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# The Legal 500 Country Comparative Guides

## Argentina

# BRIBERY & CORRUPTION

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Argentina.

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## ARGENTINA

# BRIBERY & CORRUPTION



### 1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

Bribery and corruption are criminalized for individual persons in the Argentine Criminal Code (“ACC”), Title XI (“Crimes against the public administration”). Legal persons’ criminal liability for bribery and corruption offenses is established in Law 27,401. Also relevant are the Law N° 25.188 on Public Ethics, Executive Decree N° 1179/2016 on Gifts to Public Officials, the Anticorruption Office’s Resolution 18 E/2017, further regulating gifts and hospitality to public officials, Law No. 27.504 on Political Financing, and the Anticorruption Office’s “Integrity Guidelines to better comply with articles 22 and 23 of Law 27401 of Legal Persons’ Criminal Liability”, and “Guidance for the Implementation of Integrity Programs at Small and Medium Sized Enterprises”.

### 2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

The main enforcement authorities are the Public Prosecutor’s Office (Public Ministry of the Prosecution; or “MPF” for its acronym in Spanish), as well as investigative magistrates, in charge of the investigation stage of the criminal procedure, and criminal courts, responsible for adjudication. Besides, both the Prosecutor’s Office of Administrative Investigations (“Procuraduría de Investigaciones Administrativas”, or “PIA”, for its acronym in Spanish) within the MPF, and the Anti-Corruption Office (“Oficina Anticorrupción”, or “OA”, for its acronym in Spanish), an administrative agency within the Ministry of Justice and Human Rights of the Executive Branch, are empowered to investigate and participate in the prosecution of bribery and corruption offenses. Argentina is a federal country. The federal government co-exists with 24 districts, comprised of 23 provinces and the autonomous city of Buenos Aires. By constitutional design, the provincial governments keep authority over criminal procedure

law, so the procedural model varies across the country. Federal offences (including bribery and corruption offenses, among other economic crimes) are subject to federal jurisdiction, whereas criminal investigation is still in charge of an investigative magistrate, who has the power to delegate this task to a prosecutor –an inquisitorial-oriented procedural model. A new Federal Criminal Procedure Code establishing an adversarial model, in which prosecutors investigate under a judge’s control and adjudication, was approved by Congress in 2018. However, its implementation will be gradual –it has entered into force in two provinces (Salta, and Jujuy), and will be enforced in the remaining provinces according to a 5-to7-years calendar. In these guidelines, when we refer to criminal procedure law we always refer to federal criminal procedure law.

### 3. How is bribery defined?

The ACC defines active bribery as giving or offering any gift to a public official, either personally or through an intermediary, in order for him/her to do, delay or omit to do certain actions relating to his/her public duties or activities (art. 256). The ACC also punishes active trading in influence, defined as giving a gift or anything of value to any person in order for him or her to make an unlawful use of his/her influence before a public official with the purpose of having such official acting, delaying or refraining from acting in relation to his or her duties (art. 258). Passive bribery and passive trading in influence are committed by the public official receiving or accepting, directly or indirectly, money or any other gift or thing of value in any of the aforementioned circumstances. (ACC, arts. 256, 256 bis and 257). The Argentine Criminal Code also considers an offense (different from bribery) to give or offer a gift to a public official in consideration to his/her office. To commit this “mere gift giving/offering” offense (“dádivas”), no specific quid pro quo is required –the sole giving or offering in consideration to the public post is enough for the offense to be completed (ACC, art. 259). The public officer who receives gifts in consideration for his/her public position is also criminalized (gift receiving). Finally, the ACC also punishes active transnational

bribery, defined as improperly giving, offering or promising, personally or through an intermediary, own benefit or that of a third person, any gift to a public officer from a different state (understood as any person appointed or elected to perform a public function in any of the state's levels or territorial divisions of government, or in any class of an body, agency or public company where said State exerts a direct or indirect influence) or international organization in order for him/her to act or delay an action in relation to his or her duties, or in order to use his/her influence in a commercial operation (art. 258 bis, ACC).

