



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

CHILE: PHASE 1ter
REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997
RECOMMENDATION

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CHILE - REVIEW OF IMPLEMENTATION OF THE CONVENTION PHASE 1TER

1. Chile signed the Convention on 17 December 1997 and deposited its instrument of ratification with the OECD Secretary-General on 18 April 2001. The implementing legislation, Law No. 19,829, entered into force on 8 October 2002.

2. The Phase 1 review of Chile took place in 2004 and the Phase 2 review took place in 2007.¹ In 2007, the Working Group was seriously concerned that Chile had not taken any steps to address the Working Group's Phase 1 recommendations with regard to the responsibility of legal persons, sanctions, jurisdiction, bank secrecy or the foreign bribery offence. It recommended that Chile take prompt action in order to achieve full compliance with Articles 1, 2, 3, 4 and 9 of the Convention. It also made specific recommendations.

3. Considering the seriousness of the situation, the Working Group decided to engage in an exceptional additional review of Chile's legislation (Phase 1bis), discussed by the Working Group in October 2009. Because the Bill on the responsibility of legal persons had not at that time entered into force, the Phase 1bis evaluation did not consider Chile's implementation of Article 2 of the Convention, and associated matters. The present review (Phase 1ter) sets out the Group's review in the latter respect.

1. ARTICLE 2: RESPONSIBILITY OF LEGAL PERSONS

4. Article 2 of the Convention requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official". In both Phase 1 and Phase 2, the Working Group noted that Chile failed to implement this provision and urged the Chilean authorities to implement the Convention promptly.

5. Law No. 20,393 on Criminal Responsibility of Legal Persons for the Crimes of Money Laundering, Financing of Terrorism and Offences of Bribery entered into force upon its publication in the Official Gazette on 2 December 2009 (see Annexes 1 [English] and 2 [Spanish]). The Law introduces criminal responsibility of legal persons for a limited list of offences: bribery of Chilean and foreign public officials, money laundering, and financing of terrorism.² This list corresponds to requirements of

¹ Phase 1 evaluates the implementation of the Convention into Chile's legislation. Phase 2 evaluates Chile's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors Chile's compliance with the 1997 Revised Recommendation.

² Article 1 of the Bill provides that article 58 of the Criminal Procedure Code (which provides that criminal responsibility is applicable only to natural persons) does not apply to these offences.

international treaties, including the OECD Anti-Bribery Convention.³ Although the Law is a standalone law, its functioning is nevertheless linked to the Criminal Code and the Criminal Procedure Code.⁴

1.1 Legal entities subject to criminal responsibility

6. Law No. 20,393 applies to “private legal persons and State companies”. “Private legal persons” cover civil and business corporations, including non-profit corporations and foundations.

7. State companies are companies created by a law. Codelco, Bancoestado, Empresa Nacional de Minería (Enami), Empresa Nacional del Petróleo (ENAP), Empresa de Ferrocarriles del Estado (EFE) are among the most important State-owned companies.⁵

8. Other companies controlled by the State are “State private companies”, i.e. “private legal persons” for the purpose of the Law. They are companies engaged in business or industrial activities, in which the State or its agencies have a major or equitable interest and that have been organised as stock corporations. They are, conceptually, public enterprises because of the shareholding by the State or its agencies. However, their business activities are governed by private sector rules and their legal status derives from compliance with private law rules. Hence, responsibility applies to both state-owned and state-controlled companies.

9. The State, government institutions, regional and local public authorities and non-profit public bodies are excluded from the scope of the Law.

10. The statute of limitations for legal persons is the same as for natural persons. i.e. five years (article 19 of the Law).⁶

1.2 Standard of liability

11. The following three cumulative requirements must be satisfied in order for a legal person to be held responsible for the foreign bribery offence (article 3):⁷

1. The offence must be committed by a person acting as a representative, director or manager, a person exercising powers of administration or supervision, or a person under the “direction or supervision” of one of the aforementioned persons.

³ The other treaties are: The United Nations Convention against Corruption; The United Nations Convention against Transnational Organized Crime; The International Convention for the Suppression of the Financing of Terrorism; Resolution No. 1373 of the United Nations Security Council; and 40+9 Recommendations of the International Financial Action Group (IFAG) on Money Laundering and Financing of Terrorism.

⁴ Article 1 provides that “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”. In the case of bribery, the special law is the Criminal Code.

⁵ For instance, Decree Law No. 1,350 of 1976 established “Corporación Nacional del Cobre de Chile (Codelco)”, created as a Chilean State-owned company engaged in mining, industrial and commercial activities, having its own legal status and net worth. “Empresa Nacional de Minería (ENAMI) was created in 1960 and organised under Statutory Decree No. 153 of the same year. Statutory Decree No. 1 of 1993 from the Ministry of Transportation and Telecommunications set the Restated, Coordinated and Systematised Text of “Empresa de Ferrocarriles del Estado” Organic Law.

⁶ However, in the case of penalties for crimes such as money laundering, the statute of limitations is ten years.

⁷ The standard of liability is inspired from the Italian system of liability of legal persons.

2. The offence must be committed for the direct and immediate benefit or interest of the legal entity. No offence is committed where the natural person commits the offence exclusively in his/her own interest or in the interest of a third party.
3. The offence must have been made possible as a consequence of a failure of the legal entity to comply with its duties of management and supervision. An entity will have failed to comply with its duties if it violates the obligation to implement a model for the prevention of offences, or when having implemented the model, it was insufficient.

Article 3. Attribution 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 favor of a third party.

12. The responsibility established in Chile is based on the behaviour of natural persons as well as a fault in the company's organisational model. The goal of the law is first to prevent the commission of offences and, when that fails, to sanction culpable companies.

13. The law does not condition the responsibility of the legal person to the use of means provided by the legal persons as instruments for the commission of the offence. Therefore it seems possible that a legal person can be sanctioned in cases where a person acting on its behalf used funds not belonging to the legal person to bribe a foreign public official. The lead examiners consider that this is an issue which should be followed up as practice emerges in the application of the law.

1.2.1 Principal offenders covered

14. The Law imposes responsibility against legal persons for offences committed by two categories of principal offenders: natural persons in senior positions, and natural persons subject to their management or supervision.

15. In the first case, article 3 (indent 1) provides that "legal persons shall be responsible for the offenses... directly and immediately committed... by their owners, controllers, responsible officers, principal executives officers, representatives or those conducting activities of administration and supervision...". The Law does not define these terms. Chilean authorities explain that this allows judges to interpret them according to the circumstances of the case and the company involved. Nonetheless, judges may refer to definitions of these terms in different Chilean laws and to their "generally accepted meaning". Accordingly, the Chilean authorities have indicated that the following interpretations are likely:

- Owners: Positive laws define an owner as the holder of ownership rights (Civil Code, articles 582 et seq., articles 700 et seq.). Shareholders would be considered as owners.
- Controller: a person holding the ownership, command, or decisive influence in an organisation (meaning derived from controller and control); persons having the power to secure a majority of votes at meetings of shareholders and to elect most of the Directors of a corporation; persons having the power to secure the majority of votes at meetings of members and to appoint the manager or legal representative or most of them, in other cases; persons having the power to play a decisive role in the management of the corporation (Law No. 18,045 on Securities Market, article 97, defines, within such framework, the term “controller” of a company).
- Responsible person: a person responsible for leading and supervising work within an organisation.
- Representative: A person representing a company or acting on its behalf.
- Principal executive officers (“ejecutivos principales”): defined under article 1(22)(b)(ii) of Law 20,382 as “any person who has the capacity to determine the objectives, to plan, to direct or to control the superior management of business or the strategic policy of the entity, whether by itself or jointly with others”.
- Administrator: A person managing a company, particularly its property; a person in charge of the administrative management of a company or institution. General managers and area managers would be covered.

