

LATIN LAWYER REFERENCE ANTI-CORRUPTION 2021

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# Ecuador

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## Laws

### 1 What laws or regulations in your jurisdiction prohibit the offering, payment or receipt of bribes by: domestic government officials; foreign government officials; or other individuals, such as commercial counterparties?

The laws and regulations in the Ecuadorian jurisdiction that prohibit the offering, payment or receipt of bribes by domestic government officials or other individuals are:

- the Constitution;
- the Criminal Code;
- Asset Laundering, Financing of Terrorism and Other Crimes Prevention Rules;
- the Organic Law of the Comptroller General of the State; and
- the Organic Law of Public Service.

Ecuador does not have a law or regulation that prohibits or sanctions the offering, payment or receipt of bribes by foreign government officials.

### 2 To what extent, and under what circumstances, do the anti-corruption laws in your jurisdiction apply to corporate entities, whether based principally in your jurisdiction or elsewhere?

The anti-corruption laws in our jurisdiction apply to all types of corporate entities incorporated in the country, or that are doing business in our jurisdiction by an attorney-in-fact. As such, corporate entities can be sanctioned due to corruption crimes such as bribing and money laundering.

### 3 To what extent, and under what circumstances, do the anti-corruption laws in your jurisdiction apply to individuals, whether resident in your jurisdiction or elsewhere?

The anti-corruption laws in our jurisdiction apply to individuals whether they are resident in Ecuador or elsewhere, when these individuals have committed a crime in our jurisdiction.

The Criminal Code in several articles establishes individual corruption crimes, such as bribery, tax fraud, information concealment, false information and others, this responsibility can apply to residents or non-residents who violate the law within Ecuador.

### 4 How do the anti-corruption laws in your jurisdiction define government officials?

Ecuador is part of the United Nations Convention Against Corruption and as such it is part of our law system. In this convention foreign government officials is defined as: any person who occupies a legislative, executive, administrative or judicial position of a foreign country, whether appointed or elected, shall be understood; and any person exercising a public function for a foreign country, even for a public body or a public company.

Also, this convention establishes that an official of a public international organisation is an international public employee or any person who the organisation has authorised to act on its behalf.

### 5 What level of knowledge or intent is required to prove a violation of the anti-corruption laws in your jurisdiction?

In a criminal procedure knowledge or intent must be beyond a reasonable doubt.

**6 Do the anti-corruption laws in your jurisdiction prohibit facilitating payments? (That is, small payments to expedite or to secure the performance of a routine government action to which a company is entitled, such as obtaining permits, processing visas, utility services, customs clearance, police protection.)**

Yes, the Public Service Law establishes in its article 24(k) a special prohibition for any public officials in which they cannot receive, request or accept in any way, gifts, rewards or contributions, in goods or money, privileges or benefits, for themselves, their superiors or their subordinates. In this sense our jurisdiction prohibit facilitating payments.

**7 What affirmative defences are available with respect to the anti-corruption laws in your jurisdiction?**

An affirmative defence will depend on the circumstances of the acts committed. Some affirmative defence could be that the person that committed the crime was coerced to commit the act, or because it was an order by his or her superior.

It will be up to on the judge to evaluate the affirmative defence and to decide whether or not to establish a penalty.

**8 What are the maximum potential fines or other penalties for violating the anti-corruption laws in your jurisdiction?**

One of the maximum potential penalties for violating the anti-corruption laws is prison of 10 to 13 years, as per the Criminal Code.

**9 Is there any pending legislation related to anti-corruption in your jurisdiction?**

Yes, there is bill in the National Assembly called the Anti-corruption and Whistleblower Protection Law. The purpose of this bill is to define integral, articulated and joint actions between public entities and citizens in the fight against corruption from all spheres, promoting a mechanism for whistle-blowing and asset recovery owing to corruption.

There are 16 other proposed bills to the National Assembly that unfortunately continue to be reviewed and analysed.

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## Enforcement

**10 Are corporate entities and individuals that violate the anti-corruption laws in your jurisdiction subject to criminal, administrative or civil liability, or a combination thereof?**

Yes, Corporate entities and individuals that violate the anti-corruption laws could be subject criminal, civil and administrative sanctions, or a combination of them.

### Corporate entities

Criminal liability: fines, confiscation of assets, closing of installations, community work, among others.

Civil liability: can cause the automatic dissolution of the company.

