



ICLG

The International Comparative Legal Guide to:

Business Crime 2014

4th Edition

A practical cross-border insight into business crime

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Colombia



Michael Diaz, Jr.



Marcela Cristina Blanco

Diaz Reus

1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The Office of the Attorney General of Colombia, “AGO” (*Fiscalía General de la Nación*), is the national authority designed to prosecute offenders, investigate crimes, and process indictments. The AGO has the authority to prosecute all crimes within Colombia.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

Colombia has a centralised system of government. The AGO is responsible for prosecuting violations of the Colombian penal law throughout the country; however the plaintiff role is not concentrated exclusively in the Attorney General Office. The Inspector General’s Office, the “IGO” (*Procuraduría General de la Nación* or *Ministerio Público*), which is in charge of monitoring and sanctioning public officials’ conduct, is able to intervene in criminal proceedings on behalf of the public interest in order to ensure that access to justice and due process are being observed. Victims of crimes have the ability to participate in the judicial proceedings through their legal representatives as a way of ensuring their right to justice. All parties can formally participate in a Colombian criminal trial.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

In Colombia, various governmental entities are authorised to investigate and bring civil enforcement proceedings. In civil proceedings, entities can seek civil monetary penalties and injunctive relief. The following are some of the entities that conduct civil enforcement matters.

Superintendency of Corporations (SC): The SC supervises all commercial corporations belonging to the real sector of the Colombian economy in compliance with corporate and accounting laws and regulations. It may impose administrative sanctions over said companies when necessary. Article 57 Commercial Code (Cco), for example, prohibits inaccurate, false, or incomplete accounting. Pursuant to its supervisory power, the Superintendence may: (i) take the control over, or intervene in the control of, the company; (ii) order its dissolution; and (iii) impose fines if, for

example, the company does not register a change of control over the company before the competent authority.

Superintendency of Industry and Commerce (SIC): The SIC may impose fines against persons who develop commercial activities without being registered before the mercantile register. The same sanction may be imposed for the lack of registration of new commercial establishments. The SIC may also impose sanctions to companies who violate the applicable rules of Law 256 of 1996 regarding unfair trade or cut-throat competition.

Finance Superintendence (FS): The inspection, surveillance, and control authority of the financial, insurance, and securities markets and any other activities related to the investment or management of funds of the general public is the FS. In general, the FS has been entrusted with exercising surveillance over the Colombian financial system with the duty of: (i) preserving its stability and trustworthiness; (ii) promoting, organising, and developing the securities market; and (iii) protecting investors and users of financial and insurance services. All companies that issue publicly traded securities are subject to the surveillance of the FS.

In addition, the FS can impose the following sanctions and penalties, among others, depending on the type of infringement. These include warnings, fines, suspension from management of entities under their surveillance, removal of administrators and auditors, suspension or cancellation of registration from certain public registries, and taking over the operation and/or winding-up of entities under the surveillance of the SFC. However, regulatory authorities are not entitled to order disgorgement of illegal profits or indemnifications for losses suffered by private parties. These would have to be pursued through the courts.

Finally, it is important to note that there are other acts that may be punished by competent authorities. They include: (a) the infraction of the prohibition for one person to occupy more than five positions in the board of directors of different companies; (b) the fraud or falsification of information; and (c) the misdirection of working capital of a foreign company in investments different to the social purpose of the company by its subsidiary; among others.

2 Organisation of the Courts

2.1 How are the criminal courts in Colombia structured? Are there specialised criminal courts for particular crimes?

The administration of justice in the criminal system is composed of Municipal Courts, which are courts of first instance; Circuit Courts that act as first instance or second instance for cases heard in Municipal Courts; the Higher Judicial District Courts, which act as

second instance or last instance; and the Criminal Chamber of the Supreme Court of Justice, which is the highest judicial body in criminal matters and the court of last resort. Law 906/2004 created specialised judges for crimes of high impact such as terrorism, extortion, and money laundering, among others. Law 975/2005, known as the “Justice and Peace Law”, also created specialised judges to restore peace and justice by assisting in the demobilisation of members of armed groups on the margin of the law through the provision of alternative punishment and other incentives in return for cooperation on issues of justice, reparation for victims, contribution to peace, and re-socialisation.