16. The Law does not expressly cover managers *de facto* (persons who perform, in fact, managerial functions). However, Chilean authorities explain that the expression in article 3, indent 1, of “those conducting activities of administration and supervision” would cover any person who performs such functions or activities *de facto* or *de jure*. Also according to Chilean authorities, if a director acts beyond his/her rights, duties or obligations, but in the direct and immediate interest or benefit of the company, the legal person remains responsible, if the organisational model failed.

17. Concerning the second category of principal offenders, article 3 (indent 2) provides that “... legal persons shall also be responsible for the offences committed by individuals who are under the direction or supervision of any of the subjects mentioned in the preceding indent”. Therefore, employees could trigger the responsibility of the legal person. Subcontractors could also trigger the responsibility of the legal person, depending on the terms of the contract and the existence of a direct hierarchical relationship with a person mentioned in indent 1. Bribery committed by a Chilean or foreign subsidiary of a Chilean company could also trigger the responsibility of the parent company, according to the Chilean authorities, if the prosecutor can prove that a manager of the parent company ordered a person of the subsidiary, who is his/her subordinate, to bribe a foreign public official.

1.2.2 The interest of the legal persons

18. For the legal person to be held responsible, the offence must have been committed directly and immediately in its interest or for its benefit (article 3, indent 1). Chilean authorities confirm that it is not necessary that the legal person actually receive any benefit. For instance, the company can be punished even if the public official refused the bribe and/or did not do anything in favour of the company. Where the legal person did receive a benefit thanks to the bribery offence, this benefit will be confiscated (article 13(2)).

19. On the contrary, if the natural person committed the bribery offence “exclusively in their own advantage or in favour of a third party”, the legal person shall not be held responsible (Article 3, indent 4). According to Chilean authorities, this situation will cover cases where a manager breaches the prevention model and bribes a foreign public official with the sole purpose of obtaining an economic bonus, and the company has not benefited from the offence. They consider that this situation would be more frequent with offences of money laundering or financing of terrorism than bribery.

20. Bribes for the benefit of related companies, such as subsidiaries or parent companies, might be seen as beyond the purview of article 3. However, according to the Chilean authorities, natural persons performing their functions in a subsidiary are covered by article 3, 1st and 2nd indents if there is a direct hierarchical link between them and managers of the parent company, and the offence is committed in the interest of the parent company. Authorities also explain that both the subsidiary and parent company could be held responsible if a bribery act was undertaken by a manager of the parent company for the sole benefit of the subsidiary where the natural person had a right to represent the subsidiary. These interpretations would need to be tested in practice.

21. The fact that the offence must be committed “directly and immediately” in the interest of the company, might act to exclude cases where the individual bribed a foreign public official with only his/her own interest in mind, even if the offence ultimately benefited or could have benefited the company. The lead examiners are concerned that this may be relied on by legal persons to avoid responsibility. For instance, some sales managers largely paid depending on their results might try to bribe a foreign public official to increase his/her personal income. The fact that the company might benefit from the offence might not be part of the considerations taken into account by the natural person and the “direct and immediate” link may therefore be missing. In such circumstances, a company being prosecuted might attempt to develop a defence strategy by suing the natural person who acted, claiming that s/he did so in breach of duties and primarily for his/her own interests. A plain reading of the text of article 3 might result in a finding that the benefit to the legal person is only remote and indirect. The application in practice of this aspect of article 3 should be followed up in Phase 3.

22. Chilean authorities indicate that the expression “directly and immediately” is simply aimed at ensuring that the conduct is undertaken in the interests of the legal person, and that the reasons personally motivating the natural person will not be relevant. At the same time, however, they acknowledge that a case that might fall outside the scope of the law is one where a manager bribes a foreign public official to obtain a public contract for the company, in order for a *subcontractor* to benefit from the contract. In this example, the judge will need to verify whether the company benefited directly and immediately from the bribe, depending on the circumstances. If the benefit is remote or indirect, the legal person will not be responsible for the offence.

1.2.3 Organisational models for the prevention of offences

23. The final cumulative requirement for responsibility stresses that the offence must have been made possible as a consequence of the failure of the legal person to comply with its duties of administration and supervision (article 3, indent 1). The entity will have failed to comply with its duties if it violated the obligation to implement a model for the prevention of offences, or when having implemented the model, the latter was insufficient: “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” (article 3, indent 3).

24. Article 4 of the Law provides minimum requirements for the model. It also aims to introduce a system of self-regulation by companies. Having a code of conduct on paper will not be sufficient to avoid

responsibility. If prosecutors can prove that the code does not meet the minimum requirements of article 4, or that it is not implemented, the company can be responsible for the offence. The lead examiners encourage Chile to ensure, through a process of robust certification and through training and education of legal persons, that this leads to more than just formal compliance with article 4 and that article 4 is applied so as to require actual compliance with the minimum requirements of article 4. This would be an issue for Phase 3.

a) *Appointment and powers of a person responsible for the prevention model*

25. Within each company, a person or body must ensure the adoption of all measures meant to prevent the perpetration of offences by a person responsible for prevention. The autonomy of this person varies according to the size of the company. In the case of companies with an annual income above approximately EUR 2.8 million, the person responsible for prevention must be autonomous from the administration and from the owners, partners, shareholders or controllers of the legal person (article 4(1)). For “small” sized legal persons (defined as those with incomes below approximately EUR 2.8 million),⁸ the owners can themselves act as the person responsible for prevention. The lead examiners are concerned that the threshold between “small” and other companies is very high so that, in practical terms, the majority of Chilean companies will be able to have owners and senior managers act as the person responsible for prevention. This might undermine the independence of such persons and, accordingly, their ability to properly implement a prevention model.

26. The Law also provides for the minimum means and faculties that the person responsible for prevention should obtain from the administrator of the legal person (article 4(2)). This person must report to the executives of the company on his/her activities at least each semester (half yearly).

b) *Design of the prevention system*

27. Article 4(3) provides for the minimum features of a prevention system. It must:

- Identify the different activities or processes of the entity, whether habitual or sporadic, in whose context the risk of commission of the offences emerges or increases;
- Establish protocols, rules and procedures that permit persons involved in above-mentioned activities or processes to program and implement their tasks or functions in a manner that prevents the commission of the indicated offences;
- Identify procedures for the administration and auditing that allow the entity to impede their use in the listed offences;
- Establish internal administrative sanctions, as well as procedures for reporting or pursuing pecuniary responsibility against persons who violate the prevention system;
- Introduce the above-mentioned duties, prohibitions and sanctions into the internal regulations of the legal person, and ensure that they are known by all persons bound to apply it (workers, employees, and service providers).

28. The person responsible for prevention, together with the administration of the company, must set up methods for the supervision and enforcement of the prevention system, as well as for its regular update.

⁸ The threshold for small sized legal persons is 100 000 units of account (Unidades de Fomento UF). As at 16 November 2009, 100 000 UF were valued at CLP 2 103 million, that is approximately EUR 2.8 million.

Although article 4(3)(d) requires the prevention model to include procedures for reporting, it does not require the setting up of a mechanism of protection for whistleblowers.

c) Supervision and certification of prevention systems

29. Article 3 provides that a legal person is not responsible for offences committed by its managers or employees when it has adopted and efficiently enforced an organisational model to prevent the commission of offences. Under article 4(4), legal persons will be able to undergo a certification process on the existence and relevance of the organisational model.