Administrative liability: companies can be blacklisted, prohibiting them to participate in public tenders for a period of five years.

### Individuals

Criminal liability: public officials who were involved in a corruption crime, as well as private individuals how participated in the corruption crime of the public official.

Civil liability: damages could be initiated, as well as antitrust proceeding in the Superintendency of Market Power Control.

Administrative liability: prohibition from participating as candidates for any public position; inability to assume public office.

**11 Which prosecutors or other government agencies may bring enforcement actions under your jurisdiction's anti-corruption laws?**

- The Prosecutor General Office.
- The Financial and Economic Analysis Unit against Money Laundering.
- The Comptroller General Office.
- The Transparency and Social Control Function.

- The Superintendency of Market Power Control.
- The Superintendency of Companies, Values and Insurance.
- The Superintendency of Banks.
- The Public Procurement Secretariat (SERCOP).
- The Internal Revenue Service IRS (SRI).
- The National Customs Service of Ecuador (SENAE).

## **12 Have any multinational corporations or their domestic subsidiaries been subject to enforcement actions in your jurisdiction for domestic or foreign bribery violations?**

Yes, Odebrecht, SK Engineering & Construction, Sinohydro Corporation, Grupo Azul (Tecnazul, Azulec, Canterpremiere and Campetrol), Telconet, PetroChina, INA Investment Corporation, Equitesa Equipos y Terrenos, Fopeco, Metco Mercantil, Sanrib Corporation, Consermin Construcciones, Hidalgo & Hidalgo, Técnica General de Construcciones and China International Water & Electric Corp-CWE are already face or are facing criminal investigations for bribery and money laundering as reported in news releases.

## **13 Have the employees of any multinational corporations or their domestic subsidiaries been subject to enforcement actions by the authorities in your jurisdiction for domestic or foreign bribery violations?**

There are many cases for domestic or foreign bribery violations, among the most popular are:

- SAI BANK: María Paola Alvear and Daniel Eduardo Borja officials of Sai Bank were found guilty for illegal receiving money related to acts of corruption. They were sentenced to nine years and four months of prison.
- Federación Ecuatoriana de Fútbol FEF: Luis Chiriboga (President of FEF), Hugo Mora (Treasurer FEF) they were found guilty of money laundering and were sentenced to 10 years of prison in relation to 'FIFA Gate'.

On 8 September 2020, the following persons were sanctioned in the biggest "Bribery" case, who represented the government and companies:

- Rafael Correa Delgado (Ex-President) – eight years of prison.
- Jorge Glass Espinel (Ex-Vice-president) – eight years of prison.
- María de los Angeles Duarte (Ex-Minister of Transport and Public Works of Ecuador) – 8 years of prison.
- Alexis Mera (Ex-Legal Secretary of the Presidency) – eight years of prison.
- Walter Solis (Ex-Secretary of Water) – eight years of prison.
- Vinicio Alvarado (Ex-National Secretary of Communication and Minister of Tourism) – eight years of prison.
- Viviana Bonilla (Ex-Vice President of National Assembly) - eight years of prison.
- Cristian Viteri (Ex-Assemblyman) - eight years of prison.
- Victor Fontana (Owner of FOPECA S.A.) - eight years of prison.
- Rafael Cordova (Owner of Metco) - eight years of prison.
- Bolívar Sánchez (Owner of Sanrib Corporation) - eight years of prison.
- Edgar Salas (Owner of Constructora Consermin) - eight years of prison.
- Ramiro Galarza (Owner of Constructora Consermin) - eight years of prison.
- Alberto Hidalgo (Owner of Hidalgo & Hidalgo) - eight years of prison.
- Teodoro Calle (Owner of Tecnica General de Construcciones) - eight years of prison.
- Pedro Verduga (Owner of Equitesa) - eight years of prison.
- Mateo Choi (Owner of SK Engineering and Constructions) - eight years of prison.
- William Phillips (Owner of companies of Grupo Azul) - eight years of prison.
- Pamela Martínez (Ex-Presidential Adviser) – nine months of prison.
- Laura Terán (Ex-Presidential Adviser) – nine months of prison.

## **14 Have resolutions of anti-corruption enforcement actions with corporate entities resulted in settlements, such as deferred prosecution or non-prosecution agreements or leniency agreements?**

An important case that resulted in settlement is the case of the company Telconet in relation to the submarine internet cable, whose investment was about US\$300 million.

