</sup> Re-designating the Ministry of Justice or the PPO as the central authority for sending and receiving MLA requests, which Chile states is possible, may reduce delay by eliminating a stage in the process. In 2010-2013, Chile sent and received 38 and 15 MLA requests respectively in corruption cases. Data on the time needed to execute these requests were not provided. Separate data from the PPO showed that from 2009 to February 2014, 40 outgoing and 21 incoming MLA requests were executed in 5.16 and 1.04 months respectively. The data, however, did not cover all of the requests that were made and received during this period.

### *Commentary*

***The lead examiners are seriously concerned that several issues concerning MLA identified in Phase 2 remain unresolved. As described at p 34, bank secrecy rules may impede Chile's own foreign bribery investigations. These same rules apply to the execution of an MLA request for information covered by bank secrecy. The lead examiners therefore reiterate Phase 2 Recommendation 3(c) and recommend that Chile take all necessary measures to ensure that it will not deny MLA in foreign bribery cases on grounds of bank secrecy. Chile should also ensure that it can provide MLA for confiscation of equivalent value. The lead examiners also recommend that the Working Group follow up whether Chile can use the Convention as a treaty basis to provide MLA for confiscation in foreign bribery cases.***

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<sup>33</sup> See also [2010 GAFISUD Report on Chile](#) at p. 232-233.

**(b) Extradition**

167. Since Phase 2, Chile has entered into a bilateral extradition treaty with the US and signed a protocol to its extradition treaty with Italy. It has also become a party to the multilateral Convention on Extradition between the Party States of Mercosur and the Republic of Chile and the Republic of Bolivia.

168. The domestic legislative framework for extradition has not changed since Phase 2. Extradition to Chile (active extradition) is governed by CPC Articles 431-439. Active extradition may be sought for offences punishable by deprivation of liberty of “a minimum duration exceeding one year”. Extradition from Chile (passive extradition) is covered by CPC Articles 440-454. Passive extradition is available if the offence is punishable in the requesting state by deprivation of liberty of at least one year; the conduct underlying the request would be a crime in Chile had it been committed there (dual criminality); and the extradition is authorised by a treaty to which Chile is party (e.g. the Anti-Bribery Convention). In the absence of a treaty, extradition may be granted based on reciprocity or the principles of international law (CPC Articles 440 and 449; Phase 1 Report paras. 116 and 120).

169. Chilean nationals may be extradited. In Phase 1 (para. 119), Chile stated that it would prefer to prosecute nationals in lieu of extradition. In Phase 3, it retracted this statement. In 2010 Chile stated that it would extradite its nationals on a timely basis.<sup>34</sup> The OAS has recommended that Chile promptly notify a requesting state where it refuses extradition on the basis of nationality or the assertion of jurisdiction.<sup>35</sup> Chile states that out of 306 incoming requests in 2000-2013, extradition was refused on the basis of nationality in only 13 cases.

170. The requirement that an offence be punishable by at least one year’s imprisonment to be extraditable has attracted some comment (Phase 1bis Report paras. 34-36 and 84). Active foreign bribery resulting from a solicitation is punishable by imprisonment of 61 to 540 days. The *minimum* punishment for this offence is thus less than one year. This does not pose a problem for *passive* extradition. The Supreme Court has clarified that extradition may be granted if the underlying conduct is subject to a *maximum* penalty of over one year’s imprisonment in Chile.<sup>36</sup> The Chilean authorities were confident that *active* extradition would similarly depend on whether the maximum penalty for the offence exceeds one year’s imprisonment in Chile. This is despite a different wording of the tests for active extradition (CPC Art 431: “punishable by deprivation of liberty of a minimum duration exceeding one year”) and passive extradition (CPC Art. 440: “punishable by deprivation of liberty of at least one year”).

**10. Public Awareness and the Reporting of Foreign Bribery**

171. The section considers Chile’s efforts to raise awareness of foreign bribery and to encourage reporting. Similar efforts relating to tax and public advantages are described at pp. 44 and 50.

**(a) Awareness of the Convention and the Offence of Foreign Bribery**

172. Phase 2 Recommendation 1(a) and (b) suggested that Chile raise awareness of foreign bribery in the public and private sectors. Different government entities have made efforts but these appeared uncoordinated and gaps remain.

173. A Ministry of Foreign Affairs (MOFA) brochure revised in October 2010 provides information on the Convention, Chile’s implementing legislation, key concepts, and relevant authorities. In 2008 and

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<sup>34</sup> [2010 GAFISUD Report on Chile](#) at p. 239.

<sup>35</sup> [2010 MESICIC Report](#) at paras. 117 and 129(a).

<sup>36</sup> Supreme Court Case (28 October 2008), Case No. 2194-2008.

2010, the brochure was disseminated among diplomatic and consular missions and Chilean commercial offices from ProChile in Chile and abroad. Officials at the on-site visit seemed aware of the brochure. However, there is no evidence that the brochure was widely disseminated outside the government. Some information on foreign bribery, the Convention and the MOFA brochure is available on the MOFA and SVS websites. After the on-site visit, Chilean authorities indicated that in 2013 MOFA prepared a new brochure which was circulated among diplomatic missions, Diplomatic School, Chilean commercial attachés in Latin America and in a seminar for exporters. The anti-corruption portal established by the PPO, Comptroller General's Office and State Defence Council addresses almost exclusively domestic corruption and only mentions foreign bribery in the glossary of terms. Relevant Chilean authorities have been asked to include the Convention as well as the 2010 and 2013 brochures in the anti-corruption portal.

174. Chile also held events and seminars to raise awareness of foreign bribery, some of which took place shortly before the on-site visit. In April and May 2013, MOFA made presentations on foreign bribery to Chilean commercial attachés in Latin America and to students from the Diplomatic School. Also in 2013, MOFA with ProChile organised seminars for exporters, businessmen and financial companies, and gave joint presentations on foreign bribery to exporters. ProChile has also committed to incorporate the issue of bribery in the export training programme. In August and September 2013, the Diplomatic School and business associations organised seminars and courses on foreign bribery and corporate responsibility in which the National Group of Experts against Corruption (GNECC)<sup>37</sup> has participated. Corporate responsibility and foreign bribery are now included in the curriculum of post-graduate studies on criminal and corporate law. There is, however, limited additional information on the format, regularity, audience and impact of these seminars and events.

175. Additional efforts relate to Law 20 393 (corporate liability) and corporate governance rather than to foreign bribery specifically. There is a good level of awareness, particularly in the private sector, of the corporate liability regime. UNAC has given presentations on corporate liability and offence prevention models. The Office of the Comptroller General, which is mostly concerned with domestic corruption, provided some support to the private sector on similar issues. SVS Rules 302/2011, 341/2012 and 638/2010 deal with corporate liability and corporate governance. Unfortunately, SVS has not actively raised awareness of foreign bribery despite its role as the principal regulator of listed companies.

176. There have not been awareness-raising efforts targeting SMEs, which may have contributed to a lack of corporate compliance measures among these enterprises (see p. 43). Business associations at the on-site visit could not recall government efforts to raise awareness. No efforts have been made by Chilean SMEs agencies, the Smaller Enterprises Division (*División de Empresas de Menor Tamaño*) and the Smaller Enterprises National Consultative Council (*Consejo Nacional Consultivo de la Empresa de Menor Tamaño*). ProChile, which supports SME exporters and is present in 43 countries, has undertaken to train and raise awareness of SMEs.

### *Commentary*

***The lead examiners recognise Chile's foreign bribery awareness-raising efforts and witnessed a good level of awareness among on-site visit participants. To strengthen these efforts, they recommend that Chile continue to raise awareness in a more co-ordinated manner. Information on the format, regularity, audience and impact of its awareness-raising seminars and events should be maintained. Greater efforts should be made to raise awareness among enterprises, particularly SMEs. Awareness-raising efforts should involve all relevant***

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<sup>37</sup> The GNECC consists of experts from the Ministries of Foreign Affairs, Finance, and Justice; Financial Analysis Unit; Public Prosecutor's Office; and Securities and Insurance Superintendence.

*government bodies, such as the Ministry of Economy and SME agencies, that interact with Chilean companies which are active in foreign markets.*

**(b) Reporting Suspected Acts of Foreign Bribery**

177. Phase 2 Recommendation 2(b) asked Chile to take steps to facilitate the reporting of suspicions of foreign bribery to prosecutors, including by improving the enforcement of the general duty on public officials to report suspicions of crimes directly to law enforcement authorities. Chile has not taken action in this respect. Reporting rates remain low and are of concern.

178. Chilean public officials are required to report crimes of which they become aware in the course of their duties.<sup>38</sup> This includes ChileCompra and AGCI staff. However, this obligation does not appear to be enforced. Failure to report is punishable by a small fine of one to four UTM (a maximum of CLP 164 724 or USD 296) (CPC Art. 175-177 and PC Art. 494). Additional administrative responsibility and disciplinary measures may also apply (Law 18 834 Arts. 61(k) and 125). Chile was requested but did not provide statistics on public officials reporting crimes. Just before the adoption of this report, Chile informed the Working Group that the draft Bill replacing the current Penal Code would increase the maximum penalty for failure to report crimes.

179. There is no obligation on private individuals (including employees of SOEs) to report crimes. Any person may report crimes to a public prosecutor, police or criminal court, but anonymous reports are not accepted (PC Art. 174). The websites of the PPO and the abovementioned anti-corruption portal provide information to citizens on reporting procedures.

180. Given Chile's inaction, actual reporting of corruption remains rare. The Phase 2 Report (para. 35) noted that most cases of domestic corruption were reported by agencies with oversight powers, and secondarily by public officials to whom bribes were offered. Reporting by company employees was unusual. In Phase 2, the Chilean authorities stated that the general level of reporting was "very low" and "is something that could be improved." In Phase 3, Chile stated that reporting rates remain very low and could be improved. Indeed, the six foreign bribery allegations that have been investigated in Chile were reported by the foreign authorities or media. Individuals and companies have not reported incidents of foreign bribery to the Chilean authorities.