30. Certification will confirm that the offence-prevention model complies with the minimum requirements of article 4, taking into account the characteristics of the legal person (article 4(4)(b)). The certification is valid as long as the situation of the company does not change. Certification will be carried out by private institutions which have been authorised by public agencies to undertake this role. Two points should be noted. The first is that certification will not, by itself, avoid responsibility, since it will remain possible to convict a legal person if it can be proved that, notwithstanding the certification, the preventive model did not meet the minimum requirements of article 4; and/or that the model was not implemented. The second point to note is that, pursuant to article 4(4)(c), private institutions carrying out certification will be carrying out public functions, which means that they will be criminally responsible in the event of a failure to act properly in the execution of those functions. The sole function of public agencies will be to authorise institutions to carry out these functions, and to keep record of certifications.

d) Burden and standard of proof

31. The failure to comply with duties of management and supervision is an element of the offence rather than a defence. Therefore the burden of proof lies on prosecutors, i.e. it will be up to prosecutors to prove that the entity failed to comply with its duties of management and supervision.⁹

32. This will require prosecutors to prove that the company failed in the design and/or implementation of the offense prevention model including why, in the circumstances, the prevention model was insufficient. This would appear to also require the prosecutor to establish that this failure made perpetration of the offence possible. The lead examiners consider that the legal person will be much more familiar than the judiciary with the nature of its own internal organisation, its qualities and its defects. The justice system will probably find it difficult to prove defective organisation, especially when an enterprise is part of a complex group, and this could deter prosecutions. The application of such provisions, especially the way in which prosecutors are able to comply with this burden of proof and how these provisions are interpreted by courts, should be followed up in Phase 3.

33. The Law will apply to both Chilean companies, and foreign companies operating in Chile. This means that, to avoid responsibility, foreign companies operating in Chile will have to adopt a prevention model which conforms with the minimum requirements of article 4, in addition to its own national legislation. Chilean authorities advise that comparable certification performed in another country might be relevant for proceedings in Chile, but that the minimum requirements of article 4 would need to be satisfied in such cases.

⁹ Article 3(1) provides that legal entities will be liable for the offence committed by listed persons, “provided that the commission of the crime is the consequence of the failure of the [legal entity] to comply with its duties of management and supervision”.

1.3 Proceedings against the legal person

1.3.1 Link between the responsibility of the legal person and the responsibility of the natural person(s) involved

34. The responsibility of the legal person is generally linked to the responsibility of the natural person(s) having committed the offence (article 5). It can nevertheless be autonomous in three specific cases. First, the responsibility of the legal person can be autonomous when the responsibility of the individual is extinguished because of his/her death or because of the expiry of the statute of limitations (article 93 of the Penal Code).

35. Second, the responsibility of the legal person can be autonomous when the proceedings against the natural person are dismissed because he/she has fled or he/she became insane after having committed the offence (article 252 of the Code of Criminal Procedure). According to general principles of penal law, the legal person will not be responsible if the natural person was considered insane at the time of the offence, or has acted under self-defence or duress. However, Chilean authorities take the view that if an insane individual is allowed to continue to operate in his or her office, despite the administration being aware of this insanity, the offence prevention model would thereby fail to have been properly implemented and may therefore lead to criminal responsibility for the legal person.

36. Third, the responsibility of the legal person can be autonomous when the existence of the offence is established and it is irrefutably proved that the commission of the offence has necessarily been committed within the ambit of the functions and attributions of any of the persons listed in article 3 (indent 1) (i.e. by a manager, etc.), even though the involvement of the specific individual(s) responsible could not be established. According to the Chilean authorities, if several persons participated in the offence, dividing the task of bribing a foreign public official among them, the situation is one of co-perpetration of the offence and they are all responsible for the offence together with the company. If, on the contrary, the criminal conduct cannot be attributed to any of the natural persons who successively or jointly contributed to the perpetration of the offence, responsibility of the legal person can follow.

1.3.2 Criminal procedure

37. Proceedings against legal persons are governed by the Law, complemented by the Criminal Procedure Code. Legal persons benefit from the same rights as natural persons throughout the criminal proceedings, and are represented by the person of their choice (except that this legal representative must not be involved him/herself in the proceedings). The unjustified default of a representative can lead to his/her arrest and his/her unavailability suspends the proceedings until the legal person nominates another representative. Criminal courts will preside over proceedings against legal persons.

38. The investigation of offences involving a legal person will be handled by the prosecutors' office. It is noted in article 20 that: "If during the investigation of any of the offenses prescribed by article 1, the Public Ministry 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". According to Chilean authorities, prosecutors will open an investigation if a legal person is identified, even if no natural person has been identified. Conditions are stricter at the stage of the formalisation of the investigation. To formalise an investigation against a legal person, prosecutors must first have requested an audience in view of the formalisation of the investigation against a natural person listed in article 3 of the Law (or started a simplified procedure against him/her). If not, prosecutors must demonstrate that the conditions set in article 5 for an autonomous responsibility of the legal person are met.

39. Chilean authorities indicate that the principle of mandatory prosecution applies to legal persons. Indeed, article 3 indicates that legal persons “shall be responsible” for the offences listed in article 1. General instructions to public prosecutors might be developed in the future.

40. Interestingly, the principle of opportunity amply discussed in the Phase 2 Report (§§ 93-98) is not applicable to legal persons (article 24). On the other hand, conditional discontinuance of the investigation, the use of which *vis-à-vis* natural persons was strictly framed in an instruction to prosecutors, is available *vis-à-vis* legal persons (article 27, see §99 of the Phase 2 Report).¹⁰ Conditions to meet to escape prosecution may include, among others, the payment of a certain amount to the State, and “the implementation of a programme to implement the model of organisation, administration and supervision referred to in article 4” of the Law. According to Chilean authorities, in practice, the conditions will be discussed between the company and the prosecutor, and approved by the guarantee judge.

41. Abbreviated proceedings are available against legal persons in the same way as against natural persons, i.e. when the accused person agrees with the presentation of the facts done by the prosecutor. In that case, the judge cannot impose a sanction more severe than the one proposed by the prosecutor (article 27). Article 29 of the Law provides for the suspension of the penalty. The court can, exceptionally, declare the penalty suspended for a delay of between six months and two years, and refrain from applying confiscation. The sentencing judge may, however, suspend penalties while at the same time applying confiscation. The application of this provision depends on the size of the company and intends to favour small companies, although no threshold appears in the Law.

42. Judgements against legal persons will be rendered according to the same procedure as for natural persons. If not, simplified rules of procedure will apply in case prosecutors request for the application of sanctions in their minimum degree; and oral trial will take place if sanctions in their medium degree are requested for.

1.4 Sanctions

43. The Convention requires effective, proportionate and dissuasive sanctions on legal persons for foreign bribery, including monetary sanctions. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. At the time of Phase 2, the absence of effective responsibility precluded effective sanctions, and in its Phase 2 report, the Working Group recommended that Chile “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”.

44. The Law provides for three types of sanctions against legal persons convicted for bribery of foreign public officials: a permanent or temporary prohibition from entering into acts and contracts with public administrative organs; a partial or total loss of fiscal subsidies, or an absolute prohibition from receiving such subsidies for a specified period of time; and a fine. Sanctions may be suspended. Ancillary penalties (i.e. publication of an extract of the judgement and confiscation) are automatically applied.¹¹

¹⁰ In addition, now that the maximum imprisonment sanction for offering a bribe has risen to 5 years, this alternative to prosecution of individuals is available only in cases of positive answer to solicitation (for which the maximum imprisonment is 3 years), and no longer in cases of offering a bribe.