#### **4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?**

The ACC does not prohibit private bribery, except for the case of financial passive bribery –Article 312 prohibits employees or staff members of financial institutions, or institutions which operate in the stock market, from receiving money or any other economic advantage as a condition to engage in loans, financial or stock capitalization transactions. However, certain private bribery cases could be construed as fraudulent mismanagement, if a private bribe taker has management functions, and the company suffers economic loss due to the bribe (ACC Art. 173.7). The ACC defines public official as any person who takes part, incidentally or permanently, in the exercise of public functions whether by popular vote or by appointment of the competent authority (art 77). According to the Public Ethics Law, public function means “every activity, permanent or temporary, paid or honorary, performed by a person in the name or service of the State or any of its entities, at any hierarchical level” (Law 25188, art. 1).

#### **5. What are the civil consequences of bribery in your jurisdiction?**

Broadly speaking, the Argentine Civil and Commercial Code (ACCC) establishes a duty to avoid causing an unjustified harm (ACCC art. 1710). The breach of this duty creates an obligation to compensate the generated torts (ACCC art. 1716). Besides, the Antitrust Law No. 27442 establishes a tort action against those who violate the free competition regime. Although there is no case law, it could be argued that in the context of a bidding process, a bribe paid in order to win a contract rises a right to compensation for the excluded competitors of such procedure. On the other hand, if anti-bribery

clauses were in place in a contract, a plaintiff (an investor, business partner, competitor in a procurement process, etc.) may take the non-compliant party to trial for damages. Also, Decree No.1023/2011 establishes in its article 10 that public contracts tainted with corruption will be terminated. Additionally, the Argentine Government has recently issued the Emergency Decree 62/2019 which sets a Procedural Regime for Civil Action that will apply to nonconviction based asset forfeiture. The Decree establishes a civil action in favour of the Federal Government, which applies to the goods or titles that are allegedly the result of certain crimes, including bribery. This civil proceeding is autonomous from any conviction issued by a criminal court. The final judgment will be res judicata regarding the goods or rights involved, regardless of the outcome of any other judicial action. However, the final judgment of dismissal or acquittal issued at the criminal court, based on the inexistence of the fact under investigation or in which said fact does not fit into a legal figure, will oblige the Federal Government to restore the property or right (or, when that's impossible, an equivalent value in money) to its previous owner.

#### **6. What are the criminal consequences of bribery in your jurisdiction?**

For individuals, criminal consequences might be: Prison between 1 and 6 years for basic bribery and trading in influence, and transnational bribery, between 4 and 12 years when bribery and trading in influence are aggravated for involving a magistrate of the Judiciary or the Public Ministry (for him/her to issue, decree, delay or refrain from issuing any resolution, decision or judgment concerning a matter under his/her jurisdiction). between 1 month and 2 years for mere improper gift receiving (“dádiva”) between 1 month and 1 year for mere improper gift giving (“dádiva”). Fine of between 2 to 5 times the amount of the illicit benefit; Disqualification from public service (life disqualification in the cases of passive bribery, trading in influence, and transnational bribery); Confiscation For legal entities, criminal consequences might be: Fines between 2 and 5 times the amount of the illicit benefit; Debarment from government contracting and disqualification from professional practice/suspension of licence up to ten years; Partial or total suspension of activities up to ten years; Suspension from participating in state tenders of public works or services or in any other activity linked to the state, up to ten years; Dissolution or liquidation of the business when it has been created for the sole purpose of the commission of the offence, or when those acts constitute its main activity; Loss or suspension of state benefits; Publication of an excerpt of the conviction sentence; Confiscation. Sanctions are only applicable by

courts under a final judgement. Nevertheless, courts may order precautionary measures against defendants, including seizing and freezing of assets (embargo) to guarantee an eventual confiscation, and preventative detention in the case of individual defendants.