181. Of particular concern is reporting by the MOFA. Instruction 4189/2010 reminded officials in Chilean embassies and consulates of their duty to report foreign bribery to the competent authorities in Chile. It also required these officials to raise awareness of the Convention and the Chilean implementing framework. Similar instructions asking foreign missions to report foreign bribery have been issued since at least 2006 (Phase 2 Report para. 48.) Nevertheless, embassies did not report any of the seven foreign bribery cases investigated by the Chilean authorities, even though some of these cases were widely reported by the foreign media. Prosecutors stated that the MOFA's only involvement in these cases was to facilitate MLA.

**Commentary**

***The lead examiners are concerned about Chile's inaction to improve the reporting of foreign bribery and the low reporting rates in practice. The failure of Chilean embassies to report foreign bribery allegations that had been widely circulated in the foreign media is especially disturbing. The lead examiners therefore reiterate Phase 2 Recommendation 2(b) and urge Chile to take steps to facilitate the reporting of foreign bribery. In particular, Chile should***

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<sup>38</sup> Chile states that the duty to report does not apply to entities certifying offence prevention models despite their status as public officials under the Penal Code.

*analyse why its officials in overseas missions failed to report foreign bribery allegations and take appropriate remedial action. It should also enforce the obligation on officials to report.*

**(c) Whistleblowing and Whistleblower Protection**

182. Phase 2 Recommendation 2(b) asked Chile to enhance and promote the protection of whistleblowers in the private and public sectors. Chile has taken few steps in this regard.

183. Limited protection is afforded to whistleblowers in the public sector who report irregularities in the public administration and “misconduct to probity”.<sup>39</sup> Public officials who report can request that their identity be kept confidential, and they cannot be suspended, dismissed or transferred. If the report concerns a superior, then the performance of the reporting official cannot be assessed. Nevertheless, protection is limited to a short period of time as it ends when the report is rejected or up to 90 days after the end of the investigation or proceeding triggered by the report. Non-permanent employees (e.g. consultants) and employees of SOEs are not covered.

184. Additional provisions raised by the Chilean authorities after the on-site visit are of uncertain effectiveness. Since 2012, employees are protected against “workplace harassment” under amendments to the Labour Code and Administrative Statute for Public Officials (Law 20 607). Workplace harassment is defined as “conduct that constitutes repetitive aggression or torment [...] through any means that results in the damaging, mistreatment or humiliation of those affected, or to threaten or jeopardize their situation or employment opportunities.” The Chilean authorities state that workplace harassment can encompass retaliation against whistleblowers. Harassment, however, requires “repetitive” conduct. A single act of reprisal (e.g. a transfer of position) arguably would not qualify. General awareness that whistleblower reprisals could amount to workplace harassment may also be low. None of the on-site visit participants referred to this provision. There were no known cases in which these provisions were applied to protect whistleblowers.

185. Less protection is available in the private sector, where only the Labour Code workplace harassment provisions would apply. When discussing this topic at the on-site visit, however, Chilean officials referred instead to Law 20 393 (corporate liability). In their view, the requirement that corporate offence prevention models provide a channel for reporting violations (see p. 16) adequately addresses whistleblowing. They also referred to SVS Rule 341/2012 which requires companies (*sociedades anónimas*) to provide information on their corporate governance frameworks, including channels to report wrongdoing. However, these provisions offer whistleblowers a reporting channel but not protection from reprisals. They are also silent about the standards that the reporting channels should meet (see p. 17).

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<sup>39</sup> Law 18 834 Arts. 90A and 90B as amended; Law 18 883 Arts. 88A and 88B.

186. The consequent landscape for private sector whistleblowing is discouraging. Many companies' reporting systems go little beyond providing for anonymous or confidential whistleblowing. A broad definition of and protection from retaliation are not addressed. Even if provided, protection remains at the level of company policy. Whistleblowers would be fully exposed if the policy is violated, or if he/she reports outside the company when the company refuses to take action. Whistleblowing in practice is thus rare. A civil society organisation recently conducted a survey which found that 61% of employees in 31 companies witnessed but did not report unethical conduct. Reasons included a belief that remedial action would not be taken (31%); distrust in confidential reporting mechanisms (17%); and fear of retaliation (36%). Civil society organisations at the on-site visit said that legislative action is needed.

### *Commentary*

*The lead examiners welcome the steps taken by Chile to provide protection for whistleblowers. Nevertheless, the legislation provides limited protection, particularly in the private sector. Awareness of the applicable provisions appears low. Of even greater concern, empirical evidence suggests that a fear of reprisals may continue to be the main reason for an absence of whistleblowing. The lead examiners therefore reiterate Phase 2 Recommendation 2(b) and urge Chile to enhance and promote whistleblower protection in the private and public sectors.*

## **11. Public Advantages**

187. This section considers the implementation of Phase 2 Recommendation 6(f) regarding the imposition of additional administrative sanctions for foreign bribery. It also addresses the prevention, detection and reporting of foreign bribery by agencies involved in official development assistance (ODA) and officially supported export credits and guarantees.

### **(a) Public Procurement**

188. Since Phase 2, Chile has enacted two parallel provisions to provide debarment from public procurement as a sanction for certain crimes, including foreign bribery. Under Art. 10 of Law 20 393 (corporate liability), a company may be debarred permanently or for two to five years for foreign bribery. In addition, under Art. 92 of Ministry of Finance Decree 250/2004, persons convicted of bribery (including foreign bribery) are debarred for three to five years. Unlike Law 20 393, Decree 250/2004 requires mandatory debarment upon conviction and applies to both natural and legal persons.

189. Chile has some measures to implement these debarment provisions. *ChileCompra* within the Ministry of Finance is responsible for operating the on-line public procurement system in Chile. Art 10 of Law 20 393 requires the court to inform *ChileCompra* of debarment ordered under that provision. *ChileCompra* is then required to maintain a register of debarred companies. It had not done so at the time of the on-site visit. Instead, it ensured that debarred companies were removed from *ChileProveedores*, an online register of companies accredited for public procurement. In addition, further to a "collaboration agreement", the Public Prosecutors' Office informs *ChileCompra* bimonthly of all criminal convictions. *ChileCompra* is therefore also notified of all individuals and companies convicted of foreign bribery and debarred under Decree 250/2004, even if debarment is not ordered under Law 20 393. At the on-site visit, *ChileCompra* stated that it had not received notification of the corporate convictions in *Salmones Colbún Case*.

190. Unfortunately, this enforcement regime can be circumvented. Government procuring agencies are not required to choose suppliers from *ChileProveedores*. A company that has been debarred and excluded from *ChileProveedores* could thus nevertheless obtain certain government contracts. Furthermore, the Armed Forces and Police Force can maintain their own separate and classified registers of suppliers. There is no mechanism to ensure that these registers do not contain companies convicted of foreign bribery. To

close these loopholes, information about criminal convictions need to be provided to or made accessible by procuring agencies beyond *ChileCompra*.

191. Developments after the on-site visit raised additional issues. *ChileCompra* indicated that it had created a debarment register as required by Law 20 393 which is available on its website.<sup>40</sup> Whether *ChileCompra* would continue to remove companies convicted of bribery from *ChileProveedores* was not explained. *ChileCompra* added that the register “allows” procuring agencies to check whether a company has been debarred before awarding a procurement contract. There is no indication, however, that procuring agencies are required to check the register before every contract, or whether they have been informed of the register’s creation. *ChileCompra* also stated that its only role relating to foreign bribery is debarment under Law 20 393. Debarment under Art. 92 of Decree 250/2004 was no longer mentioned, thus casting doubt over this provision’s enforcement. At the time of this report, the on-line debarment register was empty. It did not reflect the convictions in the *Salmones Colbún Case* that took place some five months earlier.

192. Finally, *ChileCompra* officials do not appear to check the debarment lists of multilateral development banks. They are required to do so in principle. However, they were unaware of four Chilean companies that featured on these lists at the time of the Phase 3 on-site visit. Chile should consider systematically checking these debarment lists before awarding procurement contracts.

#### *Commentary*

***Chile has enacted legislation to debar individuals and companies convicted of foreign bribery. To implement this regime effectively, Chile should ensure that all government procuring agencies verify whether an individual or company has been convicted of foreign bribery before granting a procurement contract. Chile should also consider routinely checking debarment lists of multilateral development banks in relation to public procurement contracting.***

#### **(b) *Official Development Assistance***

193. Debarment of companies convicted of foreign bribery from contracts funded by official development assistance (ODA) is currently of limited relevance in Chile. The Chilean International Cooperation Agency (AGCI) does not fund development projects that are implemented by private sector companies. Examples of current assistance include scholarships for foreign students and funding experts from the Chilean government and international organisations who provide technical assistance. AGCI is considering whether to engage the private sector as a partner or “co-funder” in development co-operation projects.

#### *Commentary*

***The lead examiners recommend that the Working Group follow up whether AGCI engages the private sector in future development projects. If such engagement materialises, Chile should adopt measures to prevent, detect and report foreign bribery, and consider excluding companies convicted of this crime from AGCI-funded contracts.***

#### **(c) *Export Credits***

194. Unlike most Parties to the Convention, Chile has not adhered to the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits (2006 Recommendation). Chile is also not a

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<sup>40</sup> See [www.chileproveedores.cl](http://www.chileproveedores.cl). The debarment register is also expected to be made available on [www.chilecompra.cl](http://www.chilecompra.cl) and [www.mercadopublico.cl](http://www.mercadopublico.cl).

member of the OECD Working Party on Export Credits and Credit Guarantees (ECG). The 2009 Anti-Bribery Recommendation, to which Chile has adhered, asks Working Group Members to support the ECG's efforts. It also recommends that Parties to the Convention that are not OECD Members adhere to the 2006 Recommendation. While this provision on its face is directed at non-OECD countries, in principle it applies *a fortiori* to OECD members like Chile. In Phase 2 (Recommendation 1(d)) the Working Group asked Chile to adhere to the 2006 Recommendation "as soon as possible".

