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## Costa Rica Enacts Corporate Criminal Liability for Acts of Bribery; Enforcement May Soon Follow

### I. The New Law

Costa Rica is the latest country in Latin America to establish corporate criminal liability for acts of corruption, following the recent implementation of similar legislation in Argentina (2018) and Peru (2018), expanded criminal liability in Chile (2018), and enhanced administrative liability in Colombia (2016). Despite Costa Rica’s relatively positive rankings on international corruption surveys compared to much of Latin America, corruption remains a significant issue in the country. This summer, Costa Rica’s legislature enacted Legislative Decree 9699<sup>1</sup> (the “New Law”) which imposes corporate<sup>2</sup> criminal liability for corruption offenses already on the books—including both domestic and foreign bribery—and creates a new criminal offense of accounting fraud. The New Law also creates stiff new monetary and administrative penalties, while allowing companies to earn a forty percent reduction by taking affirmative compliance actions.<sup>3</sup> As the country pursues full membership in the OECD, Costa Rican authorities may seek to enforce the New Law soon to address the OECD Working Group on Bribery’s criticism regarding the country’s lack of enforcement efforts to date.

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Under the New Law, private and public Costa Rican companies, including state-owned enterprises, and foreign companies that maintain agencies, subsidiaries, or branches in Costa Rica or that do business in Costa Rica will now be liable for corruption-related criminal offenses committed by employees or third parties acting on a company’s behalf.<sup>4</sup> The New Law covers corruption crimes already foreseen under Costa Rican law, including domestic and transnational bribery, as well as for the newly created crime of falsifying books or records to hide a corruption-related crime.<sup>5</sup>

The New Law introduces significant new penalties ranging from fines to debarment and dissolution. Large companies will face fines of up to 10,000 times the statutory base salary, or currently about \$7.5 million, per offense, while small to medium-sized companies<sup>6</sup> will be subject to a lower range of fines.<sup>7</sup> If the crime occurs in the public procurement context, an alternative fine, if greater, of up to ten percent of the value of the contract sought will apply along with a ten-

<sup>1</sup> Responsabilidad De Las Personas Jurídicas Sobre Cohechos Domésticos, Soborno Transnacional Y Otros Delitos Decreto Legislativo No. 9699 (Responsibility of Legal Persons for Acts of Domestic Bribery, Foreign Bribery, and other Crimes, Legislative Decree No. 9699), available [here](#).

<sup>2</sup> The New Law applies to all legal persons, including trusts, companies, corporations of any kind, and other non-commercial associations that have the capacity to act and assume legal responsibility for their acts.

<sup>3</sup> Previously, prosecutors could bring criminal corruption charges only against individuals under Costa Rican law, while companies were subject to either administrative proceedings resulting in minor fines or civil suits for damages. Thus, the New Law is a positive step in Costa Rica’s fight against corruption given that it incentivizes enhanced transparency and investigative cooperation from all companies doing business in the country.

<sup>4</sup> Law 9699, Articles 1, 2.

<sup>5</sup> Law 9699, Articles 1, 39. Notably, the law explicitly extends liability to parent companies for crimes committed by their subsidiaries when the parent directly or indirectly profits from the crime or the subsidiary acts on the parent’s behalf. Article 2. The law also provides for successor liability and international cooperation in investigations. Articles 3, 30, 31.

<sup>6</sup> Article 10 of Law 9699 defines small and medium-sized companies pursuant to Law 8262 on the Strengthening of Small and Medium-Sized Companies of May 2, 2002 (*Ley de Fortalecimiento de las Pequeñas y Medianas Empresas, de 2 de mayo de 2002*) and other relevant applicable legislation.

<sup>7</sup> Law 9699, Article 11.

year debarment.<sup>8</sup> Other penalties include stripping companies of government benefits such as subsidies or tax incentives, cancelling their operating licenses, or even dissolving a company altogether.<sup>9</sup> Companies convicted under the New Law will be required to pay for the publication of a notice of their conviction in a national publication.<sup>10</sup>

Notwithstanding these serious potential fines and penalties, the New Law provides companies with the opportunity to receive a reduction in fines of up to forty percent by taking affirmative compliance steps.<sup>11</sup> In order to receive fine reductions, companies must tailor their compliance programs to the risks inherent in the company's Costa Rica business, taking into account the company's size, complexity, and capacity to prevent, detect, correct, and raise to the relevant authorities any misconduct covered by the law.<sup>12</sup> At a minimum, the law requires that a company take the following steps in its compliance program to qualify for a penalty reduction:

1. Conduct a risk assessment of the company's business activity specific to Costa Rica;
2. Establish a code of conduct and relevant policies and procedures to prevent the commission of crimes;
3. Implement specific policies and procedures to prevent crimes related to public bidding contracts, obtaining licenses, or any other activity involving the public sector;
4. Determine the scope of application of the above policies and procedures to third parties;
5. Implement protocols or procedures for making and carrying out company decisions;
6. Enable adequate management of financial controls and financial records that allow for the prevention of wrongdoing;
7. Conduct periodic anti-corruption training, including for third parties;
8. Periodically carry out a risk assessment and, when necessary, modify or adapt the compliance program accordingly;
9. Establish an effective disciplinary system;
10. Appoint a compliance officer and ensure adequate compliance capacity and resources; and
11. Conduct an external accounting audit and disclose any apparent illicit findings.