### **7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?**

There is a general regime that regulates gifts giving to public officials (including hospitality and entertainment expenses) and a specific framework regulating travel and lodging. Public Ethics Law, No. 25188 establishes a general prohibition for public officials to accept gifts given in relation to their public functions, unless they were given out of courtesy or diplomatic custom. Article 2 of said Act establishes that all persons performing public functions at all levels and hierarchies, permanently or temporarily, by election, direct appointment, competition or any other legal means, including all state magistrates, officials and employees must refuse any improper personal benefit derived of the realization, delay or abstention from an act inherent to his/her functions, or imposing special conditions deriving on a benefit. Furthermore, Article 18 of the Law provides that public officials may not receive presents, gifts, or donations, whether of things, services or assets, in return for performance of their duties or in the course thereof. Should the gifts be given out of courtesy or diplomatic custom, the enforcement authority shall draw up rules on their registration and on the cases and manner in which they should become the property of the State, in order to be allocated for use in the areas of health, welfare, and education, or to be made part of the country's historical and cultural heritage, as appropriate. Executive Decree 1179/2016 regulates the implementation of Article 18 of the Public Ethics Act. It reiterates the general prohibition for public officials from receiving any gifts, with the exception of those given for reasons of courtesy or diplomatic custom. Courtesy is defined as "demonstrations or acts which manifest the attention, respect or affection that one person has in regard to another on the occasion of events in which it is habitual to give [gifts]". Diplomatic custom signifies, "protocol recognitions received from governments, international organisms or non-profit entities, under the conditions in which the Law or the official custom admit these benefits." The acceptance of any gift, even those given out of courtesy or diplomatic custom, is banned when they come from a forbidden source. Forbidden sources are: a. Any person or entity carrying out activities regulated or controlled by the State agency or

entity in which the public official is acting; b. Any person or entity managing or exploiting concessions, authorizations, privileges or customs duty exemptions granted by the agency or entity in which the public official is acting; c. Any person or entity who is a contractor or supplier of works, goods or services to the agency or entity in which the public official is acting; d. Any person or entity requesting a decision or action from the agency or entity in which the public official is acting; e. Any person or entity that has interests which could be significantly affected by a decision, action, delay or omission of the agency or entity in which the public official is acting (Decree 1179/2016, Article 4). There is only one scenario in which gifts given out of courtesy or diplomatic custom by a forbidden source are allowed - when they are given "during an official visit, event or public activity, a situation the reasonableness of which shall be assessed in light of the competence, powers and responsibilities of each public official." (Decree 1179/2016, article 4, last paragraph). Decree 1179/2016 also regulates travel and lodging expenses. Public officials may only accept the payment of travel expenses by third parties in order to participate in conferences, courses or academic activities; only when the financing originates from governments, entities, natural or legal persons that are not forbidden sources; and only when doing so is not incompatible with their public functions. All permissible gifts and travel must be registered in the Registry of Gifts to Public Officials (including things, donations, benefits, or rewards). The OA (OA)'s Resolution 18 E/2017 regulated the Gifts and Travel Registry. The public official receiving the gift must file an electronic form describing the gift's characteristics (e.g. the exception—either courtesy or diplomatic custom—allowing it, its type, and its value), the details of the public officer receiving it (e.g. name, jurisdiction, hierarchy, function, etc.), the destination that the gift will have (e.g. education, public health, etc.), the circumstances in which the gift was given (e.g. official activity, public officer's office) and information about the person or company making the gift. In the case of public officials' travels paid by third parties, the public official must inform the dates and destination of the travel, who is paying for the trip, details of the event to which he/she is invited, and his/her role during the event (e.g. attendee, teacher, speaker, etc.). The Gifts and Travel Registry is available at: <https://www.argentina.gob.ar/anticorrupcion/obsequiosyviajes>. Finally, Decree 1179/2016 also establishes that all gifts that surpass a certain value threshold, currently set in 12,000 Argentine pesos (around USD 120, at the May 2021 official exchange rate) must be incorporated by the public official that received them to the State's property, unless they are edible. Gifts received out of diplomatic custom that do not exceed this value must as well be incorporated to State property when they

possess institutional value.

## 8. Are political contributions regulated?

Law No. 27.504, of Political Parties Financing, which entered into force in June 6, 2019, establishes a mixed model by which political parties will obtain their resources through public and private financing for the development of their ordinary operations and activities. The following contributions are not allowed: - Anonymous contributions; - Contributions from companies that have contracts with Federal, Provincial or local authorities; - Contributions from casinos and any other form of gambling businesses; - Contributions from foreign governments, or institutions, or companies that are not incorporated in the country; - Contributions from individuals or legal entities that have been indicted or sued for tax evasion; Contributions per person (either individuals or legal entities) may not exceed a limit that will be established by the National Electoral Chamber every year; Money contributions should only be made by bank transfer, bank deposit accrediting identity, electronic means, check, credit or debit card, or digital platforms and applications provided that they allow the adequate identification of the donor and traceability of the funds. Whoever makes a contribution to a political group in any instance must issue a sworn affidavit representing that he/she/it does not fall under any of the prohibitions foreseen in the law. Companies and individuals that breach the provisions of the law may be fined with 1 to 10 times the value of the illicit contribution.