195. During previous evaluations and Chile's accession to the OECD, Chile undertook to adhere to the 2006 Recommendation and to implement anti-foreign bribery measures in the area of export credits. The Chilean Economic Development Agency (*Corporación de Fomento de la Producción*, CORFO) is Chile's officially supported export credit agency. In 2007, CORFO issued Official Letter 688/2007 supporting adherence to the 2006 Recommendation (Phase 2 Report para. 42). In 2009, CORFO informed the ECG that "Chile accepts the [2006 Recommendation]" and had put in place anti-bribery measures.<sup>41</sup> CORFO also informed the Working Group that it had introduced anti-bribery contractual clauses and committed to implementing further measures (Written Follow-Up Report para. 5 and pp. 15-16). The Working Group concluded that Phase 2 Recommendation 1(d) was fully implemented but that it would "follow up in Phase 3 the actual adhesion to the Recommendation".

196. However, not only has Chile yet to adhere to the 2006 Recommendation, but CORFO has ceased its anti-bribery efforts. CORFO explained that it made its earlier commitments to the OECD because it provided export credits to intermediaries in trade transactions. This programme ended in 2010. In a separate programme, CORFO continues to guarantee loans made by financial institutions to Chilean exporters. Materials provided after the on-site visit appeared to suggest that the current programme offers export-contingent, working capital guarantees. Strictly speaking, this type of support does not fall within the scope of the 2006 Recommendation. Nevertheless, it shares certain characteristics with other export credits programmes, and some OECD export credit agencies have applied anti-bribery measures (e.g. signed client declarations) to programmes that offer similar support.

### *Commentary*

***The lead examiners recommend that Chile adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits if and when it provides officially supported export credits.***

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<sup>41</sup> Letter from CORFO to ECG Chair dated 1 July 2009.

## C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

197. While the Working Group welcomes Chile's efforts to implement the Convention, it is concerned about insufficient foreign bribery enforcement and detection in Chile. Since the Convention entered into force in Chile in 2001, only six foreign bribery allegations have surfaced. There have not been convictions and only one case has led to charges. Of even greater concern, some cases have been provisionally filed without sufficient investigation. In one case, an investigation was not opened at all. In one major case, the Chilean authorities did not take any steps to gather evidence in the US and made insufficient efforts in Chile, despite the case's strong and evident connections with both jurisdictions. In another case, poor coordination meant a decision not to investigate was made without thoroughly considering all relevant evidence. Chilean embassies and diplomatic missions did not inform prosecutors of any of the foreign bribery allegations that had been widely circulated in the foreign media. In the Working Group's view, Chile must substantially improve its record of detecting, reporting and investigating foreign bribery.

198. After the on-site visit, Chile re-opened investigations into two of the foreign bribery allegations that had previously been filed. Just before the adoption of this report, Chile informed the Working Group that on-going Penal Code reform would address issues such as *media prescripción*, confiscation, jurisdiction, corporate liability, and penalties for foreign bribery and failure to report offences. The Working Group welcomes these developments, and will assess any relevant new legislation only if and when it is enacted.

199. Regarding outstanding recommendations from previous evaluations, since Chile's Phase 2 Written Follow-Up Report, Phase 2 Recommendations 1(c), 1(d), 1(e), 2(a), 2(d), 3(a), 3(d), 3(e), 4(a), 4(b), 6(a), 6(c), 6(e) and 8 have been fully implemented. Recommendations 1(a), 1(b), 2(b), 2(c), 3(b), 3(c), 3(f), 5, 6(b), 6(d), 6(f) and 7 are partially or not implemented.

200. In conclusion, based on the findings in this report on Chile's implementation of the Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Chile to provide a written self-assessment report within one year (i.e., by March 2015) on (1) all of its foreign bribery investigations and prosecutions, and (2) the implementation of recommendations 1, 2, 4(c) and 4(f). Chile is further invited to submit a written follow-up report within two years (i.e., by March 2016) on all recommendations, follow-up issues, and foreign bribery investigations and prosecutions.

### 1. Recommendations of the Working Group

#### *Recommendations Concerning Investigation, Prosecution and Sanctioning of Foreign Bribery*

1. With regards to the liability of legal persons and offence prevention model defence, the Working Group recommends that Chile:

- (a) Provide guidance on the elements of an effective model for preventing foreign bribery as required by Law 20 393 and (i) train judges, prosecutors on police on this guidance; and (ii) encourage Chilean companies, especially SMEs, to adopt models that conform to the guidance; and
- (b) Ensure that under Art. 3 of Law 20 393 the requisite independence of prevention officers is determined based on all relevant factors, and not solely the size of the company's revenues (Convention, Art. 2; 2009 Recommendation Annex I.B and Annex II).

2. With regards to the liability of legal persons and certification of offence prevention models, the Working Group recommends that Chile take immediate steps to:

- (a) Clarify the legal effect of certification of an offence prevention model under Law 20 393; and
- (b) Strengthen and enforce rules and standards that apply to certifying entities, including those regarding qualifications, certification requirements (Convention, Art. 2; 2009 Recommendation Annex I.B and Annex II).

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

- (a) Eliminate mandatory reductions of sanctions for foreign bribery (i) where a foreign public official solicits the bribe; and (ii) where the case begins more than half way through the limitation period (Convention, Art. 3(1));
- (b) Amend the Penal Code to ensure equivalence between the fines applied to domestic and foreign bribery cases (Convention, Art. 3(1));
- (c) 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));
- (d) Increase the maximum fine available against legal persons for foreign bribery to a level that is effective, proportionate and dissuasive (Convention, Art. 3); and
- (e) Amend its legislation without delay to provide for confiscation of property, the value of which corresponds to that of the proceeds of a foreign bribery offence, where the bribe and the proceeds of foreign bribery cannot be confiscated, or monetary sanctions of comparable effect (Convention, Art. 3(3)).

4. Regarding investigations and prosecutions, the Working Group recommends that Chile:

- (a) Take steps to ensure that the overall limitation period for the foreign bribery offence, including the two-year period for formalised investigations, is sufficient for proper investigation and prosecution (Convention, Arts. 5 and 6);
- (b) Periodically review its laws implementing the Convention and its approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention, Art. 5 and 2009 Recommendation V);
- (c) (i) Take steps to ensure that foreign bribery allegations are thoroughly investigated and not prematurely filed, and that corporate liability is fully explored; (ii) use proactive steps to gather information from diverse sources to increase sources of allegations and enhance investigations; (iii) seek co-operation and MLA from foreign countries whenever appropriate, including through the Working Group's Informal Meetings of Law Enforcement Officials, and solicit the assistance of Chilean embassies and other international fora to facilitate MLA; (iv) take steps to ensure that Chilean authorities thoroughly explore territorial links with Chile in foreign bribery cases, including by issuing guidance to law enforcement authorities on the jurisdiction to prosecute foreign bribery; and (v) take appropriate steps to further investigate the foreign bribery cases that have been provisionally filed or where a decision had been taken to not open an investigation (Convention, Arts. 2, 4(1), 5, Commentary 27; 2009 Recommendation XIII, Annex I.D);

- (d) Improve its internal co-ordination and intelligence gathering in foreign bribery cases by (i) ensuring that prosecutors and law enforcement authorities systematically inform the UNAC of any foreign bribery allegation which comes to their knowledge, including via incoming MLA requests; and (ii) consider establishing a national database of all foreign bribery cases (Convention, Art. 5; 2009 Recommendation V);
- (e) Raise awareness of Art. 5 of the Convention among Chilean judges, prosecutors, investigators and relevant government officials, including by adding references to factors enumerated in Art. 5 to the relevant prosecutor instructions (Convention Art. 5, Commentary 27; 2009 Recommendation III.i);
- (f) Align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases, tax offences and money laundering; and take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases (Convention, Arts. 5 and 9(3));
- (g) Align the investigative tools available in investigations of foreign bribery and money laundering, so that special and covert investigative techniques are available in foreign bribery investigations (Convention, Art. 5, Commentary 27); and
- (h) Take urgent steps to ensure that expertise in corporate investigations, evaluation of offence prevention models, forensic accounting and information technology is available in foreign bribery investigations (Convention, Arts. 2, 5; 2009 Recommendation III.ii).

5. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that Chile amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for the foreign bribery offence (Convention, Art. 4(4)).

6. With regards to statistics, the Working Group recommends that Chile maintain detailed statistics on (i) sanctions imposed against natural and legal persons in domestic and foreign bribery cases; (ii) enforcement of false accounting offences; (iii) format, regularity, audience and impact of its awareness-raising seminars and events (Convention Arts. 3(3), 8; 2009 Recommendation II).

### ***Recommendations Concerning Prevention, Detection, and Reporting of Foreign Bribery***

7. With regards to money laundering, the Working Group recommends that Chile:

- (a) Take appropriate measures to enforce the money laundering offence more effectively in connection with foreign bribery cases, and ensure that its law provides that an individual is simultaneously convicted of money laundering and foreign bribery where appropriate; and
- (b) Require appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions, develop typologies on money laundering related to foreign bribery, and further encourage reporting entities to make STRs (Convention Art. 7; 2009 Recommendation III.i).

8. With regards to accounting and auditing, corporate compliance, internal control and ethics, the Working Group recommends that Chile:

- (a) Regarding the false accounting offence, (i) 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;

and (ii) vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention, Arts. 3, 5, 8(1); 2009 Recommendation X.A.i); and

- (b) Regarding external auditors, (i) consider requiring “external audit firms” to report crimes to competent authorities; (ii) ensure that auditors who report suspected wrongdoing reasonably and in good faith to competent authorities are protected from legal action; (iii) take steps to encourage external auditors to take greater account of the risks of foreign bribery in the companies that they audit; and (iv) improve audit quality standards, including with regard to certification and independence (2009 Recommendation X.B.i, ii, v).