During the investigation of Tomislav Topic, he confirmed that his company Telconet had invested US\$13.5 million that came from Odebrecht in that megaproject. He says he did not know about the illicit origin of the funds and that “as proof of good faith” undertakes to deliver the money to the state.

The announcement of this news was made at a press conference where they explain the settlement between Telconet and the Prosecutor's Office in 2019.

## **15 In recent years, have there been trials or other proceedings in which an individual or corporate entity has contested alleged violations of anti-corruption laws in your jurisdiction?**

Yes, in the Odebrecht case for money laundering.

In this judicial process, the defendants are declared guilty for the money-laundering crime established in article 15 of the Asset Laundering, Financing of Terrorism and Other Crimes Prevention Rules, imposing:

- prison of three to five years;
- suspension of citizenship rights such as participation for public positions;
- confiscation;
- imposition of the fine equivalent to double the amount of the crime; and
- perpetual prohibition to exercise all employment or public office or fulfil management functions in finance and insurance entities.

Also, on trial for bribery followed against former President Rafael Correa and 19 other defendants (among whom are former government officials and businessmen), they were sentenced to a fine of more than US\$14 million, eight years of prison and loss of political rights.

## **16 To what extent do the enforcement authorities provide incentives for or otherwise require companies to self-report known or suspected violations?**

There are no incentives for companies to self-report known or suspected violations. The National Assembly is analysing an Anti-corruption and Whistle-blower Protection Law bill that could incorporate some incentives.

There are only obligations in relation money-laundering prevention where the obligated sectors (automotive, real estate, banking, insurance and others) must supply to the authority certain information in relation to the transactions.

## **17 To what extent do the enforcement authorities take into account a company's level of cooperation with the government's investigation or the strength of its compliance programme when considering whether to bring enforcement actions or when assessing penalties?**

The strength of a compliance programme is not taken into consideration by a judge. Compliance programmes have been promoted in recent years, but there is no obligation nor culture to have one. Companies that have one are either multinational companies or those required to because of their commercial activities with foreign counterparts.

Under a criminal process, if an accused party cooperates with an investigation, an effective cooperation agreement must be signed in which the accused party will provide information to assist in the investigation of a crime, to receive a reduced penalty. We can see in the Odebrecht case that certain persons were given 14 months in prison because of effective cooperation, whereas they merited a few years in prison in accordance with the law.

## **18 To what extent and under what circumstances do the enforcement authorities provide incentives for whistle-blowers to report known or suspected anti-corruption violations?**

There are no incentives for whistle-blowers. As mentioned before the National Assembly is analysing an Anti-corruption and Whistleblower Protection Law project that could incorporate some incentives.

## **19 What has been the most significant fine or monetary penalty to date under the anti-corruption laws of your jurisdiction?**

The Criminal Guarantees Court of the National Court of Justice increased the pecuniary penalty against 10 individuals sentenced for the crime of bribery in the state-owned PetroEcuador case. The sentence was modified in the restitution to the state because,

in addition to the payment of triple damages, which is US\$37,813,886.60, they had to assume the material and immaterial reparation, for an amount of US\$12.6 million; that is, the total pecuniary penalty is US\$50.4 million.

## **20 Do the enforcement authorities use any other statutes to prosecute conduct related to bribery and corruption?**

Besides the regulations, laws and authorities previously described in question 1, there are no other statutes to prosecute conduct related to bribery and corruption.

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## **International cooperation**

### **21 Have the enforcement authorities issued general guidance regarding compliance with and enforcement of the anti-corruption laws?**

The enforcement authorities have not issued any guidance regarding compliance with and enforcement of the anti-corruption laws.

### **22 To what extent do authorities in your jurisdiction cooperate and coordinate with foreign authorities in enforcing applicable anti-corruption laws?**

Ecuador ratified the Inter-American Convention against Corruption and the United Nations Convention against Corruption. Both conventions are intended to strengthen measures to fight corruption, and the adoption of strategies to prevent it. Additionally, the need for international cooperation in this area is contemplated, as well as the obligation to keep an accounting record for accountability, especially when public funds are managed.

### **23 Is there a formal understanding with authorities in other jurisdictions to share information and provide reciprocal assistance in enforcement matters?**

Yes, based on the Inter-American Convention against Corruption and the United Nations Convention against Corruption. Also, Ecuador is a party to the Global Forum on Transparency and Information Exchange for Fiscal Purposes. So there is reciprocal assistance with all the jurisdictions that are party to these treaties.