## 9. Are facilitation payments regulated? If not, what is the general approach to such payments?

There is no defence for, or special regulation of facilitation payments in Argentine law. Any payment made to a public official in order for him/her to do anything related to his or her public function will trigger liability for bribery, or, in lack of a quid pro quo for mere gift giving. There are no value thresholds, or legal limits applicable in consideration of the amount of the payment -although case law and the legal doctrine have taken the approach that "small gifts," meaning presents that lack in economic or pecuniary value, are out of the scope of the offense.

## 10. Are there any defences available?

There are no bribery-specific defences for individuals, although those who are able to prove that the payment was a consequence of an extortive demand, or a

deception from a public official, could claim that instead of being committing the offense of active bribery they were victims of an "illegal exactions" offence ("exacciones ilegales") under the ACC, article 266. This offense is committed by a public officer which, by abusing his or her office, requests, demands, asks or forces to pay an illegitimate contribution or higher rights than those that correspond. Legal persons will be exempted from penalty and administrative liability under Law 27,401 when three (3) circumstances concur simultaneously: -the legal person must spontaneously self-report the offense as a consequence of internal detection and investigation; -the legal person must have established, before the facts under investigation occurred, a proper control and supervision system (i.e. compliance program, called "integrity program" by Argentine law), which must have required an effort from wrongdoers to breach it; and - the legal person must have returned the undue benefit obtained through the crime (disgorgement).

## 11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

Having a compliance program in place is not enough by itself to exempt a legal person from liability, although concurring with the other 2 conditions described in the previous answer, it may be considered by courts to exempt legal persons from punishment. Besides, according to Section 8 of Law 27401, to graduate the penalty, courts will take into account the internal proceedings of the legal entity, the omission of vigilance over the activity of the authors and participants, and if a company spontaneously reported irregularities revealed by an internal investigation. Under Sections 22 and 23 of Law 27401, to be considered adequate, a compliance programme must: Be appropriate to the specific risks of the activities, size, and economic capacity of the legal entity; Include a Code of Ethics, and internal policies to prevent crimes in any interactions with the public sector, and Lay out periodic training on the Compliance Programme to directors, administrators and employees. Additionally, the programme may contain the following elements: A periodical analysis of risks and consequent adaptation of the compliance program; Visible and unequivocal support to the compliance program from the senior management (tone at the top); Internal channels to report irregularities, open to third parties and adequately publicized; A policy to protect whistleblowers against retaliation; An internal investigations system that respects the rights of the investigated and imposes effective sanctions for breaches of the Code of Ethics; Procedures which attest the integrity and track record of third parties or business partners, including

suppliers, distributors, service providers, agents and intermediaries, on the moment of contracting their services and during the commercial relationship; Due diligence during the process of corporate transformations and acquisitions, for the verification of irregularities, illicit conducts or the existence of vulnerabilities in the involved corporations; Monitoring and continuous evaluation of the Compliance Programme's effectiveness; An internal authority in charge of the development, coordination and supervision of the compliance program (compliance officer); and Compliance with the statutory demands over compliance programmes that were issued by the authorities of the national, provincial, municipal, or communal levels of Government.

## 12. Who may be held liable for bribery? Only individuals, or also corporate entities?

As explained before, Law 27401 establishes criminal corporate liability for private legal persons, as defined in the Argentine Civil Code, including: Companies incorporated under any legal form (LLCs, PLCs, partnerships, etc.) whether of national or foreign capital and including private legal persons in which the State is a shareholder; Civil associations, foundations, mutual associations, cooperatives; Churches, confessions, religious communities or entities, and; Horizontal property regimes. Notably, labour unions and their healthcare associations ("obras sociales sindicales"), professional associations and political parties are not considered "private legal persons" under Argentine law. Therefore, these entities are out of the statute's reach. Private legal persons are liable for the corruption offenses committed, directly or indirectly, with their intervention or in their name, interest or benefit. The individual offenders may be employees or third parties — even unauthorized third parties, provided that the legal person ratified the act, even tacitly. The statute also establishes successor liability in cases of merger, acquisition or other forms of corporate transformation.