¹¹ Each of the sanctions is described in a dedicated article of the Bill (articles 9 to 13). A few additional sanctions are available for crimes (instead of misdemeanours such as bribery), such as the dissolution of the entity or cancellation of its legal status. Dissolution does not apply to public companies or private

45. The nature and quantum of the penalty must be determined by taking into account six factors, in addition to mitigating and aggravating circumstances (article 17): the quantum of monies involved in the offence; the size and nature of the legal persons; the financial capacity of the legal person; the degree of observance of and compliance with laws and regulations and mandatory technical rules in the exercise of habitual business; extent of the damage caused by the offence; the seriousness of the social and economic consequences for the community caused by imposing the penalty on a State company or public utility company. The Law governs the cases of mergers, dissolution or takeovers of accused legal persons (article 19).

1.4.1 Prohibition on entering into acts and contracts with public administrative organs

46. The exclusion of public procurements (i.e. a prohibition to sign acts¹² or contracts with the public administration¹³ – *organismos del estado*) implies that the company cannot provide goods or services to any part of the public administration either in perpetuity, or for a period between two and four years in the case of a conviction of foreign bribery. Article 10 provides that the court shall send a notification to the Directorate for Public Procurement, which will maintain a register of debarred legal persons. The prohibition is able to apply with respect to all organs and public services created for State functions, which means that a convicted company which is excluded from public procurements will not be able to sign contracts with either centralised or decentralised authorities.

1.4.2 Loss of fiscal subsidies

47. The partial or total loss of fiscal subsidies granted by the State applies to benefits that the State grants as a matter of discretion without obtaining anything from the legal person, such as subsidies linked to special programmes (article 11), but does not include the loss of tax credits or licences. The partial loss of fiscal subsidies corresponds to the loss of a determined percentage of the benefit, between 20% and 70%. Chilean authorities state that this penalty can operate with respect to both ongoing and future projects.¹⁴ Where this sanction is imposed upon a legal person that is in receipt of subsidies, it might be able to apply for new and full subsidies in the future, unless this is expressly prohibited by the court in its sentencing. Authorities explain that this is highly unlikely, however, because all fiscal subsidies have appropriateness requirements for being obtained so that, in practice, a convicted company would not receive fiscal subsidies again. A convicted legal person which does not receive fiscal subsidies can be banned from receiving future subsidies for a period between 2 and 3 years. The application in practice of this sanction might warrant further follow up in Phase 3. Registries of debarred legal persons will be maintained by the Ministry of Finance and the Ministry of Interior (for regional subsidies), based on notifications from the courts. The lead examiners note that the loss of fiscal subsidies under article 11 of the Law does not include the possibility of a legal person losing tax benefits, or export credit support.

companies providing a necessary public service, the interruption of which would cause serious economic and social damages.

¹² Under Chile's Civil Code, reference to "acts and contracts" is commonly used. The expression "acts" is used to describe juridical unilateral acts, such as participation in a public bidding (tender), to succeed a bid (tender), which is treated by Chilean authorities as a unilateral act preceding the signature of the contract.

¹³ The expression "public administration" is to be understood as referring to all forms of public administrative organs, include the executive, the national congress and judiciary, and regional equivalents.

¹⁴ Chilean authorities further note that benefits already received that had been used or were proceeds of the commission of the offense can be subject to confiscation under article 13(2) as an ancillary penalty, which is applicable in all cases.

1.4.3 *Fines*

48. Fines are based on an evolving account unit. The amount of the fine for the foreign bribery offence can be between approximately EUR 10 000 and EUR 465 000.¹⁵ Although this is a relatively low maximum sanction by itself, courts can impose one or more sanctions against legal persons, with varying severity, depending on the number of mitigating and aggravating circumstances. The only aggravating circumstance is recidivism (article 7). Article 6 provides for three mitigating circumstances. First, that the legal entity has substantially collaborated in the investigation and establishment of the facts. Second, that the entity accurately remedied the harm caused or prevented the future harmful effects of the offence including, for example, where the company itself files a complaint against a manager, or other natural person, who had committed the act of foreign bribery. Third, that the entity established (following the offence but before the beginning of the lawsuit) effective measures to prevent and discover the same kind of offences being investigated that might be committed in the future. The two first mitigating circumstances are also available to natural persons.

1.4.4 *Dissolution of illicit associations*

49. Finally, dissolution applies to “illicit associations”, i.e. when the sole purpose of the legal entity is to commit offences (new indent 2 to article 294bis of the Penal Code). The court will order the dissolution of the entity, as an ancillary consequence of the penalty imposed on the responsible individuals. The Chilean authorities explain that this measure, which is not a sanction *per se* against the entity, targets entities which are facades to illicit associations of criminals and not designed to fulfil a productive purpose for the economy of Chile.

1.5 **Confiscation**

50. Confiscation is an automatic, ancillary sanction (together with the publication of the judgement in the Official Gazette and national newspaper) since article 13(2) provides that: “The proceeds from the offense and other property, effects, objects, documents and instruments thereof shall be confiscated.” Article 13(3) further provides that “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”. Chilean authorities explain that the “instruments” of crime are the material means by which the authors have perpetrated the offence, such as weapons, or tools. They further explain that the “effects” of crime are the material objects on which the criminal action has taken place or which are the product of it, such as the counterfeit money or damaged medicines.

¹⁵ *I.e.* between 200 and 10 000 UTM, or between CLP 7.33 million and 366.45 million. The UTM value changes every month. It is of CLP 36 645 in September 2009.

EVALUATION OF CHILE

General Comments

51. The Working Group on Bribery commends Chilean authorities for the high level of co-operation and openness during the examination process.

52. Law No. 20,393 on Criminal Responsibility of Legal Persons for the Crimes of Money Laundering, Financing of Terrorism and Offences of Bribery introduces criminal responsibility of legal persons for a limited list of offences, including the bribery of Chilean and foreign public officials. For a legal person to be held responsible for these offences, three cumulative requirements under article 3 of the Law must be satisfied. The Working Group considers that, overall, Chile's legislation conforms to the standards of Article 2 of the Convention. However, the Working Group has certain concerns, as noted below.

Specific issues

1. Offence committed in the interests of the legal person

53. One of the cumulative elements under article 3 of the Law requires that the offence must have been committed directly and immediately in the interests of the legal person. This means that if the natural person committed the bribery offence exclusively in his or her own interest, or in the interest of a third party, the legal person will not be held responsible. The Group is concerned that the need for the offence to be committed "directly and immediately" in the interest of the company might be relied on by legal persons to avoid liability in certain circumstances, including where a company being prosecuted might attempt to develop a defence strategy by suing the natural person who acted, claiming that s/he did so in breach of duties and primarily for his/her own interests. The application in practice of this cumulative element should be followed up in Phase 3.

2. Failure of offence prevention model

54. A further cumulative requirement under article 3 of the Law is that the offence must have been made possible as a consequence of the failure of the legal entity to comply with its duties of management and supervision, the minimum criteria for which are set out in article 4 of the Law. The Working Group encourages Chile to ensure, through a process of robust certification of the prevention model and through training and education of legal persons on its design and implementation, that this leads to more than just formal compliance with article 4 and that article 4 is applied so as to require actual compliance with the minimum requirements of article 4. This is a matter that should be followed up in Phase 3, together with any practical difficulties that prosecutors may face in discharging the burden of proof to establish that a failure by a legal person to implement the prevention model made perpetration of the offence possible. The Working Group will also be interested to learn the level to which legal persons appoint independent persons responsible for prevention, and whether this impacts on the effective implementation of prevention models.

3. Sanctions

55. Law 20,393 provides for three types of sanctions against legal persons convicted for bribery of foreign public officials. Although the maximum fine for foreign bribery is approximately EUR 465 000, courts can impose one or more sanctions against legal persons, with varying severity, depending on the number of mitigating and aggravating circumstances. The Working Group urges Chile to ensure that legal persons convicted of foreign bribery are in all cases sanctioned by effective, proportionate and dissuasive sanctions.

