



# Colombia - Global bribery offenses guide

11 January 2022

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## 1) What is the legal framework governing bribery in Colombia?

Bribery in Colombia is governed by two main pieces of legislation:

- Under the Colombian Criminal Code (CCC) (*Código Penal Colombiano*), articles 405, 406 and 407 define three crimes related to public officers that receive bribes for performing, delaying or omitting activities related to their functions, as well as related to the individual that bribed or offered to bribe a public officer.
- The conduct of transnational bribery has also been classified as crime in the CCC, by article 433.
- Law 1778 from 2016 is designed to prosecute transnational bribery via administrative sanctions.
- External Circular 100-000011 of 2021 of the Superintendence of Companies promotes the obligation for companies under supervision or obligated subjects, of developing transparency and business ethics programs to mitigate corruption and bribery risks.

## 2) What constitutes a bribe?

Bribes in Colombia have different definitions depending on the applicable law; however, generally speaking they all revolve around the same idea: the offering, giving or receiving of some sort of economic benefit to a public officer in exchange for an illegal advantage.

The criminal definition for bribery is money or any other income, or promise of remuneration for performing, delaying or omitting activities related to public functions. Under this general definition, the CCC defines the following criminal offenses:

- *Cohecho Propio* is when any public officer that directly or indirectly receives for themselves or a third party, money or any other economic benefit, or promise of remuneration to delay or omit an activity that arises from their functions or to perform any activity beyond or against such functions.
- *Cohecho Impropio* is when any public officer that directly or indirectly receives for themselves or a third party, money or any other economic benefit, or promise of remuneration to perform an activity that arises from their functions.
- Bribery for Giving or Offering (*Cohecho por Dar u Ofrecer*) is when any individual gives or offers money or any other economic benefit to a public officer.
- Transnational bribery is when any Colombian national or resident or company domiciled in Colombia directly or indirectly offers money or any kind of economic benefit to a foreign (not Colombian) public officer in exchange for such public officer performing or omitting certain activity under their functions.

Finally, there are some other types of conduct in the CCC that may be associated with bribery, such as: giving, offering or promising money to a witness in order to persuade them not to testify or falsely testify in a court of law as established in article 444 of the CCC. A case could also be made for the crime of influence peddling (*tráfico de influencias*), which can

take place by the action of either a private individual or a public officer according to articles 411A and 411 of the CCC; although not technically bribery since there is an illegitimate exercise of a position of power rather than the offering of money or any kind of utility.

The offering of money among private parties to obtain unlawful benefits is known as a private corruption crime (*corrupción privada*), and it was introduced into the CCC as article 250A by Law 1474 from 2011.

As for the administrative regulation, mainly provided by Law 1778, a bribe consists of a representative of a legal entity giving, offering or promising sums of money, benefits or objects of monetary value to a foreign public officer in order to obtain a benefit derived from his servant role and in relation with an international business deal or transaction.

### 3) What are the principal offenses under this legal framework?

For a Bribery for Giving or Offering the offense comprises the giving, offering or promising money or any other utility, directly or indirectly to a public officer in order to delay or prevent them from fulfilling their public duty, or act against their official duties. Also, these crimes can be committed with the purpose of ensuring, with a bribe, that the execution of a public function favors oneself or a third party.

Regarding public officers, it is a crime for them to receive money or any other economic benefit, or to accept a promise of remuneration in order to perform, omit or delay their public duties, or act against their official duties, or to execute a public function favoring the briber or a third party.

Criminal transnational bribery occurs when a Colombian national, resident, or legal entity offers directly or indirectly any money, object of value, or any other utility to a foreign public officer, in order for them to act or avoid acting accordingly with their public duties regarding an economic or commercial transaction.

Administrative transnational bribery is defined in article 2 of Law 1778 as the legal entity that directly or indirectly through its own, or any of its subsidiaries, employees, contractors, administrators or associates gives, offers or promises sums of money, any object of value or any other economic benefit or utility to a foreign public officer, with the purpose of influencing them to perform, omit or delay their public duties regarding an economic or commercial international transaction.

Parent companies whose subsidiaries conduct such behavior will be held responsible and sanctioned appropriately, if they consented or tolerated any of the actions of its subsidiaries.

### 4) What is the jurisdictional reach of the legal framework?

The criminal offenses described in articles 405 through 407 only affect the person or persons who actually committed the crime on Colombian territory, public officers and private bribers alike without regard to their nationality. If a legal entity is involved in the criminal activity, its legal representative will usually be held responsible, although any member or body that represents the legal entity can be held accountable in light of article 29 of the CCC.

The same applies to the transnational bribery crime regulated by article 433 of the CCC, with the additional requirement that the briber must be a Colombian national or habitual resident, as for legal entities they shall be domiciled in Colombia.

Both of the crimes included in the CCC can only be performed by individuals, meaning that legal entities cannot have criminal liability for these activities, but their legal representatives and managers might have criminal liability. Criminal punishment can only be enforced by a national criminal judge.