## 13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?

The OA issued "Integrity Guidelines to better comply with articles 22 and 23 of Law 27401 of Criminal Liability for legal entities"<sup>[1]</sup>. These Guidelines explain further the main elements of integrity programs which are listed in Law 27,401 as described in answer to question No. 11.

Besides, the OA issued a specific guidance for the implementation of integrity programs at small and medium sized enterprises.<sup>[2]</sup> An adequate compliance program must be tailored to each legal entity taking into consideration its own needs, characteristics and culture, as well as the context in which it operates and its associated risks.

## References

<sup>[1]</sup> Anti-Corruption Office, Guidelines for the Implementation of Integrity Programs (2018). Available in Spanish at: <https://www.argentina.gob.ar/anticorrupcion/implementacion-programas-integridad>

<sup>[2]</sup> Anti-Corruption Office, Guidance for the Implementation of Integrity Programs at Small and Medium Sized Enterprises (2019). Available (in Spanish) at: <https://www.argentina.gob.ar/noticias/la-oa-publico-la-guia-de-integridad-para-pymes>

## 14. Does the law provide protection to whistle-blowers?

A National Witness Protection Program is in place in Argentina since 2003. Even though the program's resources are limited and protective measures have been considered weak, in recent years it offered effective protection to witnesses and whistle-blowers of grand corruption cases. The program sets forth several protection measures, including personal or domiciliary custody; temporary accommodation in reserved places; change of address; provision of economic means for lodging, transportation, food, communication, health care, moving, labour reintegration, and other essential expenses (although not for more than six months). Anonymous reporting lines have been opened in recent years by the Special Office for Economic Crime and Money Laundering ("Procuraduría de Criminalidad Económica y Lavado de Activos" or "PROCELAC"), and the PIA, at the MPF, and by the Anti-Corruption Office at the Executive. Other administrative agencies have also opened anonymous reporting lines, such as the Tax Administration ("AFIP", for its acronym in Spanish) and the Agri-Food Sanitary Agency (Senasa, for its acronym in Spanish). When it comes to corporate internal whistle-blowers, Law 27401 encourages companies to establish a procedure for internal reporting so that employees and third parties file reports under confidentiality or anonymously and without fear of retaliation. Besides, complementing the protective-oriented measures, positive incentives to whistle-blowers have also been established by Law. On the one hand, Law 27304 on co-

operators (“Ley del Arrepentido”, or “Repentant Law”), foresees that persons investigated for corruption and other complex crimes (except high rank State officials) may obtain a reduction of their punishment and the avoidance of prison during the process in exchange for the disclosure of precise, useful and verifiable data relating to other participants in the offense that occupied a higher hierarchical role in the criminal organization. Law 27,304 makes the Witness Protection Program applicable to whistle-blowers under this law. On the other hand, Law No. 27319 allows for the application of special investigative techniques in complex criminal investigations, including the possibility of offering economic awards to whistle-blowers. In addition, and according to Emergency Decree 62/2019, which sets a Procedural Regime for Civil Forfeiture, the MPF may develop collaboration programs with the persons who provide relevant information for asset recovery proceedings. The collaborating persons may be awarded with up to 10% of the goods obtained as a consequence of the information they provided.

### 15. How common are government authority investigations into allegations of bribery?

In recent years, Government authorities have been relevant actors in the investigation of alleged corruption. In particular, the Financial Intelligence Unit (Argentine FIU) and the Anti-Corruption Office led several investigations against former government authorities for corruption and money laundering, and both acted as a private prosecutor (“querellante”) in criminal proceedings against former public officials. In October 2019, former head of cabinet of Nestor and Cristina Kirchner’s administrations Alberto Fernandez was elected President. Cristina Kirchner was elected Vicepresident. The new Government took office on December 10, 2019. Both the President and the Vicepresident, as well as some provincial governors and high rank officials in the Executive, including the new head of the OA, have referred to the corruption investigations boosted during the former administration as instances of the so-called “lawfare”. Besides, the new head of the OA publicly stated that the OA does not have the priority mission of being a prosecutor. As a result, the OA withdrew itself as a private prosecutor from all cases in which it was intervening in such character, except for those in which it is still producing evidence. On the other hand, the head of the FIU stated that the agency would continue investigating and prosecuting ongoing cases of laundering the proceeds of corruption, but highlighted that the FIU would focus on economic offenses other than corruption, such as tax evasion, trade mis- or overinvoicing, and the misuse of offshore structures to hide profits of transnational crimes.