ANNEX 1 – LAW ON RESPONSIBILITY OF LEGAL PERSONS (ENGLISH)

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 favor 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 person responsible for the prevention model.
- (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 foment*”, 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, ~~to~~ for this purposes.

- (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) Partial or total 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 installments 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 degree to permanent.
- (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 misdemeanor.

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 Ministry 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 summon 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 ongoing 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 favor 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 Ministry.

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 misdemeanors 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 misdemeanor 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 misdemeanor.

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

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

Article 29. Suspension of Sentence. If in the condemned sentence the Court imposes a penalty of misdemeanor 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 ”

ANNEX 2 – LAW ON RESPONSIBILITY OF LEGAL PERSONS (SPANISH)

Oficio N° 8388

Valparaíso, 27 de octubre de 2009.

A S.E.
el Presidente de la
Republica

su aprobación al siguiente

Tengo a honra comunicar a V. E. que el Congreso Nacional ha dado

PROYECTO DE LEY:

“ARTÍCULO PRIMERO.- Apruébase la siguiente ley sobre responsabilidad penal de las personas jurídicas:

“Artículo 1°.- Contenido de la ley. La presente ley regula la responsabilidad penal de las personas jurídicas respecto de los delitos previstos en el artículo 27 de la ley N° 19.913, en el artículo 8° de la ley N° 18.314 y en los artículos 250 y 251 bis del Código Penal; el procedimiento para la investigación y establecimiento de dicha responsabilidad penal, la determinación de las sanciones procedentes y la ejecución de éstas.

En lo no previsto por esta ley serán aplicables, supletoriamente, las disposiciones contenidas en el Libro I del Código Penal y el Código Procesal Penal y en las leyes especiales señaladas en el inciso anterior, en lo que resultare pertinente.

Para los efectos de esta ley, no será aplicable lo dispuesto en el inciso segundo del artículo 58 del Código Procesal Penal.

Artículo 2°.- Alcances. Las disposiciones de esta ley serán aplicables a las personas jurídicas de derecho privado y a las empresas del Estado.

TÍTULO I

RESPONSABILIDAD PENAL DE LAS PERSONAS JURÍDICAS

1.-De la atribución de responsabilidad penal de las personas jurídicas

Artículo 3°.- Atribución de responsabilidad penal. Las personas jurídicas serán responsables de los delitos señalados en el artículo 1° que fueren cometidos directa e inmediatamente en su interés o para su provecho, por sus dueños, controladores, responsables, ejecutivos principales, representantes o quienes realicen actividades de administración y supervisión, siempre que la comisión del delito fuere consecuencia del incumplimiento, por parte de ésta, de los deberes de dirección y supervisión.

Bajo los mismos presupuestos del inciso anterior, serán también responsables las personas jurídicas por los delitos cometidos por personas naturales que estén bajo la dirección o supervisión directa de alguno de los sujetos mencionados en el inciso anterior.

Se considerará que los deberes de dirección y supervisión se han cumplido cuando, con anterioridad a la comisión del delito, la persona jurídica hubiere adoptado e implementado modelos de organización, administración y supervisión para prevenir delitos como el cometido, conforme a lo dispuesto en el artículo siguiente.

Las personas jurídicas no serán responsables en los casos que las personas naturales indicadas en los incisos anteriores, hubieren cometido el delito exclusivamente en ventaja propia o a favor de un tercero.

Artículo 4°.- Modelo de prevención de los delitos. Para los efectos previstos en el inciso tercero del artículo anterior, las personas jurídicas podrán adoptar el modelo de prevención a que allí se hace referencia, el que deberá contener a lo menos los siguientes elementos:

1) Designación de un encargado de prevención.

a) La máxima autoridad administrativa de la persona jurídica, sea ésta su directorio, un socio administrador, un gerente, un ejecutivo principal, un administrador, un liquidador, sus representantes, sus dueños o socios, según corresponda a la forma de administración de la respectiva entidad, en adelante la “Administración de la Persona Jurídica”, deberá designar un encargado de prevención, quien durará en su cargo hasta tres años, el que podrá prorrogarse por períodos de igual duración.

b) El encargado de prevención deberá contar con autonomía respecto de la Administración de la Persona Jurídica, de sus dueños, de sus socios, de sus accionistas o de sus controladores. No obstante, podrá ejercer labores de contraloría o auditoría interna.

En el caso de las personas jurídicas cuyos ingresos anuales no excedan de cien mil unidades de fomento, el dueño, el socio o el accionista controlador podrán asumir personalmente las tareas del encargado de prevención.

2) Definición de medios y facultades del encargado de prevención.

La Administración de la Persona Jurídica deberá proveer al encargado de prevención los medios y facultades suficientes para el desempeño de sus funciones, entre los que se considerarán a lo menos:

a) Los recursos y medios materiales necesarios para realizar adecuadamente sus labores, en consideración al tamaño y capacidad económica de la persona jurídica.

b) Acceso directo a la Administración de la Persona Jurídica para informarla oportunamente por un medio idóneo, de las medidas y planes implementados en el cumplimiento de su cometido y para rendir cuenta de su gestión y reportar a lo menos semestralmente.

3) Establecimiento de un sistema de prevención de los delitos.

El encargado de prevención, en conjunto con la Administración de la Persona Jurídica, deberá establecer un sistema de prevención de los delitos para la persona jurídica, que deberá contemplar a lo menos lo siguiente:

a) La identificación de las actividades o procesos de la entidad, sean habituales o esporádicos, en cuyo contexto se genere o incremente el riesgo de comisión de los delitos señalados en el artículo 1°.

b) El establecimiento de protocolos, reglas y procedimientos específicos que permitan a las personas que intervengan en las actividades o procesos indicados en el literal anterior, programar y ejecutar sus tareas o labores de una manera que prevenga la comisión de los mencionados delitos.

c) La identificación de los procedimientos de administración y auditoría de los recursos financieros que permitan a la entidad prevenir su utilización en los delitos señalados.

d) La existencia de sanciones administrativas internas, así como de procedimientos de denuncia o persecución de responsabilidades pecuniarias en contra de las personas que incumplan el sistema de prevención de delitos.

Estas obligaciones, prohibiciones y sanciones internas deberán señalarse en los reglamentos que la persona jurídica dicte al efecto y deberán comunicarse a todos los trabajadores. Esta normativa interna deberá ser incorporada expresamente en los respectivos contratos de trabajo y de prestación de servicios de todos los trabajadores, empleados y prestadores de servicios de la persona jurídica, incluidos los máximos ejecutivos de la misma.

4) Supervisión y certificación del sistema de prevención de los delitos.

a) El encargado de prevención, en conjunto con la Administración de la Persona Jurídica, deberá establecer métodos para la aplicación efectiva del modelo de prevención de los delitos y su supervisión a fin de detectar y corregir sus fallas, así como actualizarlo de acuerdo al cambio de circunstancias de la respectiva entidad.

b) Las personas jurídicas podrán obtener la certificación de la adopción e implementación de su modelo de prevención de delitos. En el certificado constará que dicho modelo contempla todos los requisitos establecidos en los numerales 1), 2) y 3) anteriores, en relación a la situación, tamaño, giro, nivel de ingresos y complejidad de la persona jurídica.

Los certificados podrán ser expedidos por empresas de auditoría externa, sociedades clasificadoras de riesgo u otras entidades registradas ante la Superintendencia de Valores y Seguros que puedan cumplir esta labor, de conformidad a la normativa que, para estos efectos, establezca el mencionado organismo fiscalizador.

c) Se entenderá que las personas naturales que participan en las actividades de certificación realizadas por las entidades señaladas en la letra anterior cumplen una función pública en los términos del artículo 260 del Código Penal.