2.2 Is there a right to a jury in business-crime trials?

There is no right to a jury in crime trials in Colombia.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Colombia to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud and misrepresentation in connection with sales of securities

Article 317 of the Penal Code (PC) establishes that any person who enters into transactions with the intention to appear of a greater liquidity with respect to a determined security or instrument registered in the National Registry of Securities and Issuers (RNVE), or performs fraudulent manoeuvres with the intention to alter the quotation of the same, will incur two to six years’ imprisonment and fines of up to 50,000 minimum monthly wages (approximately 15 million USD). Imprisonment may be greater if the intended result is achieved.

o Accounting fraud

Article 289 PC provides that forgery and later use of a private document shall be considered a criminal offence punishable by one to six years of imprisonment.

o Insider trading

Article 258 PC provides that it is a criminal offence for the trading of a public company’s stock or other securities registered in the RNVE by individuals with access to non-public information by the reason of their professions.

o Embezzlement

Article 249 PC punishes the act of dishonestly appropriating assets. There are three elements that must be proven to get a conviction in an embezzlement case: (i) a fiduciary relationship between the accused and the victim; (ii) rightful access to and possession of the property in question; and (iii) illegal assumption of property rights.

o Bribery of foreign government officials

Article 433 of the Colombian Penal Code as amended by article 30 of Law 1474 of 2011 penalises the bribery of a foreign government official. The elements of crime are: (i) any person; (ii) intentionally; (iii) to offer, promise or give; (iv) any undue pecuniary or advantage; (v) whether directly or through an intermediary, it is not necessary to prove the intent of the intermediary unless he/she is prosecuted; (vi) to a foreign public official; (vii) for that official or for a third party; (viii) in order that the official act or refrain from acting in relation to the performance of official duties; (ix) in order to obtain or retain business or other improper advantage; and, (x) in the conduct of international business.

o Bribery of domestic government officials

Articles 405 and 406 PC penalises the bribery of domestic government officials, which is defined as when a public servant receives or accepts money or other benefit, directly or indirectly, to delay or omit a proper act of his or her office or to engage in one contrary to the official duties. To bribe a public official involves those that offer or give the money or benefits to public officials to obtain undue privileges.

o Criminal anti-competition

Article 410-A PC states that collusion within a government contract bid to illegally alter the established contractual procedure is a criminal offence.

o Tax crimes

Articles 654, 657 and 658-1 Tax Code contain penalties for falsifying accounts in tax declarations. In addition, article 43 of Law 222 of 1995 provides for criminal liability and imprisonment to the statutory auditor or CPA who knowingly provides authorities with information contrary to reality; or issues certifications or attestations of the same nature; or, who order, tolerate, incorporate, or conceal forgeries in financial statements or notes.

o Government-contracting fraud

Article 410 PC states that public servants commit a criminal offence when they process public procurement contracts without verifying that all requirements established by law have been fulfilled.

o Environmental crimes

Articles 328 and 329 PC state that it is a criminal offence to conduct an unauthorised activity to exploit natural resources within the national territory.

o Campaign-finance/election law

Article 422 PC states it is a crime when a public servant uses his or her position to favor or harm a political candidate.

o Any other crime of particular interest in Colombia

Money Laundering

Article 323 PC states that anyone who acquires, protects, invests, transports, converts, safeguards or administers assets originating, directly or indirectly, from activities of trafficking in migrants, trafficking in persons, extortion, illicit enrichment, extortive kidnapping, rebellion, arms trafficking, the financing of terrorism or administering of resources related to terrorist activity; trafficking in toxic or narcotic drugs or psychotropic substances; crimes against the financial system or crimes against public administration; or assets linked to the proceeds of crimes that are part of a conspiracy to commit an offence or gives assets derived from such activities the appearance of legality or legalises them, conceals or disguises the true nature, origin, location, destination, movement or rights to such assets, or commits any other act for the purpose of concealing or disguising their illicit origin shall, by that act alone, be liable to a term of imprisonment of eight to 22 years and a fine of 650 to 50,000 times the minimum statutory monthly wage.