### 16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any impact and, if so, what?

Recent years had shown a peak in anti-corruption and anti-money laundering enforcement, boosted by both legal and regulatory reforms and a changing political environment both at the national and regional levels. High-ranking officials of former administrations were prosecuted (and some of them were imprisoned on) on corruption and money laundering charges, including former President Cristina Kirchner (who avoided preventative detention on the grounds of her legislative immunity as a national senator), the former Vice-president, Amado Boudou (currently under domiciliary arrest) and former Ministry of Federal Planning, Julio de Vido. Law enforcement reached not only former officials but also private sector executives. In 2019, several high profile investigations of alleged corruption during the former governments were sent to trial. Besides, former Secretary of Public Works, José López, was sentenced to 6 years in prison and disqualification for life for illicit enrichment. In October 2019, former head of cabinet to Nestor and Cristina Kirchner’s administrations, Alberto Fernandez, was elected President, and former President Cristina Kirchner was elected Vice-president. After the elections, several former authorities and businessmen that had suffered preventative detention in the context of corruption investigations were released from prison. The current administration portrays those corruption investigations, carried out under a Government of a different political sign, as instances of the so-called “lawfare”. Such investigations are still open and some of them were sent to oral trial. The new head of the OA has publicly criticized both Law 27,401, on criminal corporate liability for corruption offenses, and the “Repentant law”. The former was pointed as foreign to the Argentine criminal law tradition, while the latter was depicted as an extortive tool, which has been used as a means for “lawfare”.

On late February, 2021, Lázaro Baez, a local businessman with strong ties to the Kirchner family, was convicted to 12 years in prison –together with other 21 defendants, also convicted to between 9 and 2 and half years in prison and millionaire fines and confiscation measures- for aggravated money laundering. This has possibly been the most relevant landmark in Argentina’s short history of anti-money laundering enforcement. Baez was convicted for having laundered assets derived from corruption in public contracting and tax fraud during the Kirchner Presidencies (2003-2015). The majority of the Court considered proved that Baez laundered the proceeds of corruption in public

procurement during the Kirchner's presidencies, in what media outlets have referred to as the "K (for Kirchner) Money Route", even though a criminal conviction has not yet been issued in that case. Fines exceeding US\$ 4,300 million were imposed to both individuals and legal persons, although the latter had not been accused, and therefore had not been able to exercise their right to defense. One of the companies was punished with the cancelation of its legal personality.

In a long sentence, the Court justified the penalties to legal persons in that they are accessory consequences of the convictions to the individuals that acted through them or on its behalf, as well as in the companies' lack of adequate compliance programs. It remains to be seen whether appellate courts confirm these decisions.

Besides, one of the defendants received a reduced penalty due to his collaboration with the investigation under the Repentant Law. To do so, it followed the precedent of the Federal Chamber of Cassation in another high-profile corruption case, the so-called Notebook's Scandal. In such case, the highest criminal tribunal of the country upheld the application of such law against several constitutional challenges, and confirmed the validity of the collaborator's declarations in spite of the fact that they had not been registered by digital means.

In the last year, the Supreme Court issued important decisions too. It confirmed former Vice-President, Amado Boudou's conviction to 5 years and 10 months in prison for passive bribery and incompatible negotiations with the public office in the so called "Ciccione Case". On a separate ruling, the Supreme Court confirmed the convictions of more than twenty defendants, including both businesspersons and public officers (e.g., the former Minister of Federal Planning Julio De Vido, and former Secretary of Transportation Juan Pablo Schiavi), in the criminal investigation of the so-called "Once Tragedy" -a 2012 railway accident that resulted in 52 deaths and hundreds of injured, and was depicted as an evidence of the impact of corruption in daily life.

Finally, in the context of the Covid-19 pandemic, the government faced a scandal in April 2020 related to the procurement of food for relieving the most affected population. The Ministry of Social Development purchased a large amount of food at prices sometimes 50% higher than those established by a "maximum prices" program, which had been established by the government a few weeks earlier. Although the MPF started a criminal investigation, it ended in February 2021 with the acquittal of all defendants.

### **17. Is there a process of judicial review for challenging government authority action and decisions?**

Yes, there is judicial review in Argentina by which pieces of legislation and Government's regulation and acts can be declared unconstitutional, mirroring the US's system.