9. With regards to tax-related measures, the Working Group recommends that Chile:

- (a) Update Circular 56/2007 to refer to PC Art. 251bis and Law 20 393 (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);
- (b) Ensure that SII is routinely informed of foreign bribery convictions and systematically re-examines the relevant tax returns of convicted taxpayers to determine whether bribes have been deducted (2009 Recommendation III.iii, VIII.i; 2009 Tax Recommendation II);
- (c) Incorporate the essential elements of the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors into the SII’s Standard Plan for Tax Audits, and examine why SII has failed to detect proven cases of bribery (2009 Recommendation III.i, III.iii, VIII.i; 2009 Tax Recommendation II);
- (d) Promptly ratify the Convention on Mutual Administrative Assistance in Tax Matters, and consider systematically including the language of Art. 26 of the OECD Model Tax Convention in all future bilateral tax treaties with countries that are not parties to the multilateral Convention (2009 Recommendation VIII.i; 2009 Tax Recommendation I.iii).

10. With regards to international co-operation, the Working Group recommends that Chile:

- (a) Take all necessary measures to ensure that it will not deny MLA in foreign bribery cases on grounds of bank secrecy (Convention, Art. 9(3));
- (b) Ensure that it can provide MLA for confiscation of property the value of which corresponds to the bribe and the proceeds of foreign bribery (Convention, Arts. 3(3) and 9).

11. With regards to awareness-raising and reporting, the Working Group recommends that Chile:

- (a) Continue to raise awareness in a more co-ordinated manner, involving all relevant government bodies that interact with Chilean companies which are active in foreign markets, and make greater efforts to raise awareness among enterprises, particularly SMEs (2009 Recommendation III.i);
- (b) Regarding reporting, (i) analyse why Chilean overseas missions failed to report foreign bribery allegations and take appropriate remedial action; and (ii) enforce the obligation on public officials to report suspicions of crimes (2009 Recommendation IX.ii); and
- (c) Enhance and promote the protection from discriminatory or disciplinary action of public and private sector employees who report in good faith and on reasonable grounds to competent authorities suspected acts of foreign bribery (2009 Recommendation IX.iii).

12. With regards to public advantages, the Working Group recommends that Chile:
- (a) Ensure that all government procuring agencies verify whether an individual or company has been convicted of foreign bribery before granting a procurement contract, and consider routinely checking debarment lists of multilateral development banks in relation to public procurement contracting (Convention Art. 3(4); 2009 Recommendation XI.i); and
  - (b) Adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits if and when it provides officially supported export credits (2009 Recommendation III.i, IX.i, XII; 2006 Export Credit Recommendation).

**2. Follow-up by the Working Group**

13. The Working Group will follow up the issues below as case law and practice develop:
- (a) The foreign bribery offence, particularly (i) coverage of bribes to induce an official to perform his/her duty; (ii) coverage of bribery by a company that was the best qualified bidder or otherwise could properly have been awarded the business; (iii) whether the definition of a foreign public official is interpreted as autonomous; and (iv) whether the prevalence of bribery in a foreign jurisdiction can constitute a defence or mitigating factor (Convention, Art. 1, Commentaries 3, 4 and 7; 2009 Recommendation III.ii);
  - (b) Law 20 393, particularly (i) the interpretation of the term “directly and immediately” in the interest or for the benefit of the legal person and (ii) the application of the offence prevention model defence by Chilean courts, including the burden of proof (Convention, Art. 2; 2009 Recommendation Annex I.B and I.C, and Annex II);
  - (c) Sanctions against natural and legal persons (Convention, Art. 3(1));
  - (d) Application of conditional suspensions and expedited procedures (Convention, Art. 5; 2009 Recommendation V);
  - (e) The Convention as a basis for MLA for confiscation (Convention, Arts. 3(3) and 9);
  - (f) AGCI engagement with the private sector in future development projects, and its measures relating to prevention, detection, reporting and debarment (2009 Recommendation XI.ii).

## ANNEX 1 WORKING GROUP PHASE 2 RECOMMENDATIONS TO CHILE AND THEIR IMPLEMENTATION

<i>Phase 2 Recommendation</i>	<i>2009 Working Group Evaluation</i>
<b><i>Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery</i></b>	
1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Chile:	
a) take additional measures, including further training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Chilean companies active in foreign markets, including trade promotion, export credit and development aid agencies (Revised Recommendation, Paragraph I);	Partially implemented
b) provide support for private sector initiatives such as seminars, conferences and technical assistance targeted at the business sector on foreign bribery issues, and, in cooperation with business and other relevant organisations, assist companies in engaging in preventive efforts (Revised Recommendation, Paragraph I);	Not implemented
c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I);	Satisfactorily implemented
d) require CORFO to adopt anti-bribery policies with regard to export credit operations, and consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Paragraph I);	Satisfactorily implemented/ Follow-up issue
e) consider maintaining and/or formalising the GNECC as an oversight and coordinating body for effective implementation of the foreign bribery offence in Chile, including awareness raising activities for the public and private sector (Revised Recommendation, Paragraph I).	Satisfactorily implemented
2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Chile:	
a) revise the instruction document sent to Ministry of Foreign Affairs (MFA) staff regarding foreign bribery to better reflect the nature of the foreign bribery offence and applicable reporting obligations, and issue it to all MFA staff including those at PROCHILE (Revised Recommendation, Paragraph I);	Satisfactorily implemented
b) take steps to facilitate the reporting of suspicions of foreign bribery to prosecutors, including by improving the enforcement of the general duty for public officials to report suspicions of crimes directly to law enforcement authorities under art. 175 CPC and art. 55 of Law N° 18,834; and enhance and promote the protection of private and public sector employees who report in good faith suspicions of foreign bribery, in order to encourage them to report such suspicions without fear of retaliation (Revised Recommendation, Paragraph I);	Partially implemented
c) introduce money laundering reporting requirements for appropriate non-financial entities including lawyers, accountants and auditors (Convention, Article 7; Revised Recommendation, Paragraph I);	Not implemented

<i>Phase 2 Recommendation</i>	<i>2009 Working Group Evaluation</i>
d) require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and take steps to improve the effectiveness of auditors' reporting obligations to competent law enforcement authorities as established in art. 59 of the Company Regulations (RSA) (Revised Recommendation, Paragraph V.B).	Satisfactorily implemented
<b><i>Recommendations Pertaining to Investigation of Foreign Bribery</i></b>	
3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Chile:	
a) clarify, in an instruction or other appropriate measure, the rules governing the investigation and prosecution of foreign bribery and in particular any possible exceptions to the general rule of mandatory prosecution (Convention, Article 5; Revised Recommendation, Paragraph 1);	Satisfactorily implemented
b) align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases and in money laundering investigations by the Financial Intelligence Unit (UAF); and take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases (Convention, Articles 5 and 9(3); Revised Recommendation, Paragraph 1);	Partially implemented/ Follow-up issue
c) take all necessary measures to ensure that Chile will not decline to render mutual legal assistance (MLA) in foreign bribery cases on grounds of bank secrecy; and that MLA can be provided in criminal and non-criminal cases of foreign bribery involving legal persons (Convention Articles 2 and 9);	Partially implemented
d) consider aligning the treatment of the foreign bribery offence with the money laundering offence with regard to the investigative tools made potentially available to prosecutors in appropriate cases (Convention, Article 5; Revised Recommendation, Paragraph 1);	Satisfactorily implemented
e) promptly take all necessary action to ensure that territorial jurisdiction extends over all foreign bribery offences committed in whole or in part in Chilean territory; and adopt nationality jurisdiction in foreign bribery cases in order to strengthen enforcement of the offence (Convention, Article 4(1), (2) and (4));	Satisfactorily implemented/ Follow-up issue
f) take action to ensure that the overall limitations period for the foreign bribery offence is sufficient to ensure adequate investigation and prosecution, including that the two year period for formalised investigations can be extended as necessary (Convention, Articles 5 and 6; Revised Recommendation, Paragraph 1).	Partially implemented
<b><i>Recommendation Pertaining to the offence of foreign bribery</i></b>	
4. With respect to the offence of foreign bribery, the Working Group recommends that Chile:	
a) amend the law to ensure that (i) the foreign bribery offence can apply to bribes composed of non-pecuniary benefits; and (ii) vagueness with regard to the requirement that the advantage supplied by the briber be "undue" is eliminated (Convention, Article 1);	Satisfactorily implemented/ Follow-up issue
b) take all necessary measures to ensure that (i) the foreign bribery offence can apply to the giving of a bribe; and (ii) the concept of "public service enterprise" in the definition of "foreign public official" is consistent with the Convention definition of a "public enterprise" (Convention, Article 1).	Satisfactorily implemented