3.2 Is there liability for inchoate crimes in Colombia? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Yes, there is liability for attempted crimes in Colombia. Generally, attempt statute requires proof of (i) specific intent, (ii) acts to unequivocally commit a specific crime, and (iii) failure to commit the crime. It is important to note that in Colombia, for example, an offer or attempt to bribe either a domestic or foreign public official is considered an instantaneous offence. This means that the offence occurs simply by the performance of the actions that constitute

either of its alternative forms (giving or offering), no matter if the result is obtained.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

In terms of process, there are no criminal proceedings (prosecutions) against legal persons under the Colombian legal system. Investigation of legal entities is purely administrative and independent from the criminal liability of natural persons. However, pursuant to article 34, paragraph 1 of Law 1474 of 2011 (Anticorruption Statute) and article 91 of the Criminal Procedural Code (CPC), sanctions would be applied in the context of a prosecution against a natural person.

According to article 91 CPC, to establish the liability of the legal person it must be established that the offence was committed by (paragraph 1), or with the consent or tolerance (paragraph 3), of a legal representative or manager. Therefore, paragraph 1 clearly requires the prosecution of a natural person to be able to impose article 91 PC sanctions on the related legal person. Under paragraph 3, although prosecution of a natural person is not formally required, it may be very difficult to establish that the bribery, for example, occurred with the consent or tolerance of the legal representative or manager without the said legal representative or manager being prosecuted or even convicted.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

As mentioned above, the investigation of legal entities is purely administrative and independent from the criminal liability of natural persons.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

As mentioned above, there are no criminal proceedings (prosecutions) against legal persons under the Colombian legal system. Investigation of legal entities is purely administrative and independent from the criminal liability of natural persons.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

Article 83 PC provides for a limitation period equal to the maximum imprisonment penalty for the relevant crime. In any case, the statute of limitations may not be any lower than five years or higher than 20 years. Furthermore, the statute of limitations increases by half for offences initiated or committed abroad, without exceeding a maximum of 20 years. Thus, for example, for the foreign bribery offence the statute of limitations would run 15 years if committed in Colombia and 20 years if committed abroad (since one and a half times 15 years would equal 22 years, which is higher than the maximum 20-year statute of limitations allowed). The statutes of limitations also increase by one and a third times if a public servant commits the crime in an official capacity. When it

comes to crimes of sexual violence against minors, the 20 years start running when the victim turns eighteen years of age. In cases of human rights violations, the statute of limitation is 30 years. On this topic, the Supreme Court has stated that certain crimes have no statutes of limitation in accordance with the International Human Rights Law.

Article 84 PC states that the statute of limitations starts to run for (i) instantaneous offences on the date the crime is committed, and for (ii) continuous offences, conspiracy or attempted crimes, on the date the last act is committed. Regarding bribery, Colombian courts have also stated that the offence is completed with the offer of the bribe regardless of the outcome, and therefore it is an instantaneous rather than a continuous offence.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

No. As explained above, Colombia penal law states that for crimes that are "continuing offences" the statute of limitation starts to run on the date the last act is committed.

5.3 Can the limitations period be tolled? If so, how?

Yes. According to article 86 PC, the statute of limitation is tolled when the indictment is final.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

In Colombia, the prosecutor generally learns of criminal charges when a complaint is filed. However, in certain cases the AGO can initiate an investigation without a complaint having been filed (*de oficio*). The pre-trial discovery stage is closed and conducted under the sole direction of the prosecutor, who responds to the complaint and formulates the case theory. Based on case theory, the prosecutor then creates a methodological plan for obtaining needed information, to be collected by the judicial investigators, in order to support his or her theory. This information is known as the body of evidence, which becomes proof during the trial stage.

Under Colombia's accusatory system, it is assumed that there is no debate in this stage that would require the participation of the involved parties. Therefore, the victims and their representatives are not allowed to intervene. However, any person that becomes aware that there are criminal investigations against them can petition the judge to order the prosecutor to disclose to them and their attorney the body of evidence that has been collected in order to prepare for the defence. But victims and their attorneys are not allowed to access the prosecutor's methodological plan or the body of evidence.