### **18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?**

The Government has recently promoted a bill reorganizing the federal criminal jurisdiction (where corruption offenses are heard) that was passed by the Senate -mainly controlled by the Government- but has still not made progress at the Lower House -where political competition is much higher. The main goal of this bill is to create new federal courts (thus disseminating the actual power of federal judges) and to implement an adversarial judiciary system (currently, it is a mix with an inquisitorial orientation).

In addition, the government is promoting a project to reform the Federal Prosecutor's Office organizational structure, including the selection of the Attorney General and the Jury with powers to sanction and remove prosecutors, which were depicted by the Prosecutors Association as the creation of a "firing squad" against them.

Further, the government also announced that it would send to Congress bills related to:

- the Supreme Court's appellate jurisdiction,
- the creation of a new intermediate court below the Supreme Court to review "arbitrary decisions", and
- the creation of a Congressional Committee to oversee the Judicial Power to "avoid its use as a political weapon".

### **19. To which international anti-corruption conventions is your country party?**

Argentina is a party to the Inter-American Convention against Corruption, the United Nations Convention against Corruption, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

### **20. Do you have a concept of legal**



**privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.**

Attorney-client privilege in Argentina derives from the constitutional rights to defence and against selfincrimination (article 18, National Constitution). The Criminal Procedure Code establishes attorney client privilege by forbidding lawyers from testifying in court regarding secret information received from the client –unless client’s waiver (article 244), impeding courts from ordering the submission of witnesses or documents in violation of professional secrecy among other reasons (article 232), impeding the seizure of documents sent or delivered to defence attorneys for the performance of their duties (article 237), and excluding lawyers from being cited as expert witnesses in criminal proceedings in violation of privilege (article 255). Similarly, article 444 of the National Civil and Commercial Procedural Code allows witnesses to refuse answering questions when doing so would infringe professional secrecy. Complementing these procedural rules, infringing attorney-client privilege is criminalized by article 156 of the ACC. Besides, Law 23,187, which regulates lawyers’ practice in the City of Buenos Aires (each province of Argentina has its own bar association and regulations, although most of them have similar provisions), establishes that preserving attorney-client privilege is both a professional obligation, unless it is waived by the client (article 6.f), and a right (article 7.c). Additionally, it states that lawyers have the right to the inviolability of the law firm, safeguarding the constitutional right of defence (article 7.e). Argentina’s legal framework does not distinguish between external or in-house lawyers’ privilege. Although legal privilege’s scope and standards are underdeveloped in case-law, it is expected that new precedents will emerge as a consequence of the entering into force of Law No. 27,401, which foresees internal investigations as an element of compliance programs.

**21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction’s approach to anti-bribery and corruption compares on an international scale?**

In a context of heightened tension between the Government and judicial authorities, with the above-mentioned “judicial reform” proposals as a backdrop, and with continuous allegations that corruption investigations against Government officials (for offenses

committed during prior administrations) are instances of the so-called “lawfare”, the Government has promoted a number of criminal investigations against former officials of the Macri Administration, including a complaint filed by the OA against former President Macri and his collaborators for alleged fraud by agreeing “an irregular loan” with the IMF.

Aside from that, the OA’s head dissolved this body’s litigation department, and stated that the OA will focus on preventive policies, rather than enforcement actions or investigations. This Office is currently developing a Registry of Private Sector Transparency and Integrity Programs. Although the details of this initiative have not been published yet, the OA stated that the registry would aim to contribute to the development, improvement and maturity of compliance programs and the exchange of best practices through the creation of a benchmarking digital platform.

**22. Generally how serious are organisations in your country about preventing bribery and corruption?**

Until the entering into force of Law 27401, on Legal Persons Liability for Corruption Offenses, compliance programs were implemented mainly by the local subsidiaries of multinational companies, which amount to around 25% of Argentina’s GDP.

The convergence of heightened enforcement of anticorruption law in recent years at the local level against not only public officials but also local business people (specially at the construction and energy sectors; e.g. with the Notebooks Scandal), and the entering into force of Law 27401 on corporate criminal liability for corruption, have risen the local business groups’ interest in adopting compliance programs as well (integrity programs, as referred to by Law 27401).

Besides, under Law 27401, grand state contractors are requested to implement compliance programs. In addition, more companies are requiring their vendors to implement effective compliance programs as a requisite to conduct business with them as well as conducting compliance programmes’ audits.