Notably, this list does not include a whistleblower or other reporting mechanism or discuss the role of internal investigations in the compliance program. Realistically, however, those elements would be essential to a company's ability to meet the disclosure and cooperation requirements for receiving sentencing credit.

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<sup>8</sup> Pursuant to the New Law, parent companies could also be subject to debarment. Further, even if the crime does not relate to public procurement, companies may lose the ability to participate in public tenders, bids or any other activity related to the State for a period of three to ten years.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Law 9699, Article 12. The New Law lays out the minimum elements that a compliance program must contain for courts to award credit and directs the executive branch to issue supplemental regulations by June 2020.

<sup>12</sup> Law 9699, Article 8.

## II. Motivation Behind The Enactment of the New Law

Costa Rica is currently working towards full membership in the Organization for Economic Cooperation and Development (“OECD”). In working towards this objective, and as a condition to OECD membership, in 2017, Costa Rica acceded to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention”).

In June 2017, the OECD Working Group on Bribery<sup>13</sup> issued a Phase 1 report evaluating Costa Rica’s initial implementation of the OECD Anti-Bribery Convention and setting out recommendations, including strengthening its corporate liability regime.<sup>14</sup> The Phase 1 report found that “Costa Rica ha[d] yet to hold a company liable for a corruption offence or any other economic crime” and recommended that Costa Rica increase financial penalties for corruption offenses by legal entities, ensure agency coordination in investigations, and take steps to protect prosecutorial independence. In particular, the OECD recommended that Costa Rica amend its legislation to “impose proportionate, effective and dissuasive sanctions on both natural and legal persons” because Costa Rica’s were “among the lowest maximum fines for legal persons among Parties to the Convention.”<sup>15</sup>

The New Law implements this recommendation by significantly increasing the fines companies face and by permitting “confiscation and seizure of property.”<sup>16</sup> Additionally, the Working Group on Bribery expressed its concern regarding the division of responsibility between Costa Rican authorities charged with investigating and prosecuting bribery, which the Working Group noted could result in investigatory overlap and overlooking of bribery allegations.<sup>17</sup> In doing so, the Working Group highlighted that Costa Rica’s Public Prosecution Service (“PPS”) historically handled corruption proceedings against natural persons, while the Ministry of Justice (“MOJ”) conducted proceedings against legal persons, and that the MOJ may not be sufficiently independent so as to execute its mandate free of political influence.<sup>18</sup> Costa Rica has addressed these concerns in the New Law by making the PPS responsible for the criminal investigations and sanctioning of both natural and legal persons.<sup>19</sup>

## III. Key Implications of the New Law for Multinationals

Companies doing business in Costa Rica should review their compliance programs. Corporate compliance departments and legal teams will want to conduct comprehensive reviews of their compliance programs to ensure that they meet or exceed the new minimum standards set out in the New Law. Even for companies with compliance programs already in place, it will be important to ensure that regular training, including for third parties, and ongoing monitoring are effective. As with any compliance program, documenting the measures taken at each step and retaining documentation for a sufficient period will be critical to a company’s ability to demonstrate the adequacy of its compliance program if it should ever need to seek a penalty reduction under the new law.

For future investigations in Costa Rica, companies will face the added specter of criminal charges, fines, debarment, and other penalties in addition to the existing civil suits for restitution and damage caused. For example, Alcatel-Lucent and

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<sup>13</sup> Established in 1994, the OECD Working Group on Bribery in International Business Transactions is responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention, the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. This peer-review monitoring system is conducted in successive phases. Made up of representatives from States Parties to the OECD Anti-Bribery Convention, the Working Group meets four times per year in Paris.

<sup>14</sup> OECD Working Group on Bribery, *Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Costa Rica* (June 2017), para. 1, 20, available [here](#).

<sup>15</sup> *Id.* at para. 127.

<sup>16</sup> Law 9699, Articles 11, 25.

<sup>17</sup> OECD Working Group on Bribery, *Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Costa Rica* (June 2017), para. 71, available [here](#).

<sup>18</sup> *Id.*, para. 61, 67, 78.

<sup>19</sup> Law 9699, Article 14.

three of its subsidiaries agreed in 2011 to pay over \$137 million to U.S. authorities to settle a Foreign Corrupt Practices Act investigation related to the company's global sales practices. In Costa Rica specifically, one subsidiary made corrupt payments worth \$300 million to government officials to secure three government contracts between 1999 and 2006. Although Costa Rica criminally prosecuted various government officials, including former Costa Rican president Miguel Ángel Rodríguez, and reached a \$10 million civil settlement from Alcatel-Lucent, the country could not hold the company criminally liable. Under the New Law, in addition to the civil damages paid, the company would have also been subject to at least a fine of up to \$30 million (10% of the value of the contracts received) and debarment for ten years.

While the extent to which this New Law will affect enforcement activity against corporate entities is unknown, Costa Rican and foreign companies subject to the new liability regime should take measures to ensure that their operations comply with the legislation. Such efforts should include, among other activities, reviewing and, where necessary, enhancing a company's compliance program or implementing a new program where one did not presently exist, thereby avoiding pitfalls down the road.