The administrative embodiment of transnational bribery stipulated in Law 1778 is exclusively addressed to legal entities and is enforced by the Superintendence of Companies. However, if an administrative investigation finds evidence of a crime, they will notify the Colombian General Attorney's Office (*Fiscalía General de la Nación*), and a criminal investigation will be opened against the alleged offenders.

### 5) Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

As mentioned above, individuals, public officers and officials, legal representatives, managers and members of

representative bodies of legal entities, can be liable for criminal bribery.

Regarding criminal transnational bribery, nationals or habitual residents might be liable for it.

Only legal entities are liable under Law 1778, so only they can be sanctioned under such law. However, legal representatives, members of the board of directors, controlling partners, branch offices, can be declared unable to perform certain contracts or activities with the Colombian government.

## 6) Can a parent company be liable for its subsidiary's involvement in bribery?

Yes, paragraph two of article 2 of Law 1778 stipulates that parent companies can be liable where they either consented or tolerated the bribery that their subsidiaries carried out.

## 7) Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

Yes, any offered amount, no matter how little, that interferes with the decision-making process of a public officer or interferes in the normal performance of their public duties is considered a bribe. Neither the CCC nor Law 1778 set an amount for bribes to be prosecuted; therefore, any quantity given or offered with the intention of altering government's action will be considered a bribe.

## 8) Does the legal framework restrict political and charitable contributions?

A political or charitable contribution could be considered a criminal bribe if it is given or received with the necessary intent. The same logic applies to legal entities or their representatives offering or giving political and charitable contributions for foreign officials in order to influence them, with the intention of obtaining or retaining a business deal or an advantage on an international transaction under the context of law 1778. Therefore, the relevant criteria to be considered is the final and real purpose of the contribution given or offered.

Law 1778 also provides that the natural and legal persons that grant political contributions to campaigns for the Presidency, local authorities or the Congress that exceed 2% of the maximum amounts that can be used by the candidate in electoral campaigns according to Colombian law will be considered unable to execute any contract or agreement with public entities of the level of the elected candidate. Such condition will be extended for the elected period.

Companies under supervision or obligated subjects, in compliance with Superintendence of Companies External Circular 100-000011 of 2021, also must include guidelines on political or charitable donations in their transparency and business ethics programs.

## 9) Does the legal framework place restrictions on corporate hospitality?

There is no criminal, administrative or legal prohibition for corporate hospitality. However, corporate hospitality could give rise to a bribe if it meets the requirements as set out in this note. The burden of proof on this scenario will be on either the DA's Office or the Superintendence Companies, as they will have to demonstrate there was a misguided intention behind the hospitality practices.

In accordance with External Circular 100-000011 of 2021 of the Superintendence of Companies, companies under supervision or obligated subjects must include guidelines on corporate hospitalities in their transparency and business ethics programs.

## 10) Are there any defenses for bribery offenses?

For criminal offenses there is no special defense apart from the adequate legal defense any person under trial is entitled to.

Law 1778 does not provide specific defenses, nevertheless, it mentions the criteria to be considered to determine the sanctions to be imposed, which include the following:

- the economic benefit obtained or intended;
- the patrimonial capacity of the offender;
- the repetition of offenses;
- the resilience, denial or obstruction of the investigation;
- the use of different means or an intermediary to hide the offense, the benefits received, or given or offered to a local or foreign officer;
- the acquiescence or acknowledgment of the offense granted, before the start of the probatory stage in the administrative procedure;
- the existence, implementation and efficiency of business ethics programs or anticorruption mechanisms within the company;
- the degree of compliance of any interim measure ordered by the authority;
- if the company undertook due diligence processes before any merger, split, reorganization or control acquisition in which the offender company has been involved; and
- if the company informed the authorities of conducts performed by employees, legal representatives or shareholders.

## 11) What are the key regulatory or enforcement bodies with regard to bribery?

All criminal activity will be investigated and prosecuted by the National District Attorney Office (*Fiscalía General de la Nación*). Criminal liability can only be imposed by a national criminal judge after a criminal procedure is held.

Regarding administrative investigation and sanctioning, the Superintendence of Companies is the only authority with power to enforce Law 1778 and impose the sanctions it contains.

## 12) What are the legal consequences of being found guilty of bribery offenses?

Individuals found guilty under article 405 of the CCC for bribery may be imprisoned for a minimum of 80 months and maximum of 144, as well being subject of a fine between with 66.66 and 150 Colombian monthly minimum legal wages (approximately between GBP13,800 and GBP31,054). Finally, they will be unable to be public officers for the duration of their penalty.

Individuals found guilty under article 406 of the CCC for bribery will be imprisoned for a minimum of 64 months and maximum of 126, as well as being fined between 66.66 and 150 Colombian monthly minimum legal wages (approximately between GBP13,800 and GBP31,054) Finally, they will be unable to be public officers for a minimum of 80 months and maximum of 144.