After the prosecutor has reasonable inference that a person is the author of a crime, the prosecutor formally informs the person that they are the subject of an official criminal investigation during a hearing known as *Audiencia de Imputación*. During this hearing, the accused is entitled to the right to be represented by counsel, and the judge decides on the imposition of security measures involving, or not involving, the deprivation of liberty. Throughout this pre-trial phase, the Guarantee Judge (*Juez de Garantías*) must ensure that the prosecutors and the judicial police respect the

fundamental rights of the accused enshrined in the Constitution of Colombia, in the Criminal Code, and international treaties concerning human rights.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

Colombian law provides for local investigative and judicial authorities to maintain international cooperation through the Ministry of Foreign Affairs in accordance with the Constitution, international instruments, and laws. The central authority responsible for international cooperation depends upon the international instrument forming the basis of the request. In most cases, the Ministry of Justice or the AGO is designated as the relevant central authority.

International cooperation may consist of: exchange of information such as documents, judgments, location of persons and goods; recording of statements and testimony; transfer of defendants, witnesses or experts; seizure of assets, as well as assistance allowed under the law of the requested country. The AGO maintains an International Cooperation Handbook in Criminal Matters.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The AGO has three ways to gather information in a criminal investigation: (i) through an informal request to voluntarily produce documents or information; (ii) through investigative techniques that do not require prior judicial authorisation, set out in articles 213 to 245 CPC, which include wire-tapping, undercover agents, and undercover anti-corruption operations that allow for the use of undercover agents and analysis and infiltration of a criminal organisation to verify the possible existence of crimes against the public administration in Colombian public entities, controlled deliveries in cases involving arms trafficking, explosives, ammunition, counterfeit, drugs of dependency or continuing criminal activity, selective database searches, and DNA analysis; and (iii) through other investigative techniques such as search and seizure that affect fundamental rights of citizens and which must be previously approved by the judge.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Prosecutors may demand documents through a judicial order where a supervisory judge, at the request of a prosecutor, issues a judicial order. It is important to note that under the most recent changes to the Colombian legal system, the prosecutor cannot order nor collect evidence, does not issue an arrest warrant or levies, and no longer definitively decides an individual's criminal responsibility. The power to order, collect, and evaluate evidence and to determine the outcome in the course of a criminal

investigation belongs exclusively to the judges.

Prosecutors may, however, seek authority to raid a company to seize documents also through a judicial order known as *Orden de Registro y Allanamiento*. Only the supervisory judges may authorise the execution of this type of judicial order. According to article 220 CPC, it can be issued only when it is reasonable to believe that the owner, the holder, or the persons that are inside that place are likely the authors of the crime, or when a reasonable belief exists that inside that place there are documents or objects that were used to commit the crime. The locations to be searched and the types of evidence that may be seized must be defined in the judicial order.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Colombia recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Colombia's labour laws protect personal documents of employees, even if located in company files?

Yes. Article 223 CPC states that written communications as well as digital documents, videos, recordings, illustrations and such, between the defendants and their attorneys are protected. Under the same article, communications between the defendant and other persons that are exempted by law from testifying are also protected. Article 235 CPC also prohibits wire-tapping conversations between the defendants and their attorneys. Article 345 CPC states the parties are not compelled to produce (i) privileged information, (ii) information about facts that are not related with the accusation, (iii) materials prepared in anticipation of litigation, and others. Finally, article 244 CPC provides that the prosecutor can request personal information found in databases administrated by public or private entities without previous authorisation of the judge; however that decision is subject to review of the supervisory judge.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The AGO may seek documents from an employee or from the company, or raid the home or office of an employee, as explained in questions 7.2 and 7.3.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

The AGO may seek documents from, or raid the home or office of, a third person as explained in questions 7.2 and 7.3.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

Based on article 206 CPC, prosecutors may seek a voluntary interview with any person who is a victim or a witness of a crime,

but these individuals may refuse to do so. A supervisory judge may issue a judicial order commanding employees, officers, or directors to appear before the judicial police to answer questions. Article 383 CPC states that every person is obligated to testify, under oath, during trial if requested.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

The government may seek to question third persons to the same extent and using the same procedures explained in question 7.6.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

Persons being questioned by the judicial police have the right to remain silent and have the right not to provide answers that would tend to incriminate the person, his/her spouse, and/or relatives within the fourth degree of consanguinity or second degree of affinity. When the persons renounce the right to remain silent, the judicial police officer must inform them that they have the right to be questioned in the presence of an attorney.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The trial phase is carried out through public hearings before an impartial judge. The judge determines the guilt or innocence of the accused after studying the evidence provided by the parties. The first hearing of the trial phase is the indictment when the prosecutor informs the defendant of the charges against him, recognises the victims, and grants protective measures for them. The required form and content of the indictment is set out in articles 286 to 289 CPC.