<i>Phase 2 Recommendation</i>	<i>2009 Working Group Evaluation</i>
5. With respect to the liability of legal persons for foreign bribery, the Working Group recommends that Chile amend the law to ensure that all legal persons can be held liable for bribery of foreign public officials in accordance with the Convention (Convention, Article 2).	Not implemented
<b><i>Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery and Related Offences</i></b>	
6. With respect to sanctions for foreign bribery, the Working Group recommends that Chile:	
a) substantially increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportional and dissuasive sanctions, including in cases where the bribe is solicited by the foreign public official; and (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case (Convention, Article 3(1));	Satisfactorily implemented/ Follow-up issue
b) eliminate mandatory reductions of sanctions for foreign bribery (i) in cases of solicitation of the bribe by the foreign public official; and (ii) in cases where the case begins more than half way through the limitation period (Convention, Article 3(1));	Partially implemented
c) in conjunction with the recommended amendment of the law to ensure its application to bribes composed of non-pecuniary benefits, appropriately modify the method of fixing pecuniary sanctions for foreign bribery (Convention, Art. 3);	Satisfactorily implemented
d) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions, and confiscation (Convention, Articles 2, 3);	Not implemented
e) take all necessary measures to ensure that seizure can be initially obtained in appropriate cases without the prior knowledge of the suspect (Convention, Article 3(3));	Satisfactorily implemented
f) consider the imposition of additional administrative sanctions upon natural and legal persons subject to criminal sanctions for the bribery of a foreign public official (Convention, Article 3(4)).	Partially implemented
7. With respect to related accounting/auditing offences and obligations, the Working Group encourages the Chilean authorities to extend international financial reporting standards (IFRS) to all registered companies in accordance with the intent of the Superintendence of Securities and Insurance (SVS); to consider adopting developing simplified international accounting standards for small and medium sized enterprises; to enforce accounting and auditing offences more effectively in bribery cases; and to continue their efforts to improve audit quality standards, including with regard to certification and independence (Revised Recommendation, Paragraph V).	Partially implemented
8. With respect to related tax offences and obligations, the Working Group recommends that Chile implement the decision of the Internal Revenue Service (SII) to strengthen the explicit nature of the prohibition on deducting foreign bribes from taxable revenue in a generally applicable, public and binding circular.	Satisfactorily implemented
<b><i>Follow-up by the Working Group</i></b>	
9. The Working Group will follow up on the issues below, as practice develops, in order to assess:	
a) the functioning of MLA under the CPC, and in particular with regard to seizure and confiscation and the provision of MLA in cases involving legal persons;	Continue to follow up
b) the coverage of bribery through intermediaries, including unwitting intermediaries;	Continue to follow up
c) whether the prevalence of bribery in the foreign jurisdiction can constitute a defence or mitigating factor;	Continue to follow up

<i>Phase 2 Recommendation</i>	<i>2009 Working Group Evaluation</i>
d) the enforcement of the foreign bribery offence under the CPC as it develops;	Continue to follow up
e) the application in practice of the Company Law provisions implementing Article 8 of the Convention.	Continue to follow up

## ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

### Public Sector

- Ministry of Foreign Affairs
- Ministry of Justice
- Public Prosecutors' Office: Specialised Anti-Corruption Unit (UNAC); *Fiscalía Centro Norte*; *Fiscalía Oriente*
- National Group of Experts against Corruption (GNECC)
- *Policía de Investigaciones de Chile (PDI)*: BRILAC and BRIDEC
- *Carabineros de Chile - OS9*
- Securities and Insurance Superintendence (SVS)
- Financial Analysis Unit (UAF)
- State Defence Council (*Consejo de Defensa del Estado*)
- ProChile
- Ministry of Economy, Development and Tourism, including *Consejo Nacional Consultivo de la Empresa de Menor Tamaño*
- Ministry of Finance: Auditors Group Treasury Services
- Internal Taxation Service (SII)
- Superintendent of Banks and Financial Institutions (SBIF)
- *ChileCompra* / Directorate for Public Procurement, Ministry of Finance (*Dirección de Compras y Contratación Pública*)
- *Agencia de Cooperación Internacional de Chile (AGCI)*
- *Corporación de Fomento de la Producción de Chile (CORFO)*

### Judiciary

- *Corte de Apelaciones de San Miguel*
- *4 Tribunal de Juicio Oral en lo Penal de Santiago*

### Private Sector

#### Private Enterprises

- Alfredo Atucha Abad, Vicepresidente de Finanzas Enersis (energy)
- Antofagasta PLC (mining)
- Banco de Chile (financial services)
- BBVA Chile (financial services)
- Banco BCI (financial services)
- Banco del Estado de Chile (financial services)
- Banco Falabella (financial services)
- Banco Santander Celulosa Arauco y Constitución (resources)
- Corpbanca (financial services)
- CCNI (shipping)
- CODELCO (resources)
- Empresas Banmédica (healthcare)
- Empresa Nacional del Petróleo (energy)
- ENAER (defence / aircraft maker)
- Falabella (retail)
- Fábricas y Maestranzas del Ejército (FAMAE) (defence)
- Grupo Compañía General de Electricidad SA (CGE) (energy)
- Ripley S.A. (retail)
- Sigdo Koppers (SK) (conglomerate)

#### Business Associations

- *Cámara Chilena de la Construcción*
- *Generación Empresarial*
- SOFOFA

#### Registered Certifiers of Offence Prevention Models

- Corp Compliance
- Efectus
- Monitorcorp
- Prelafit Compliance

### Legal Profession and Academics

- *Colegio de Abogados de Chile*

### Accounting and Auditing Profession

- Chilean College of Accountants (*Colegio de Contadores de Chile*) (CCCh)
- *Instituto de Auditores Internos de Chile A.G.*
- AGN Abatas Auditores Consultores Limitada
- Baker Tilly Chile Auditores Consultores Limitada
- Deloitte
- Ernst & Young
- KPMG
- PKF Chile Auditores Consultores Limitada
- PwC

### Civil Society

- *Chile Transparente* (Transparency International)
- *Central Unitaria de Trabajadores de Chile*
- *Grupo Copesa*
- *CIPER Chile*

### ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

AGCI	<i>Agencia de Cooperación Internacional de Chile</i> (official development assistance)	OAS	Organization of American States
AML	anti-money laundering	ODA	official development assistance
BCACL	Bank Current Accounts and Cheques Law	PC	Penal Code
BRICRIM	<i>Brigada de Investigación Criminal</i> (Criminal Investigation Brigade, PDI)	PCGA	<i>Principios Contables Generalmente Aceptados</i> (Generally Accepted Accounting Principles in Chile)
BRILAC	<i>Brigada Investigadora de Lavado de Activos</i> (Money Laundering Investigation Brigade, PDI)	PDI	<i>Policía de Investigaciones de Chile</i> (investigative police)
CCCh	<i>Colegio de Contadores de Chile</i> (Chilean College of Accountants)	PEP	politically exposed person
CLP	Chilean pesos	PPO	Public Prosecutor's Office ( <i>Ministerio Público</i> )
CORFO	<i>Corporación de Fomento de la Producción de Chile</i> (export credits)	SBIF	<i>Superintendencia de Bancos e Instituciones Financieras Chile</i> (Superintendent of Banks and Financial Institutions)
CPC	Criminal Procedure Code	SII	<i>Servicio de Impuestos Internos</i> (Internal Taxation Service)
EUR	euro	SME	small and medium-sized enterprise
FATF	Financial Action Task Force	SOE	state-owned or state-controlled enterprise
FCPA	U.S. Foreign Corrupt Practices Act 1977	STR	suspicious transaction report
FIU	Financial Intelligence Unit	SVS	<i>Superintendencia de Valores y Seguros</i> (Securities and Insurance Superintendence)
GAFISUD	<i>Grupo de Acción Financiera de Sudamérica</i> (Financial Action Task Force of South America)	UAF	<i>Unidad de Análisis Financiero</i> (Financial Analysis Unit)
GBL	General Banking Law	UF	<i>unidades de fomento</i> (unit of account)
GNECC	<i>Grupo Nacional de Expertos contra la Corrupción</i> (National Group of Experts against Corruption)	ULDDECO	<i>Unidad Especializada en Lavado de Dinero, Delitos Económicos y Crimen Organizado</i> (Specialised Unit in Money Laundering, Economic Offences and Organised Crime, PPO)
IFRS	International Financial Reporting Standards	UN	United Nations
ISA	International Standards on Auditing	UNAC	<i>Unidad Especializada Anticorrupción</i> (Specialised Anti-Corruption Unit, PPO)
MESICIC	Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption	UNCAC	United Nations Convention against Corruption
MOFA	Ministry of Foreign Affairs	USD	United States dollar
MLA	mutual legal assistance	UTM	<i>unidades tributarias mensuales</i> (monthly tax units)
MOJ	Ministry of Justice		
NGO	non-governmental organisation		

## ANNEX 4 EXCERPTS OF RELEVANT LEGISLATION

### Foreign Bribery Offence (Penal Code Article 251bis and 251ter)

#### Book Two Crimes And Offenses And Penalties Simple

#### Title V Of Crimes And Crimes Committed By Simple Employees In The Performance Of Its Charges

#### § 9a. Bribery of Foreign Public Officials

**Section 251bis.** He who offers, promises or gives a foreign public official a benefit of an economic or other nature, for that official or a third person, to act or refrain from acting in order to obtain or retain – for him or a third party – any improper business or advantage in the field of any international transactions shall be punished with short-term confinement, medium to maximum degree, and with the fine and disqualification referred to in article 248bis, indent one. Should the benefit have a non-economic nature, the fine will range from one hundred to one thousand monthly tax units. The same penalties shall be imposed on he who offers, promises or gives the said benefit to a foreign public official for his/her having acted or refrained from acting.

He who, in the same situations described in the above indent, consents to give the said benefit, shall be sanctioned with short term confinement, from minimum to medium degree, besides the same penalties of fine and disqualification.

**Section 251ter.** For the purposes of the provisions of the preceding article, it is considered a foreign public official any person holding a legislative, administrative or judicial office in a foreign country, whether appointed or elected, and any person exercising a public function for a foreign country, whether within a public body or a public company. It shall also mean any official or agent of a public international organisation.

### Liability of Legal Persons(Law 20 393)

**First Article.** The following Act on criminal responsibility of legal persons is hereby approved:

**Article 1. Contents of the Act.** This Act regulates the criminal responsibility of legal persons in respect of offenses mentioned in Article 27 of Act No. 19 913, Article 8 of Act No. 18,314 and Articles 250 and 251 bis of the Criminal Code, the procedure for the investigation and establishing of such criminal responsibility, the determination of applicable penalties and the enforcement thereof.