Artículo 5°.- Responsabilidad penal autónoma de la persona jurídica. La responsabilidad de la persona jurídica será autónoma de la responsabilidad penal de las personas naturales y subsistirá cuando, concurriendo los demás requisitos previstos en el artículo 3°, se presente alguna de las siguientes situaciones:

1) La responsabilidad penal individual se hubiere extinguido conforme a lo dispuesto en los numerales 1° y 6° del artículo 93 del Código Penal.

2) En el proceso penal seguido en contra de las personas naturales indicadas en los incisos primero y segundo del artículo 3° se decretare el sobreseimiento temporal de él o los imputados, conforme a las causales de las letras b) y c) del artículo 252 del Código Procesal Penal.

También podrá perseguirse dicha responsabilidad cuando, habiéndose acreditado la existencia de alguno de los delitos del artículo 1° y concurriendo los demás requisitos previstos en el artículo 3°, no haya sido posible establecer la participación de él o los responsables individuales, siempre y cuando en el proceso respectivo se demostrare fehacientemente que el delito debió necesariamente ser cometido dentro del ámbito de funciones y atribuciones propias de las personas señaladas en el inciso primero del mencionado artículo 3°.

2.- De las circunstancias que atenúan la responsabilidad penal de la persona jurídica

Artículo 6°.- Circunstancias atenuantes. Serán circunstancias atenuantes de la responsabilidad penal de la persona jurídica, las siguientes:

1) La prevista en el número 7° del artículo 11 del Código Penal.

2) La prevista en el número 9° del artículo 11 del Código Penal. Se entenderá especialmente que la persona jurídica colabora sustancialmente cuando, en cualquier estado de la investigación o del procedimiento judicial, sus representantes legales hayan puesto, antes de conocer que el procedimiento judicial se dirige contra ella, el hecho punible en conocimiento de las autoridades o aportado antecedentes para establecer los hechos investigados.

3) La adopción por parte de la persona jurídica, antes del comienzo del juicio, de medidas eficaces para prevenir la reiteración de la misma clase de delitos objeto de la investigación.

3.- De las circunstancias que agravan la responsabilidad penal

Artículo 7º.- Circunstancia agravante. Es circunstancia agravante de la responsabilidad penal de la persona jurídica, el haber sido condenada, dentro de los cinco años anteriores, por el mismo delito.

TÍTULO II

CONSECUENCIAS DE LA DECLARACIÓN DE RESPONSABILIDAD PENAL DE LA PERSONA JURÍDICA

1.- De las penas en general

Artículo 8º.- Penas. Serán aplicables a las personas jurídicas una o más de las siguientes penas:

1) Disolución de la persona jurídica o cancelación de la personalidad jurídica.

Esta pena no se aplicará a las empresas del Estado ni a las personas jurídicas de derecho privado que presten un servicio de utilidad pública cuya interrupción pudiere causar graves consecuencias sociales y económicas o daños serios a la comunidad, como resultado de la aplicación de dicha pena.

2) Prohibición temporal o perpetua de celebrar actos y contratos con los organismos del Estado.

3) Pérdida parcial o total de beneficios fiscales o prohibición absoluta de recepción de los mismos por un período determinado.

4) Multa a beneficio fiscal.

5) Las penas accesorias previstas en el artículo 13.

Artículo 9º.- Disolución de la persona jurídica o cancelación de la personalidad jurídica. La disolución o cancelación producirá la pérdida definitiva de la personalidad jurídica.

La sentencia que declare la disolución o cancelación designará, de acuerdo a su tipo y naturaleza jurídica y a falta de disposición legal expresa que la regule, al o a los liquidadores encargados de la liquidación de la persona jurídica. Asimismo, y en iguales condiciones, les encomendará la realización de los actos o contratos necesarios para:

1) Concluir toda actividad de la persona jurídica, salvo aquellas que fueren indispensables para el éxito de la liquidación;

2) Pagar los pasivos de la persona jurídica, incluidos los derivados de la comisión del delito. Los plazos de todas esas deudas se entenderán caducados de pleno derecho, haciéndolas inmediatamente exigibles, y su pago deberá realizarse respetando plenamente las preferencias y la prelación de créditos establecidas en el Título XLI del Libro IV del Código Civil, particularmente los derechos de los trabajadores de la persona jurídica, y

3) Repartir los bienes remanentes entre los accionistas, socios, dueños o propietarios, a prorrata de sus respectivas participaciones. Lo anterior se entenderá sin perjuicio del derecho de los afectados para perseguir el resarcimiento de los perjuicios sufridos contra los responsables del delito. En el caso de las sociedades anónimas se aplicará lo establecido en el artículo 133 bis de la ley N° 18.046.

Sin embargo, cuando así lo aconseje el interés social, el juez, mediante resolución fundada, podrá ordenar la enajenación de todo o parte del activo de la persona jurídica disuelta como un conjunto o unidad económica, en subasta pública y al mejor postor. Ésta deberá efectuarse ante el propio juez.

Esta pena se podrá imponer únicamente en los casos de crímenes en que concurra la circunstancia agravante establecida en el artículo 7°. Asimismo, se podrá aplicar cuando se condene por crímenes cometidos en carácter de reiterados, de conformidad a lo establecido en el artículo 351 del Código Procesal Penal.

Artículo 10.- Prohibición de celebrar actos y contratos con organismos del Estado. Esta prohibición consiste en la pérdida del derecho a participar como proveedor de bienes y servicios de los organismos del Estado.

Para determinar esta pena, el tribunal se ceñirá a la siguiente escala:

- 1) Prohibición perpetua de celebrar actos y contratos con los organismos del Estado.
- 2) Prohibición temporal de celebrar actos y contratos con los organismos del Estado. Su duración se graduará del siguiente modo:

- a) En su grado mínimo: de dos a tres años.
- b) En su grado medio: de tres años y un día a cuatro años.
- c) En su grado máximo: de cuatro años y un día a cinco años.

La prohibición regirá a contar de la fecha en que la resolución se encuentre ejecutoriada. El tribunal comunicará tal circunstancia a la Dirección de Compras y Contratación Pública. Dicha Dirección mantendrá un registro actualizado de las personas jurídicas a las que se les haya impuesto esta pena.

Artículo 11.- De la pérdida parcial o total de beneficios fiscales o prohibición absoluta de recepción de los mismos por un período determinado. Se entenderá, para efectos de esta ley, por beneficios fiscales aquellos que otorga el Estado o sus organismos por concepto de subvenciones sin prestación recíproca de bienes o servicios y, en especial, subsidios para financiamiento de actividades específicas o programas especiales y gastos inherentes o asociados a la realización de éstos, sea que tales recursos se asignen a través de fondos concursables o en virtud de leyes permanentes o subsidios, subvenciones en áreas especiales o contraprestaciones establecidas en estatutos especiales y otras de similar naturaleza.

Esta pena se graduará del siguiente modo:

- 1) En su grado mínimo: pérdida del veinte al cuarenta por ciento del beneficio fiscal.
- 2) En su grado medio: pérdida del cuarenta y uno al setenta por ciento del beneficio fiscal.
- 3) En su grado máximo: pérdida del setenta y uno al cien por ciento del beneficio fiscal.