The trial stage is held publicly, with oral proceedings where the parties present their evidence and defend their respective allegations before the judge, who listens to the arguments, the examination, and cross-examination of evidence to determine guilt or innocence. The judge must render an impartial verdict based upon the evidence adduced at the trial. The oral trial is held in accordance to the principles of immediacy, contradiction, and concentration. When the judge finds a defendant guilty, it begins the process of reparation (*Incidente de Reparación*) in order to repair or compensate the damage caused to the victims of the crime.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

Article 322 CPC sets out the legality principle, which requires the AGO to prosecute offences except when the "opportunity principle" applies. Prosecutors are unable to suspend, discontinue, or abandon criminal proceedings, except in cases falling under the opportunity principle set out in article 324 CPC.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

Yes. Article 324 CPC sets out the circumstances in which the opportunity principle is invoked and may be applied: to crimes with a maximum penalty of over six years of imprisonment or in cases where, *inter alia*, the victim has been compensated; where the defendant is extradited to another country; where the defendant collaborates before the judgment hearing to prevent the continuation of the crime or agrees to serve as a prosecution witness against other defendants (provided he or she has the opportunity to testify); and where the defendant has suffered serious physical or moral harm; or when the criminal procedure implies risk or serious threat to the Foreign Security of the State, among others. Article 325 CPC states that defendants and prosecutors can agree to the suspension of the criminal proceedings subject to the fulfilment of certain agreed conditions and the reparation of the victims.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

Yes. Where the defendant's criminal conduct also constitutes a violation of the Colombian civil/commercial law, the defendant may be subject to civil penalties or remedies as part of a civil enforcement or administrative proceeding. A civil enforcement proceeding will often run in parallel with a criminal proceeding.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In Colombia, every person is presumed innocent until judicially proven guilty. Article 381 CPC expressly states that to convict any person the judge must find the crime was proved beyond reasonable doubt through the evidence given during the trial. The judge will appreciate the evidence given during trial using his or her "sound judgment" (*sana crítica*), which means that the evidence must be appreciated as a whole using logic, common sense and experience.

9.2 What is the standard of proof that the party with the burden must satisfy?

As we previously mentioned, to convict any person the judge must find the crime was proved beyond reasonable doubt through the evidence given during the trial.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The judge is the arbiter of fact.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

The Penal Code (PC) contains several conspiracy and association offences. Article 340 (Conspiracy) applies to all PC offences even if the conspirators do not act upon their agreement. An additional form of liability is contained in article 29 PC, which defines the perpetrators and co-perpetrators of a criminal offence and thereby establishes that the sanction for the relevant offence will apply equally to the actual perpetrators and to the co-perpetrators where they act on the basis of a common agreement. The PC states that this article does not apply in cases where a group of co-perpetrators form a common agreement but do not act on it.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Yes. Where the law defines an offence as requiring a particular intention by the defendant, this is an essential element of the offence. In such cases, the prosecutor must prove that the defendant had the requested intention to commit the offence beyond a reasonable doubt.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Generally, defendants are presumed to know the law. However, article 32 PC, numeral 11, recognises that there is no criminal liability when the defendants act under an invincible mistake that their conduct is lawful. An invincible mistake exists when the defendants did not have the "opportunity" – considering his/her knowledge and the facts of each case – to know that their conduct was against the law. There is not "invincible mistake" if the crime is the result of the negligence or the inactivity of the defendant. This is known in the Colombian penal system as *error de prohibición*.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

The "mistake of fact" defence is available when the defendant's invincible mistake negates the requisite of the intent for the offence. This is known as *error de tipo*.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