As to those matters not covered by this Act the provisions contained in Book I of the Criminal Code and in the Criminal Procedure Code, and in the special laws set forth in the preceding indent, where appropriate, shall apply.

For the purpose of this Act, Article 58, indent 2, of Criminal Procedure Code shall not apply.

**Article 2. Scope.** The provisions of this Act shall apply to private legal persons and to State companies.

#### Chapter I. Criminal Responsibility Of Legal Persons.

##### *1. Attachment of criminal responsibility to legal persons.*

**Article 3. Attachment of criminal responsibility.** Legal persons shall be responsible for the offenses listed in Article 1, when directly and immediately committed in their own interest or for their own benefit by their owners, controllers, responsible officers, principal executives officers, representatives or those conducting activities of administration and supervision, provided that the commission of the offense results from the breach of the legal person's direction and supervisory functions.

Under the same assumptions of the preceding indent, legal persons shall also be responsible for the offenses committed by individuals who are under the direction or supervision of any of the subjects mentioned in the preceding indent.

It shall be considered that the functions of direction and supervision have been met if, before the commission of the offense, the legal person had adopted and implemented organization, administration and supervision models, pursuant to the following article, to prevent such offenses as the one committed.

Legal persons shall not be responsible in the event that the individuals mentioned in the preceding indents have committed the offense exclusively in their own advantage or in favour of a third party.

**Article 4. Offenses prevention model.** For the purpose of the third indent of the preceding article, legal persons may adopt the prevention model referred to therein, which shall contain at least the following elements:

- (1) Appointment of a prevention officer.
  - (a) The maximum administrative authority of the legal person, whether its board of directors, an administrating partner, manager, a principal executive officer, an administrator, a liquidator, its representatives, owners or partners, as appropriate to the form of administration of the legal person, hereinafter “the Administration of the Legal Person”, shall appoint a prevention officer, who shall remain in office for up to three years, renewable for equal periods.
  - (b) The prevention officer shall be autonomous from the Administration of the Legal Person and from its owners, partners, shareholders or controllers. Notwithstanding, he may perform control or internal audit functions.

In the case of legal persons whose annual income does not exceed one hundred thousand “*unidades de fomento*”, the owner, partner or controlling shareholder may personally undertake the functions of the prevention officer.

- (2) Definition of means and faculties of the prevention officer.

The Administration of the Legal Person shall provide the prevention officer with sufficient means and faculties for the performing of his functions, including at least the following:

  - (a) The material means and resources necessary to conduct his functions properly, taking into consideration the size and economic capacity of the legal person;
  - (b) Direct access to the Administration of the Legal Person to promptly inform it, through appropriate channels, on the implemented measures and plans in the accomplishment of his mission, and to render account of his management at least half-yearly.

- (3) Establishment of an offenses prevention system.

The prevention officer shall, in conjunction with the Administration of the Legal Person, establish an offenses prevention system for the legal person, which shall at least contemplate the following:

  - (a) Identification of the activities or processes of the entity, whether habitual or sporadic, in the context of which the risk of committing offenses listed in article 1 emerges or increases.
  - (b) Establishment of specific protocols, rules and procedures that permit to persons involved in the activities or processes indicated in the foregoing letter “(a)”, to program and implement their tasks or functions in a manner that prevents the commission of the said offenses;
  - (c) Identification of the procedures for administrating and auditing the financial resources that permit the legal person to prevent their use in the commission of the aforementioned offenses;
  - (d) The existence of internal administrative sanctions, as well as the procedures for reporting or pursuing pecuniary responsibility against the persons who fail to comply the offenses prevention system.

These internal obligations, prohibitions and sanctions shall be stated in the regulations to be adopted by the legal person to that effect, and shall be communicated to all workers. This internal regulation shall be expressly incorporated in the respective employment contracts and agreements on rendering services of all workers, employees and suppliers of services of the legal person, including its maximum executive officers.

- (4) Supervision and certification of the offenses prevention system.
  - (a) The prevention officer shall, in conjunction with the Administration of the Legal Person, establish methods for the effective application of the offenses prevention model and its supervision, so as to detect and correct its failures and to update it according to the change of circumstances of the respective legal person.
  - (b) Legal persons may obtain certification of the adoption and implementation of its offenses prevention model. Such certificate shall attest that the model meets all the requirements set forth under numbers (1), (2) and (3) above, in connection with the situation, size, scope of business, level of income and complexity of the legal person.

Certificates may be issued by external auditing companies, risk rating societies or other entities registered with the Securities and Insurance Superintendence, which are able to perform this function in accordance with the regulations established by the aforementioned Comptroller Organ, for this purpose.
  - (c) It shall be understood that individuals participating in certification activities conducted by the entities mentioned in the preceding letter “(b)” perform a “public function” in terms of article 260 of the Criminal Code.

**Article 5. Autonomous Criminal Responsibility of the Legal Person.** The Responsibility of the legal person shall be autonomous from the criminal responsibility of individuals, and shall subsist where the requirements prescribed by article 3 are present and, in addition, one of the following situations takes place:

- (1) Individual criminal responsibility shall have extinguished in accordance with numbers 1 and 6 of Article 93 of the Criminal Code.
- (2) In the criminal proceeding instituted against individuals set forth in the first and second indent of article 3, temporary dismissal of the alleged offender or alleged offenders is decreed according to the grounds set forth in letters “(b)” and “(c)” of article 252 of the Criminal Procedure Code.

Such responsibility may also be prosecuted when, having proved the existence of any of the offenses of article 1, and the other requirements prescribed by article 3 have met, it has not been possible to establish the participation of the responsible individual or individuals, provided that it is irrefutably proved in the respective proceeding that the offense must have been necessarily committed in the scope of the functions or faculties proper to the persons mentioned in the first indent of the said article 3.

### ***2. Circumstances mitigating criminal responsibility of a legal person.***

**Article 6. Mitigating circumstances.** The following circumstances shall be regarded as mitigating the criminal responsibility of legal persons:

- (1) The one prescribed by number 7, article 11 of the Criminal Code;
- (2) The one prescribed by number 9, article 11 of the Criminal Code. It shall be especially understood that the legal person substantially collaborates when at any stage of the investigation or judicial proceeding, its legal representatives, before taking notice that a judicial proceeding has been brought against the legal person, have reported the criminal offense to the authorities or supplied information to ascertain the facts under investigation.
- (3) Adoption by the legal person, before the initiation of the legal proceeding, of effective measures to prevent the repetition of the same kind of offenses under investigation.

### ***3. Circumstances aggravating criminal responsibility.***

**Article 7. Aggravating circumstance.** A circumstance is considered to aggravate criminal responsibility of a legal person if it has been convicted for the same offense in the past five years.

## **Chapter II Consequences Of The Declaration Of Criminal Responsibility Of The Legal Person**

### ***1. Penalties in general.***

**Article 8. Penalties.** Legal persons shall be subject to one or more of the following penalties:

- (1) Dissolution of the legal person or cancellation of its legal status;  
This penalty shall not apply to State companies or to private legal persons that provide a public utility service the interruption of which might cause grave social and economic consequences or serious damage to the community as a result of the application of such penalty.
- (2) Permanent or temporary prohibition from entering into acts and contracts with State organs;
- (3) Permanent or temporary loss of fiscal benefits, or absolute prohibition from receiving the same for a specified period of time;
- (4) Fine for fiscal benefit;
- (5) The ancillary penalties prescribed by article 13.

**Article 9. Dissolution of the legal person or cancellation of its legal status.** Dissolution or cancellation will result in permanent loss of status of a legal person.

The judgment decreeing dissolution or cancellation of a legal person shall, according to its type or legal nature and in the absence of an express legal provision to govern it, designate the liquidators in charge of liquidating it. Likewise, and in equal conditions, it shall entrust them with the execution of acts or contracts necessary to:

- (1) Conclude every activity of the legal person, except for those being required for the success of liquidation;
- (2) Pay the liabilities of the legal person, including those deriving from the commission of the offense. The terms of these debts shall be understood to have expired by operation of law, thus becoming immediately payable and its payment shall be made in full respect of the preferences and credit precedence established by Chapter XLI, Book IV of the Civil Code, particularly the rights of workers of the legal person, and

- (3) Distribute the remaining property among the shareholders, members, owners or proprietors pro rata their respective interest. The foregoing shall be understood without prejudice to the right of the affected persons to proceed against the offenders for obtaining any reparation for damages. In case of stock corporations, the provisions of article 133 bis of Act No. 18,046 shall apply.

However, where the social interest so warrants, the judge may, by a grounded resolution, order the disposal of all or part of the assets of the dissolved legal person, as a set or economic unit at a public auction and to the best bidder. This shall take place before the judge himself.

This penalty may be imposed only in cases of crimes where the aggravating circumstance established in article 7 is present. Likewise, it may be applied when convicting for crimes committed repeatedly according to the provisions of article 351 of the Criminal Procedure Code.

**Article 10. Prohibition to engage in acts and contracts with State organs.** This prohibition consists in the loss of the right to participate as supplier of goods and services to State organs.

To determine this penalty, the Court shall abide by the following scale:

- (1) Permanent prohibition to enter into acts and contracts with State organs.
- (2) Temporary prohibition to enter into acts and contracts with State organs. Its duration shall be rated as follows:
  - (a) Lowest degree: two to three years;
  - (b) Medium degree: three years and one day to four years;
  - (c) Highest degree; four years and one day to five years.

Such prohibition shall apply from the date on which the judgment becomes enforceable. The Court shall give notice of this circumstance to the Directorate for Public Procurement. Such Directorate shall keep an updated register of legal persons to which it has been imposed this penalty.