Thus far, in lack of corporate enforcement actions in application of Law 27401, and whereby the new Government has not yet shown a clear orientation in relation to the criminal and compliance enforcement orientation, paper-based compliance programs still represent an important proportion of the market. In any case, the emergence of compliance as a new discipline, and an actual business need in Argentina was hard to

predict a few years ago, and constitutes a major step forward in the creation of a corporate culture of corruption prevention.

### **23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?**

In Argentina, anticorruption enforcement has been historically weak, partly because of the enforcement authorities' lack of appropriate legal resources/tools and capabilities and because of political interference. With progress and setbacks (i.e. the confirmation of the constitutionality of the Repentant Law on the one hand, and the lack of enforcement of Law 27,401 on the other), a new anticorruption framework and enhanced resources strengthened enforcement authorities' capacities in recent years. Nevertheless, the anticorruption system legitimacy still needs to be enhanced by strengthening the independence of those in charge of investigation, adjudication, and control mechanisms.

### **24. What are the biggest challenges businesses face when investigating bribery and corruption issues?**

Broadly speaking, internal investigations have not been a common practice in Argentina until recent years, with the exception of those conducted by subsidiaries of multinational companies doing business in the country. Although this started to change with the enactment of Law 27,401, companies still face several challenges when conducting an internal investigation.

Culturally, there is a widespread perception of whistleblowers as "snitches," which is aggravated by the lack of a legal framework that incentivizes and protect them from retaliation within their work environment. This prevents companies from receiving tips, as it is unlikely that people will decide to blow the whistle -and if they did, they don't have incentives to collaborate throughout the whole process.

In addition, and unlike other jurisdictions in which internal investigations are a common practice, labour laws are biased in favour of employees, thus making it difficult for companies to terminate a rogue collaborator even when there are strong grounds to conclude that a misbehaviour has been committed. Without a criminal conviction, employers take a considerable risk if they decide to terminate said employee, considering that criminal investigations last many years and only a small

percentage end up with a conviction, which exposes companies to end up losing a case in labour courts and paying severance. Companies may still decide to terminate the labour relationship through a dismissal without cause, arguing a "loss of confidence", but this would carry the obligation of paying severance.

Furthermore, the Argentine data protection framework is quite strict, and the jurisprudence is not unanimous when it comes to the legality of reviewing corporate emails and devices, as well as its allowance as evidence in judicial proceedings. A fact-specific legal assessment is therefore essential before kicking off any investigative measures to reduce risks and make the investigation as effective as possible.

### **25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?**

The Covid-19 pandemic brought about multiple emergency regulations and massively changed individual and corporate behaviour and expectations. Public procurement rules have been relaxed to facilitate the necessary purchases of sanitary-related products, and a number of overpricing scandals broke out. Companies operating in Argentina need to strengthen their efforts to document transactions with the Government, strictly registering the grounds for direct purchases, as well as any exchange with public officials. This applies as well to companies indirectly supplying to the Government, which should also conduct due diligence over their Government-supplier clients. Beyond the current emergency context, the enforcement of Law 27401, thus far unenforced, will necessarily test current businesses compliance practices, promoting debates about e.g. corporate governance, or the role of the compliance officer, and gradually answering multiple interpretive questions that the legal text opens up. A new practice will need to grow on cooperation agreements, which will be greatly challenging taking into account our historical public-private distrust. In Argentina, where corruption is widely extended in many economic sectors, compliance programs may face limitations that could be overcome by collective action strategies.

### **26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?**

First and generally, the Judiciary's legitimacy should be

strengthened through measures enhancing prosecutors', magistrates', and courts' public perception of impartiality, their professional capacity, and effectiveness. The enforcement of Law 27401 will help clarifying many legal ambiguities or vagueness in relation to corporate liability for corruption offenses and legally incentivized compliance practices. The enforcement of administrative regulations on integrity in public procurement, together with SOEs transparency and integrity policies implementation should promote

corruption prevention where it is more needed. Finally, a legal solution could be promoted to allow businesses cooperating with State's investigations to reach joint agreements over all different proceedings against them, either criminal, civil, or administrative. Otherwise, incentives to reach cooperation agreements under Law 27401 will never be complete -because a company agreeing before criminal prosecutors won't get rid of related administrative actions, e.g. on competition law, tax matters, or civil liability against competitors.

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