According to article 67 CPC, a person, including a public servant, who becomes aware that a crime has been committed, should report such crime to the competent authorities. However, no one is compelled to report a crime when it incriminates himself/herself, his/her spouse, and/or relatives within the fourth degree of consanguinity or second degree of affinity. Also, persons who are bound to keep professional secrecy are exempted from the duty-to-inform judicial authorities in cases of criminal conduct that they have known by reason of the exercise of their profession. However, a person is criminally liable for failing to file a criminal complaint when it relates to specific crimes such as genocide, torture, forced disappearance, drug trafficking, and others of such nature.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

Yes. Generally prosecutors take into account a defendant's voluntary disclosure of wrongdoing and subsequent cooperation in the investigation when making their charging decision. Where a defendant discloses their own wrongdoing or voluntarily shares information with the prosecutors in connection with his investigation, the prosecutor may agree to charge the defendant with a lesser offence.

If the defendant agrees to plead guilty at the *Audiencia de Imputación*, his sentence will be reduced to up to half. During this preparatory hearing, the parties request the evidence they will use at trial to prove their claims, and if the defendant accepts responsibility he or she will get a reduction of up to one third of the conviction. During the oral trial, if the defendant accepts responsibility, he or she will get up to one sixth of the conviction.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Colombia, and describe the favourable treatment generally received.

As already mentioned, there are no criminal proceedings (prosecutions) against legal persons under the Colombian legal system, investigation of legal entities is purely administrative.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

Yes. A defendant may enter into a "plea agreement" with the AGO under which the prosecutor will charge the defendant with agreed-

upon offences and will agree to recommend a particular, usually reduced, sentence to the court. The judge must approve the agreements between the defendant and the prosecutors.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

Defendants must be fully aware of the direct consequences, including the actual value of any commitments made to them. Also, a plea must not be induced by threats or promises to discontinue improper harassment or misrepresentation. In general, defendants must be deemed competent and have adequate counsel before voluntarily and intelligently making pleas of guilt. The agreements must be in accordance with the criminal police, set by the AGO. In addition, if as a result of the crime the defendant received an increment in his assets, the defendant cannot subscribe to an agreement with the prosecution until returning 50 per cent of that amount with a guarantee that he will return the other 50 per cent at a later prescribed time.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

Penalties in Colombia are divided into principal, alternative and accessory. The principal penalties are imprisonment and fines. Among the alternative punishments the most common is home detention, which replaces the prison sentence and may incorporate electronic surveillance. Accessory penalties include the disqualification from the exercise of rights and public office; the loss of public employment; the disqualification from exercising public functions; the prohibition to exercise a profession, trade or business; the suspension of parental rights; and the deprivation of the right to possess or carry firearms. These sanctions are imposed when they are substantially related to the crime. Currently, the maximum sentence in Colombia is 60 years' imprisonment. The Constitution prohibits exile, life imprisonment and the death penalty.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

Please refer to questions 4.1 and 4.3.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

According to article 445 CPC, after the parties have orally submitted their closing statements and during the same hearing, the judge gives his guilty or not guilty verdict. Article 446 CPC states that the sentence will be issued no later than 15 days after the verdict.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

The sentence issued by the judge pursuant to article 446 CPC may be appealed. The appeal can be requested by any of the parties that participate in the trial; including prosecutors, defendants, and victims' representatives, when the judge renders a judgment of acquittal or a conviction. The appeal against rulings are given "suspensive effect". This means there is a temporary suspension of the execution of the judgment until the appeal is resolved by the superior court.

The sentence might also be attached to a cassation, which is an exceptional appeal that must be submitted to the Supreme Court. (Courts of cassation do not re-examine the facts of a case, they are only competent for verifying the interpretation of the law.) The Supreme Court has jurisdiction for upholding or annulling higher judicial district court rulings in cases of serious error, incongruence, or violation of guiding principles or procedural guarantees.

16.3 What is the appellate court's standard of review?

The appellate court acts as if it were considering the question for the first time, affording no deference to the decisions of the trial court. This standard of review allows the appeals court to substitute its own judgment about whether the lower court correctly applied the law. However, if there is only one appellant the appellate court cannot aggravate his or her situation.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

The appellate court can totally or partially modify the sentence.



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