**Article 11. Partial or total loss of fiscal benefits or absolute prohibition from receiving the same for a specified period.** For the purpose of this Act, fiscal benefits shall be those benefits granted by the State or its organs by way of subventions without reciprocal supply of goods or services and, in particular, subsidies for financing specified activities or special programs and expenses inherent in or associated to their implementation, whether such resources be allocated through Contestable Funds or under permanent laws or subsidies, subventions in special areas or benefits established by special statutes and other similar ones.

This penalty shall be graded as follows:

- (1) Lowest degree: loss of twenty to forty percent of the fiscal benefit.
- (2) Medium Degree: loss of forty-one to seventy percent of the fiscal benefit;
- (3) Highest Degree: loss of seventy-one to one hundred percent of the fiscal benefit.

If the legal person is not entitled to such fiscal benefits, the sanction applicable may be the absolute prohibition to obtain them for a period of two to five years from the date on which the judgment declaring its responsibility becomes enforceable. The Court shall give notice of the imposition of this sanction to the General Administration Secretariat of the Ministry of Finance and to the Regional and Administrative Development Under-Secretariat of the Ministry of the Interior, so that it is entered in the main records of collaborators of the State and Municipalities, which are respectively bound to keep under Act 19,862.

**Article 12. Fine for Fiscal benefit:** This penalty shall be rated as follows:

- (1) Lowest Degree: from two hundred to two thousand monthly tax units (*unidades tributarias mensuales*).
- (2) Medium Degree: from two thousand and one to ten thousand monthly tax units.
- (3) Highest Degree: from ten thousand and one to twenty thousand monthly tax units.

The Court may authorize that the payment of a fine be made in instalments within a time limit not exceeding twenty-four months, when the quantum thereof is liable to endanger the continuity in its habitual business of the sanctioned legal person or when the social interest so warrants.

The competent Court shall, once conviction becomes enforceable, communicate the application of the fine to the Treasury General of the Republic, which shall enforce its collection and payment.

**Article 13. Ancillary Penalties.** The following ancillary penalties shall be applied in addition to those mentioned in the preceding articles:

- (1) Publication of an abstract of the judgment. The Court shall order the publication of an abstract of the decisiveness part of the judgment which imposes the penalties, in the Official Gazette or in another nationwide circulating newspaper.

The sanctioned legal person shall bear the costs of that publication.

- (2) Confiscation. The proceeds from the offense and other property, effects, objects, documents and instruments thereof shall be confiscated.
- (3) In those cases where the committed offense requires the investment of resources of the legal person in excess of its income, the payment into the Treasury of an amount equivalent to the investment made shall be imposed as an ancillary penalty.

## **2. Determination of penalties.**

**Article 14. General scale.** The penalty imposed on the legal person shall be determined in relation to the one applicable to the corresponding offense as set forth in article 1, according to the following scale:

### **GENERAL SCALE ON PENALTIES APPLICABLE TO LEGAL PERSONS.**

#### **1. Penalties for crimes.**

- (a) Dissolution of the legal person or cancellation of its legal status;
- (b) Prohibition to enter into acts and contracts with State organs in its highest to permanent degree.
- (c) Loss of fiscal benefits in its highest degree or absolute prohibition to receive them from three years and one day to five years.
- (d) Fine for Fiscal benefit in its highest degree.

In these cases, the penalties set forth in article 13 will always be applied as ancillary penalties.

#### **2. Penalties for misdemeanors.**

- (a) Temporary prohibition to enter into acts and contracts with State organs in its lowest to medium degree;
- (b) Loss of fiscal benefits in its lowest to medium degree or absolute prohibition to receive them from two to three years;
- (c) Fine in its lowest to medium degree.

In these cases, the penalties set forth in article 13 will always be applied as ancillary penalties.

**Article 15. Legal determination of the penalty applicable to the offense.** To the offenses sanctioned under articles 250 and 251 bis of the Criminal Code and under article 8 of Act 18,314, it shall be applied the penalties provided in this Act for misdemeanors according to the preceding article.

To the offense under article 27 of Act 19 913 it shall be applied the penalties for crimes according to the preceding article.

**Article 16. Circumstances amendatory of responsibility.** If a mitigating circumstance and no aggravating circumstance occur, in cases of misdemeanors, only two of the penalties contemplated under article 14 shall be applied, one of them being applied in its lowest degree. In case of crimes, the Court shall apply only two of the penalties contemplated under such article in their *minimum*, where appropriate.

If the aggravating circumstance contemplated in this Act occurs and there is no mitigating circumstance, in cases of misdemeanors the Court shall apply all the penalties in its highest degree. In case of crimes, it shall apply the penalties in their *maximum*, where appropriate, or dissolution or cancellation.

If two or more mitigating circumstances occur and no aggravating circumstance, in cases of misdemeanors, the Court shall apply only one penalty, ranging from lowest to highest. In case of crimes, the Court shall apply two penalties of those contemplated for misdemeanour.

If several mitigating circumstances and the aggravating one prescribed by this Act occur, the aggravating circumstance shall be rationally compensated with any of the mitigating circumstances, the penalties being adjusted to the foregoing indents.

**Article 17. Rules of judicial determination of the penalty.** To regulate the quantum and nature of the penalties to be imposed, the Court must, keeping a detailed record of its reasons in its ruling, consider the following criteria:

- (1) The amounts of money involved in the commission of the offense.
- (2) The size and nature of the legal person.
- (3) The financial capacity of the legal person.

- (4) The degree of observance of and compliance with laws and regulations and mandatory technical rules in the exercise of its habitual business or activity.
- (5) The extent of the damage caused by the offense.
- (6) The seriousness of the social and economic consequences or, as the case may be, the serious damages that imposing a penalty might cause to the community where a State company or a public utility company is involved.

**Article 18. Transference of criminal responsibility of the legal person.** In case of voluntary or mutually agreed transformation, merger, absorption, division or dissolution of the legal person responsible for one or more crimes referred to in article 1, its responsibility for the offenses committed prior to the occurrence of any of such acts shall be transferred to the legal persons resulting thereof, if any, according to the following rules, all that without prejudice to the rights of others acting in good faith.

- (1) If the penalty of fine is imposed, on cases of transformation, merger or absorption of a legal person, the resulting legal person shall be responsible for the total quantum. In the event of division, the resulting legal persons shall be equally or jointly responsible for payment thereof.
- (2) In cases of dissolution by mutual agreement of a for-profit legal person, the penalty shall be transferred to the members and participants in the capital thereof, who shall be responsible up to the limit of the value of the liquidation share assigned to them.
- (3) If any other penalty is concerned, the judge shall assess its convenience, depending on the pursued purposes in each case.

In order to adopt this decision, the judge shall, above all, bear in mind the substantial continuity of the material and human means and the activity being carried out.

- (4) From the request for hearing of the formalization against a non profit legal entity and until the acquittal or conviction and pending enforcement thereof, the authorization provided for in indent one, article 559 of the Civil Code shall not be granted.

### ***3. Extinguishment of the criminal responsibility of a legal person.***

**Article 19. Extinguishment of criminal responsibility.** Criminal responsibility of a legal person is extinguished on the same grounds as set forth under article 93 of the Criminal Code, except the reason contemplated under number 1 thereof.

## **Chapter III Procedure**

### ***1. Beginning of the investigation on criminal responsibility of a legal person.***

**Article 20. Investigation of criminal responsibility of legal persons.** If during the investigation of any of the offenses prescribed by article 1, the Public Prosecutors' Office takes notice of the possible participation of any of the persons referred to in Article 3, it shall extend such investigation in order to determine the criminal responsibility of the corresponding legal person.

**Article 21. Application of the rules relating to the alleged offender.** As to what is not governed by this Act, the legal provisions relating to the alleged offender, the accused person, and the convicted person, set forth in the Criminal Procedure Code and in the respective special laws, shall be applicable to legal persons, provided they are compatible with the particular nature of the legal persons.

In particular, the provisions of articles 4, 7, 8, 10, 93, 98, 102, 183, 184, 186, 193, 194 and 257 of the Criminal Procedure Code shall apply to them, rights and guarantees that may be exercised by any representative of the legal person.

**Article 22. Formalizing the investigation.** When the prosecutor deems it appropriate to formalize the proceeding against the legal person, he shall request the Guarantee Judge to summons its legal representative, in accordance with article 230 et seq of the Criminal Procedure Code. It shall be a previous requirement to proceed in this manner, at least that a hearing of formalization of the investigation has been requested or filed a requirement according to the rules of the simplified proceeding, in respect of the individual, that might involve the responsibility of the legal person as provided by indents one and two of article 3, except for those cases set forth in article 5.

Such request shall also contain the identification of the legal representative of the legal person.

**Article 23. Representation of the legal entity.** If the legal representative of the alleged offender legal person is summoned to appear in a hearing before the Court and he fails to appear without reason, the Court may order his arrest until the hearing, which shall take place within a deadline of twenty-four hours from his deprivation of liberty.

If the legal representative is not found, the prosecutor shall request the Court to appoint a criminal public defender, who shall act as *curator ad litem* on behalf of the legal person.

Anyhow, the legal person may at any time appoint a defender of its trust.

Where according to the criminal procedural legislation the presence of the alleged offender is required as a condition or requirement for a hearing, it shall be understood that such requirement has been met with the presence of the *curator ad litem* or the defender of trust, as the case may be. For that purpose, the warnings contemplated under indent one shall apply to *curator ad litem* and to the defender of trust.

**Article 24. Inapplicability of the principle of opportunity.** The provisions of Article 170 of the Criminal Procedure Code shall not apply in respect of the criminal responsibility of legal persons.

**Article 25. Conditional suspension of proceedings.** Conditional suspension of proceedings may be decreed if no sentence or other conditional suspension of the on-going proceeding exist, against the alleged offender legal person for any of the offenses prescribed by this Act.