En caso que la persona jurídica no sea acreedora de tales beneficios fiscales, se podrá aplicar como sanción la prohibición absoluta de percibirlos por un período de entre dos y cinco años, el que se contará desde que la sentencia que declare su responsabilidad se encuentre ejecutoriada. El tribunal deberá comunicar que ha impuesto esta sanción a la Secretaría y Administración General del Ministerio de Hacienda y a la Subsecretaría de Desarrollo Regional y Administrativo del Ministerio del Interior, con el fin de que sea consignada en los registros centrales de colaboradores del Estado y Municipalidades que, respectivamente, la ley N° 19.862 les encomienda administrar.

Artículo 12.- Multa a beneficio fiscal. Esta pena se graduará del siguiente modo:

- 1) En su grado mínimo: desde doscientas a dos mil unidades tributarias mensuales.
- 2) En su grado medio: desde dos mil una a diez mil unidades tributarias mensuales.
- 3) En su grado máximo: desde diez mil una a veinte mil unidades tributarias mensuales.

El tribunal podrá autorizar que el pago de la multa se efectúe por parcialidades, dentro de un límite que no exceda de veinticuatro meses, cuando la cuantía de ella pueda poner en riesgo la continuidad del giro de la persona jurídica sancionada, o cuando así lo aconseje el interés social.

El tribunal, una vez ejecutoriada la sentencia condenatoria, comunicará la aplicación de la multa a la Tesorería General de la República, quien se hará cargo de su cobro y pago.

Artículo 13.- Penas accesorias. Se aplicarán, accesoriamente a las penas señaladas en los artículos anteriores, las siguientes:

1) Publicación de un extracto de la sentencia. El tribunal ordenará la publicación de un extracto de la parte resolutive de la sentencia condenatoria en el Diario Oficial u otro diario de circulación nacional.

La persona jurídica sancionada asumirá los costos de esa publicación.

2) Comiso. El producto del delito y demás bienes, efectos, objetos, documentos e instrumentos del mismo serán decomisados.

3) En los casos que el delito cometido suponga la inversión de recursos de la persona jurídica superiores a los ingresos que ella genera, se impondrá como pena accesoria el entero en arcas fiscales de una cantidad equivalente a la inversión realizada.

2.- De la determinación de las penas

Artículo 14.- Escala general. La pena que se imponga a la persona jurídica se determinará en relación a la prevista para el delito correspondiente señalado en el artículo 1º, de conformidad a la siguiente escala:

ESCALA GENERAL DE PENAS PARA PERSONAS JURÍDICAS

1.- Penas de crímenes.

a) Disolución de la persona jurídica o cancelación de la personalidad jurídica.

b) Prohibición de celebrar actos y contratos con organismos del Estado en su grado máximo a perpetuo.

c) Pérdida de beneficios fiscales en su grado máximo o prohibición absoluta de recepción de los mismos de tres años y un día a cinco años.

d) Multa a beneficio fiscal, en su grado máximo.

En estos casos siempre se aplicarán como accesorias las penas mencionadas en el artículo 13.

2.- Penas de simples delitos.

a) Prohibición temporal de celebrar actos y contratos con organismos del Estado en su grado mínimo a medio.

b) Pérdida de beneficios fiscales en su grado mínimo a medio o prohibición absoluta de recepción de los mismos de dos a tres años.

c) Multa en su grado mínimo a medio.

En estos casos siempre se aplicarán como accesorias las penas mencionadas en el artículo 13.

Artículo 15.- Determinación legal de la pena aplicable al delito. A los delitos sancionados en los artículos 250 y 251 bis del Código Penal, y en el artículo 8° de la ley N° 18.314, se les aplicarán las penas previstas en esta ley para los simples delitos, de conformidad a lo dispuesto en el artículo anterior.

Al delito contemplado en el artículo 27 de la ley N° 19.913 le serán aplicables las penas de crímenes, según lo dispuesto en el artículo precedente.

Artículo 16.- Circunstancias modificatorias de responsabilidad. En caso de concurrir una circunstancia atenuante y ninguna agravante, tratándose de simples delitos se aplicarán sólo dos de las penas contempladas en el artículo 14, debiendo imponerse una de ellas en su grado mínimo. Tratándose de crímenes, el tribunal aplicará sólo dos de las penas contempladas en dicho artículo en su *mínimum*, si procediere.

En caso de concurrir la circunstancia agravante contemplada en esta ley y ninguna atenuante, tratándose de simples delitos el tribunal aplicará todas las penas en su grado máximo. Tratándose de crímenes deberá aplicar las penas en su *máximum*, si procediere, o la disolución o cancelación.

Si concurren dos o más circunstancias atenuantes y ninguna agravante, tratándose de simples delitos el tribunal deberá aplicar sólo una pena, pudiendo recorrerla en toda su extensión. Tratándose de crímenes deberá aplicar dos penas de las contempladas para los simples delitos.

Si concurren varias atenuantes y la agravante prevista en esta ley, ésta se compensará racionalmente con alguna de las atenuantes, debiendo ajustarse las penas conforme a los incisos anteriores.

Artículo 17.- Reglas de determinación judicial de la pena. Para regular la cuantía y naturaleza de las penas a imponer, el tribunal deberá atender, dejando constancia pormenorizada de sus razonamientos en su fallo, a los siguientes criterios:

- 1) Los montos de dinero involucrados en la comisión del delito.
- 2) El tamaño y la naturaleza de la persona jurídica.
- 3) La capacidad económica de la persona jurídica.
- 4) El grado de sujeción y cumplimiento de la normativa legal y reglamentaria y de las reglas técnicas de obligatoria observancia en el ejercicio de su giro o actividad habitual.
- 5) La extensión del mal causado por el delito.
- 6) La gravedad de las consecuencias sociales y económicas o, en su caso, los daños serios que pudiere causar a la comunidad la imposición de la pena, cuando se trate de empresas del Estado o de empresas que presten un servicio de utilidad pública.

Artículo 18.- Transmisión de la responsabilidad penal de la persona jurídica. En el caso de transformación, fusión, absorción, división o disolución de común acuerdo o voluntaria de la persona jurídica responsable de uno o más de los delitos a que se refiere el artículo 1°, su responsabilidad derivada de los delitos cometidos con anterioridad a la ocurrencia de alguno de dichos actos se transmitirá a la o las personas jurídicas resultantes de los mismos, si las hubiere, de acuerdo a las reglas siguientes, todo ello sin perjuicio de los derechos de terceros de buena fe.

1) Si se impone la pena de multa, en los casos de transformación, fusión o absorción de una persona jurídica, la persona jurídica resultante responderá por el total de la cuantía. En el caso de división, las personas jurídicas resultantes serán solidariamente responsables del pago de la misma.

2) En los casos de disolución de común acuerdo de una persona jurídica con fines de lucro, la multa se transmitirá a los socios y partícipes en el capital, quienes responderán hasta el límite del valor de la cuota de liquidación que se les hubiere asignado.

3) Si se trata de cualquiera otra pena, el juez valorará, atendiendo a las finalidades que en cada caso se persiguen, su conveniencia.

Para adoptar esta decisión deberá atender sobre todo a la continuidad sustancial de los medios materiales y humanos y a la actividad desarrollada.

4) Desde que se hubiere solicitado la audiencia de formalización de la investigación en contra de una persona jurídica sin fines de lucro y hasta la sentencia absolutoria o condenatoria y en tanto ésta no esté cumplida, no podrá concederse la autorización del inciso primero del artículo 559 del Código Civil.

3.- Extinción de la responsabilidad penal de la persona jurídica

Artículo 19.- Extinción de la responsabilidad penal. La responsabilidad penal de la persona jurídica se extingue por las mismas causales señaladas en el artículo 93 del Código Penal, salvo la prevista en su número 1°.