Individuals found guilty under article 407 of the CCC for bribery will be imprisoned for a minimum of 48 months and maximum of 108, as well as being fined between 66.66 and 150 Colombian monthly minimum legal wages (approximately between GBP13,800 and GBP31,054). Finally, they'll be unable to be public officers for the 80 months and maximum of 144.

Individuals found guilty under article 433 of the CCC for transnational bribery will be imprisoned for a minimum of 9 years and maximum of 15, as well as being fined between 650 and 50,000 Colombian monthly minimum legal wages (approximately between GBP134,569 and GBP10,351,000). Finally, they will be unable to be public officers for the duration of their penalty.

Law 1778 of 2016 has different sanctions for legal entities that are responsible for the actions forbidden by such law:

- Fines up to 200,000 Colombian monthly minimum legal wages (approximately GBP41,405,800).
- Declaration as unable to contract with the Colombian State Entities for up to 20 years; the inability will start once the sanctioning resolution of the Companies Superintendence becomes enforceable. This inability extends to legal persons.
- A widespread publication of the administrative decision for up to a year on mass media and the webpage of the legal entity, costs shall be paid by the legal entity.
- A prohibition to receive any kind of incentive or subsidy by the Colombian government for the next five years.
- The administrative act that includes the decision will also be attached to the entity's commercial registry,

There is a specific regulation for the imposition of sanctions to companies that have been subject of certain by laws

amendments:

- If legal entities that were involved in any of the proscribed conducts become extinct due to a merger or acquisition, the absorbing company or the one that replaces the former entity will be the recipient of the sanctions provided under Law 1778.
- If legal entities that were involved in any of the proscribed conducts become extinct due to a division or splintering, all legal entities that participated in the division process either as dissolved companies or beneficiaries, will have joint liability for the sanctions provided under Law 1778.
- If legal entities that were involved in any of the proscribed conducts become extinct due to a transfer of control, the new controlling party will be liable under the sanctions provided under Law 1778.
- Rules, A, B and C are applicable to every form of associate other than companies.

### 13) Are there deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

No, there is no regulation that allows the prosecutors to reach DPAs in Colombia.

There are benefits for collaboration on the administrative process for transnational bribery. Benefits will depend on the timing, the quality and/or usefulness of the information and evidence provided by the party.

The Superintendence of Companies can completely or partially exonerate legal entities from any sanction if they provide information and evidence of the misconduct being investigated. The Superintendence of Companies will evaluate the information and evidence provided, on the basis of it being useful in clearing up the facts, stopping and/or identifying the improper conduct, as well as the identification of the participants, their degree of participation and general benefits that the information supplied. Full exoneration can only be granted before the administrative process begins and when legal entities: (i) inform the Superintendence of Companies of an infraction under Law 1778 and (ii) obligations under an international contract or transaction celebrated in the context of a transnational bribery have not been performed. Partial exoneration can be granted when the information is provided after the administrative process has already begun and has a maximum absolution of 50% of the penalty to be imposed. All of this can be found on article 19 of Law 1778 from 2016.

For criminal bribery there are some options to be considered, although both of them require that the offender admits their involvement on the criminal activity investigated.

According to article 323 of the Colombian Criminal Procedural Code (*Código de Procedimiento Penal*) there are 17 limited scenarios to apply the discretionary principle (*Principio de oportunidad*) to suspend, interrupt or withdraw a public criminal action against an individual. Whether such action is suspended, interrupted or withdrawn depends on which of the 17 legal scenarios is applicable to the specific case.

In order for this principle to operate the DA's Office must follow seven verification steps:

- Adequately study the facts and evidence of the case.
- Determine if one of the 17 scenarios is lawfully and factually applicable, and if there is enough evidential value.
- Determine which of renounce, suspension or interruption is relevant.
- Guarantee that victims of the crime are involved in the process of enforcing a Principle of Opportunity.
- Define if the DA's office has the ability to apply the Principle of Opportunity to a specific case.
- Perform the internal procedure to determine whether the DA that is prosecuting can apply such principle or if the National District Attorney (*Fiscal General de la Nación*) is the only one with such capacity.
- Request a hearing with a national criminal judge to validate such procedure.

During the hearing, the DA's office must explain why such benefit is being granted and which obligations are set on the beneficiary of this program. This benefit mainly depends of the DA's office, and usually it implies an acceptance of culpability, some form of collaboration or restraint from further criminal activity.

The relevant scenarios for this question in particular can be found on numerals 4 and 5 of article 323 of the Colombian Criminal Procedural Code which established benefits for information sufficient to break up criminal bands and benefits for the person who testifies in exchange of total or partial immunity.

Finally, if the person prosecuted accepts the charges against them, they can receive a reduction of up to 50% of their

term of imprisonment, depending on the time of acceptance.

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