The Guarantee Judge shall, where appropriate, order that during the suspension period, which may not be less than six months nor more than three years, the legal person be subject to one or more of the following conditions:

- (1) To pay a certain amount for fiscal benefit;
- (2) To render a particular service in favour of the community;
- (3) To report, on a regular basis, on its financial statement to the institution to be determined.
- (4) To implement a program for giving effect to the organization, administration and supervisory model referred to in article 4.
- (5) Any other condition that is considered appropriate in view of the circumstances of the particular case and proposed on reasoned grounds by the Public Prosecutors' Office.

In cases where the Judge imposes the measure outlined in number (1), he shall notify the Treasury General of the Republic.

**Article 26. Determination of the procedure applicable to the criminal responsibility of the legal person.** If the prosecutor, when requiring or accusing, according to the rules of the simplified procedure, requests the application of any of the penalties prescribed for misdemeanours in the lowest degree, the knowledge and judgment thereof shall be in accordance with the simplified rules of procedure.

If the prosecutor, when indicting, requests only a penalty of crime or misdemeanour in its medium degree, the knowledge and judgment thereof shall be made in accordance with the rules of oral trial in Chapter III of Book II of the Criminal Procedure Code.

If the prosecutor requires or accuses the individual and legal person at the same moment, the procedure applicable to individuals shall continue. The previous, shall not apply in case of penalties of crimes.

Regarding the criminal responsibility of the legal persons, monitory proceeding shall not apply.

**Article 27. Abridged Proceeding.** The proceeding established in articles 406 et seq of the Criminal Procedure Code shall be applied to determine the responsibility and to impose the sanctions established by this Act.

This procedure shall be used to knowledge and adjudicated the facts in respect of which the prosecutor requests the imposition of one or more penalties of misdemeanour.

The Court may not impose a higher or less favourable penalty than the one required by the prosecutor.

**Article 28. Defence of legal persons.** Any legal person being unable to get its own defence is entitled to ask the Judge to appoint a public criminal defender.

**Article 29. Suspension of Conviction.** If in the condemned sentence the Court imposes a penalty of misdemeanour in its lowest degree, it may, through grounded resolution and on an exceptional basis, especially considering the number of workers or the net annual sales or the export amounts of the company, decree suspension of the sentence and its effects for a period of no less than six months nor more than two years. In this case, the Court may exempt the ancillary penalty of confiscation.

In case of State companies or companies that provide a necessary public utility service the interruption of which might cause grave social and economic consequences or serious damage to the community, the Judge may decree the suspension of the penalty regardless of the imposed sentence.

If after the lapse of the period provided for in the first indent, the legal person has not been subject of a new requirement or a new formalization of the investigation, the court shall order not giving effect to the judgment and, instead, decree the final dismissal of the case.

This suspension shall not affect the civil liability resulting from the offense.

**Article Second.** The following indent two is hereby added to article 294 bis of the Criminal Code:

“When the association has been formed through a legal person, shall be imposed dissolution or cancellation of juridical status in addition, as an ancillary consequence of the penalty imposed to the responsible individuals”

**Article Third.** The following indent two is introduced to Article 28 of act No. 19 913 which creates the Financial Analysis Unit and amends several provisions on money laundering:

“When the association has been formed through a legal person, shall be imposed dissolution or cancellation of juridical status in addition, as an ancillary consequence of the penalty imposed to the responsible individuals”

## **Bank Secrecy**

### ***General Banking Law (GBL) Article 154***

**Article 154.** The deposits and other obligations of any nature received by the banks shall be subject to banking secrecy and information regarding such transactions may not be provided except to the depositor or creditor of the obligation or whomever has been expressly authorized by him or to his or her legal representative. Anyone who infringes the rule above shall be liable to a punishment of from 61 days up to three years' imprisonment.

All other transactions shall be subject to confidentiality and the banks may only disclose them to whom demonstrate a legitimate interest and provided it is not foreseeable that the knowledge of the information may cause a monetary damage to the customer. Notwithstanding, for the purpose of appraising the situation of the bank, the latter may provide access to the detailed knowledge of these transactions and the related information to specialized firms, which firms shall become subject to the provisions regarding confidentiality established in this paragraph and provided further that the Superintendency approves and registers them in the register that shall open for these purposes.

In any event, the banks may disclose the transactions indicated in the previous paragraphs, in global terms, neither individualized nor in a partial manner, only for statistical or information purposes whenever there is a public or general interest at stake, qualified by the Superintendency.

The ordinary and military courts, in cases actually before them for decision, may order the remittance of pieces of information regarding specific transactions which are directly related to the proceedings, with respect to deposits, obligations or other transactions of any nature, effected by those who have the character of parties or indicted in the same proceedings, or to order the examination thereof, if necessary.

The Public Prosecutors' Office attorney, previous court authorization, may examine or request to examine the files mentioned above, which must be directly related to the investigation they carry out.

### ***Bank Current Accounts and Cheques Law (BCACL)***

**Article 1.** The bank account is a contract under which a bank agrees to comply with orders of payment of a person to the extent of the amount of funds the person has deposited in the account or credit line stipulated.

The Bank shall maintain strict confidence, in relation to third parties, of the movement of the current account and balances, and can only provide this information to the drawer or to a person authorised by him/her expressly.

However, the courts may order the disclosure of determined items (“*determinadas partidas*”) of the current account in civil and criminal cases involving the drawer. The Public Prosecutor's Office may use the same measures in its investigations with the authorisation of the Guarantee Judge.

Moreover, in criminal investigations against public officials for offences committed in the exercise of their duties, the Public Prosecutor's Office, with authorisation of the Guarantee Judge may order the disclosure of the full movements of current accounts and corresponding balances.

### ***Tax Code as Amended by Law 20 406/2009***

**Article 62.** The Ordinary Justice may authorize the examination of information on banking operations specific persons being understood all those subjected to secret or subject to reserve, in the case of prosecutions for offenses they say regarding the fulfilment of tax obligations. Same faculty have the Tax and Customs Courts when they know of a process over sanctions under Article 161.

Also, in exercising its supervisory powers and pursuant to the provisions of Title VI of Book III, the Service may require information on banking operations specific persons being understood all those subjected to secret or subject to reserve, which result necessary to verify the accuracy and integrity of the tax returns, or lack thereof, if any. The same information may be requested by the Service to comply with the following requirements:

- i) The foreign tax administrations from where this has been agreed under an international convention signed information exchange by Chile and ratified by Congress.
- ii) arising from the exchange of information with the competent authorities of the Contracting States in accordance with the agreed on existing conventions for the avoidance of double taxation signed by Chile and ratified by Congress.

Except where specifically regulated by other laws, bank reporting requirements under secrecy or issued by the Director in accordance with the preceding paragraph shall be subject to the following procedure:

- 1) The Service, through its National Directorate shall notify the bank, requesting to furnish the information within that there is fixed, which may not be less than forty -five days from the date of the respective notification. The request must meet at least the following requirements:
  - a) Contain the identification of the owner of the bank information requested;
  - b) Specify the operations or banking products, or types of banking operations, for which information is requested;
  - c) Report the periods covered by the application, and
  - d) State whether the information is requested to verify the accuracy and integrity of the tax returns of the taxpayer or the lack of them, if any, or to comply with a request for information from those indicated in the previous paragraph, identifying the applicant party and the background of the application.
- 2) Within five days of notification, the bank shall notify the holder of the information required, the existence of the application and scope of service. The notification must be made by registered letter sent to the address you have registered with the bank or by email, when as agreed upon or expressly authorized. Any dispute arising between the bank and the owner of the required information regarding the shortcomings in this communication, or the lack of it, will not affect the running of the period referred to above paragraph. The lack of communication from the bank will hold you responsible for the damage that it can be followed to the holder of the information.
- 3) The holder can answer the request to the bank within 15 days beginning on the third day after the notice is sent by registered letter or email referred to the number 2) of this subsection. If your response holder authorizes the bank information to deliver information to the Service, it must comply with the request without further ado, within given.

Likewise shall the bank in cases where the taxpayer would have authorized in advance to give the service information subject to secrecy or confidentiality, when requested in accordance with this article. This authorization must be expressly given in a paper exclusively for this purpose. In this case, the bank will be released from the procedure provided for in item 2) of this subsection. The taxpayer can always revoke, in writing, the authorization for the bank, which shall take effect from the date on which the revocation is received by the bank.

A lack of authorization, the bank can not comply with the request or the service requires it, unless the latter notifies a judgment as authorized in accordance with the provisions of the following article.

- 4) Within five days following the date of expiry of the deadline for response of the owner of the information, the bank must submit a written report to the Service on whether it has occurred or not, and their contents. In this communication, the bank must indicate the registered address on him by the owner of the information, as well as e-mail, in case of having this last antecedent. In addition, if applicable, will be drawn if the owner of the information has ceased to be a customer of the bank.
- 5) Welcome the intention of the Service by final judgment, he shall notify the accompanying bank authorized copy of the court's decision. The bank shall have a period of ten days for delivery of the requested information.
- 6) The delay or omission of all or part of the delivery of the information by the bank will be punished in accordance with the provisions of the second paragraph of section 1 of Article 97.

Banking information subject to secrecy or subject to reservation, obtained by the Service under this procedure shall be considered reserved in accordance with the provisions of Article 35 and may only be used by it to verify the accuracy and completeness of the statements of taxes, or lack thereof, if any, for the collection of taxes owed and to implement necessary sanctions. The Service shall adopt internal organizational measures needed to secure

your booking and check their suitability. Information collected that will not lead to an audit or collection management post, should be eliminated, unable to remain in the service databases.

The authorities or officers of the Service to take knowledge of secret or confidential banking information will be required to complete the strictest and reservation on it and, unless the cases mentioned in the second paragraph may not assign or communicate it to others. Violation of this requirement shall be punished with the penalty of imprisonment in any degree and a fine of ten to thirty UTM. In addition, such violation will result in administrative responsibility and is punishable by dismissal.