TÍTULO III

PROCEDIMIENTO

1.- Inicio de la investigación de la responsabilidad penal de la persona jurídica

Artículo 20.- Investigación de la responsabilidad penal de las personas jurídicas. Si durante la investigación de alguno de los delitos previstos en el artículo 1°, el Ministerio Público tomare conocimiento de la eventual participación de alguna de las personas indicadas en el artículo 3°, ampliará dicha investigación con el fin de determinar la responsabilidad de la persona jurídica correspondiente.

Artículo 21.- Aplicación de las normas relativas al imputado. En lo no regulado en esta ley, serán aplicables a las personas jurídicas las disposiciones relativas al imputado, al acusado y al condenado, establecidas en el Código Procesal Penal y en las leyes especiales respectivas, siempre que aquéllas resulten compatibles con la naturaleza específica de las personas jurídicas.

En especial, les serán aplicables las disposiciones contenidas en los artículos 4°, 7°, 8°, 10, 93, 98, 102, 183, 184, 186, 193, 194 y 257 del Código Procesal Penal, derechos y garantías que podrán ser ejercidos por cualquier representante de la persona jurídica.

Artículo 22.- Formalización de la investigación. Cuando el fiscal considere oportuno formalizar el procedimiento dirigido en contra de la persona jurídica, solicitará al juez de garantía la citación del representante legal de aquélla, de conformidad al artículo 230 y siguientes del Código Procesal Penal. Será requisito previo para proceder de esta forma, al menos, que se haya solicitado una audiencia de formalización de la investigación o presentado un requerimiento de acuerdo a las reglas del procedimiento simplificado, respecto de la persona natural que pudiese comprometer la responsabilidad de la persona jurídica según lo disponen los incisos primero y segundo del artículo 3°, salvo en los casos establecidos en el artículo 5°.

Dicha solicitud deberá contener, además, la individualización del representante legal de la persona jurídica.

Artículo 23.- Representación de la persona jurídica. Si citado para comparecer a una audiencia ante el tribunal, el representante legal de la persona jurídica imputada no se presentare injustificadamente, el tribunal podrá ordenar que sea arrestado hasta la realización de la audiencia, la que deberá efectuarse dentro de un plazo máximo de veinticuatro horas desde que se produzca la privación de libertad.

Si el representante legal no fuere habido, el fiscal solicitará al tribunal que designe a un defensor penal público, quien realizará la función de un curador ad litem, en representación de la persona jurídica.

En todo caso, la persona jurídica podrá designar en cualquier momento a un defensor de su confianza.

Cuando la ley procesal penal exigiere la presencia del imputado como condición o requisito para la realización de una audiencia judicial, se entenderá que dicha exigencia es satisfecha con la presencia del curador ad litem o del defensor de confianza, en su caso. Procederán respecto de ambos, para dichos efectos, los apercibimientos previstos en el inciso primero.

Artículo 24.- Improcedencia de la aplicación del principio de oportunidad. Lo dispuesto en el artículo 170 del Código Procesal Penal no será aplicable respecto de la responsabilidad penal de la persona jurídica.

Artículo 25.- Suspensión condicional del procedimiento. La suspensión condicional del procedimiento podrá decretarse siempre que no existiere una condena u otra suspensión condicional del procedimiento vigente, respecto de la persona jurídica imputada por algunos de los delitos previstos en esta ley.

El juez de garantía dispondrá, según correspondiere, que durante el período de suspensión, el que no podrá ser inferior a seis meses ni superior a tres años, la persona jurídica esté sujeta al cumplimiento de una o más de las siguientes condiciones:

- 1) Pagar una determinada suma a beneficio fiscal.
- 2) Prestar un determinado servicio a favor de la comunidad.
- 3) Informar periódicamente su estado financiero a la institución que se determinare.
- 4) Implementar un programa para hacer efectivo el modelo de organización, administración y supervisión a que se refiere el artículo 4°.
- 5) Cualquiera otra condición que resulte adecuada en consideración a las circunstancias del caso concreto y fuere propuesta, fundadamente, por el Ministerio Público.

En los casos en que el juez imponga la medida señalada en el número 1), deberá comunicarlo a la Tesorería General de la República.

Artículo 26.- Determinación del procedimiento aplicable a la responsabilidad penal de la persona jurídica. Si el fiscal, al acusar o requerir de acuerdo a las normas del procedimiento simplificado, solicitare la aplicación de alguna de las penas contempladas para los simples delitos, en su grado mínimo, el conocimiento y fallo de aquéllas se realizará conforme a las normas del procedimiento simplificado.

En los casos en que el fiscal acusare solicitando sólo penas de crimen o de simple delito en su grado medio, su conocimiento y fallo se realizará conforme a las normas del juicio oral del Título III del Libro II del Código Procesal Penal.

Si el fiscal requiriere o acusare a la persona natural y jurídica en el mismo acto, se seguirá conforme al procedimiento aplicable a la persona natural. Lo anterior no será aplicable tratándose de penas de crimen.

Respecto de la responsabilidad penal de las personas jurídicas, no será procedente el procedimiento monitorio

Artículo 27.- Procedimiento abreviado. El procedimiento establecido en los artículos 406 y siguientes del Código Procesal Penal será aplicable para determinar la responsabilidad y para imponer las sanciones establecidas en la presente ley.

Se seguirá este procedimiento para conocer y fallar los hechos respecto de los cuales el fiscal requiriere la imposición de una o más penas de simple delito.

El tribunal no podrá imponer una pena superior ni más desfavorable a la requerida por el fiscal.

Artículo 28.- Defensa de las personas jurídicas. Toda persona jurídica que no pudiere procurarse defensa por sus propios medios, tendrá derecho a solicitar al juez la designación de un defensor penal público.

Artículo 29.- Suspensión de la condena. Si en la sentencia condenatoria el tribunal impusiere alguna pena de simple delito en su grado mínimo, podrá, mediante resolución fundada y de manera excepcional, considerando especialmente el número de trabajadores o las ventas anuales netas o los montos de exportación de la empresa, disponer la suspensión de la condena y sus efectos por un plazo no inferior a seis meses ni superior a dos años. En este caso, el tribunal podrá sustraer de este efecto la pena accesoria de comiso.

Tratándose de empresas del Estado o de empresas que prestan un servicio de utilidad pública cuya interrupción pudiere causar graves consecuencias sociales y económicas o daños serios a la comunidad, el juez podrá disponer la suspensión cualquiera fuere la pena impuesta en la sentencia.

Transcurrido el plazo previsto en el inciso primero sin que la persona jurídica hubiere sido objeto de nuevo requerimiento o de una nueva formalización de la investigación, el tribunal dejará sin efecto la sentencia y, en su reemplazo, decretará el sobreseimiento definitivo de la causa.

Esta suspensión no afecta la responsabilidad civil derivada del delito.”.

ARTÍCULO SEGUNDO.- Introdúcese, en el artículo 294 bis del Código Penal, el siguiente inciso segundo:

“Cuando la asociación se hubiere formado a través de una persona jurídica, se impondrá además, como consecuencia accesoria de la pena impuesta a los responsables individuales, la disolución o cancelación de la personalidad jurídica.”.

ARTÍCULO TERCERO.- Introdúcese, en el artículo 28 de la ley N° 19.913, que crea la Unidad de Análisis Financiero y modifica diversas disposiciones en materia de lavado y blanqueo de activos, el siguiente inciso segundo:

“Cuando la asociación se hubiere formado a través de una persona jurídica, se impondrá además, como consecuencia accesoria de la pena impuesta a los responsables individuales, la disolución o cancelación de la personalidad jurídica.”.

Dios guarde a V.E.

RODRIGO ÁLVAREZ ZENTENO
Presidente de la Cámara de Diputados

CARLOS LOYOLA OPAZO
Secretario General de la Cámara de Diputados