In 2017, Ecuador initiated a process for strengthening transparency and the fight against corruption. With this agreement, in 2020 Ecuador will have immediate and timely access to tax information from more than 130 countries, including 40 countries considered as tax havens. We thus have a control system that will continue to be implemented in Ecuador and could help in investigation activities.

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## **Investigations**

### **24 Has the sharing of information with foreign authorities contributed to any enforcement actions in your jurisdiction?**

Yes, in the Odebrecht and Petro Amazonas cases.

### **25 To what extent do the enforcement authorities consider principles of international double jeopardy in deciding whether to charge an individual or corporate entity with a local anti-corruption violation based on conduct underlying a foreign anti-corruption conviction?**

Double jeopardy is not valid in Ecuador as per the Criminal Code. If an individual or corporate entity is charged abroad with an anti-corruption violation, then such individual or corporate entity cannot be sanctioned in Ecuador.

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## Risk areas

### 26 To what extent and under what circumstances do the applicable laws in your jurisdiction allow for extradition of your country's nationals or foreign nationals charged or convicted of wrongdoing under anti-corruption laws in other jurisdictions?

Ecuador signed the Inter-American Convention on Extradition, and according to this convention each of the signatory states undertakes to deliver, in accordance with the provisions of this agreement, to any of the other states that require them, to individuals who are on their territory and are accused or have been sentenced. For extradition to proceed, the following is required:

- The offence that motivates must have been committed in the territory of the requesting state.
- When the crime for which extradition is requested has been committed outside the territory of the requesting state, extradition shall be granted provided that the requesting state has jurisdiction to hear the crime that motivates the request for extradition, and to issue the corresponding ruling.
- The requested state may refuse extradition when it is competent, according to its own legislation, to judge the person whose extradition was requested for the crime on which the requirement is based. If for this reason the extradition is denied by the requested state, the latter shall submit the case to its competent authorities and communicate the decision to the requesting state.

### 27 Must publicly traded companies in your jurisdiction disclose pending investigations in their regulatory filings, or is such disclosure typical, even if not required?

If it is a publicly traded company, there exist some information that have to declare but not pending investigations because it contradicts the innocence principle stated in the Constitution.

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## Compliance best practices

### 28 Have any companies publicly disclosed investigations relating to bribery or corruption issues within the past five years?

No.

### 29 What laws or regulations may restrict companies' internal investigations in your jurisdiction, such as regarding data privacy or labour relations?

There are not many restrictions but it is rare that companies start internal investigations.

There are certain restrictions in labour law because of the regulations for the eradication of discrimination, for example, requesting criminal or judicial records for a personnel selection process.

### 30 Which industries or business sectors in your jurisdiction are most vulnerable to public corruption?

The oil, energy, construction and telecommunications industries are the most vulnerable to public corruption, as well as the provision of medicines and healthcare goods for public hospitals, and public procurement in general.

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## Other

### 31 Is it common in your jurisdiction for companies to engage third parties to assist in interacting with government officials, whether in connection with sales and marketing or with obtaining permits, licences or other government approval?

Yes, it is common. Usually, law firms, lawyers or special consultants assist in interacting with government officials when it comes to matters that require technical knowledge, such as obtaining permits or licences.

### 32 What additional anti-corruption risk factors are particularly noteworthy in your jurisdiction?

There are plenty of risk factors in Ecuador, but the most common are:

- a high tax burden, which generates tax evasion;
- very slow economic and social development with a very large social gap;
- legal stability; and
- credibility of state institutions.

### 33 Is it common for companies in your jurisdiction to have an internal hotline or other mechanisms by which anonymous reports or other compliance questions or concerns may be raised?

It is not common for companies to have an internal hotline or other mechanisms by which anonymous reports or other compliance questions or concerns may be raised, but some multinationals companies have hotlines. In the public sector, the Public Procurement Secretariat (SERCOP) has set up a hotline; there is also a hotline in which citizens can address concerns about corruption by calling 1-800-SOYHONESTO (1-800-769-466). Also, there is another hotline managed by the police to receive information on corruption, unjustified enrichment, and suchlike by calling 1-800-DELITO (1-800-335-486).

### 34 Is it common practice for companies in your jurisdiction to conduct anti-corruption due diligence before engaging third parties, such as agents, consultants and distributors?

It is not a common practice for companies to conduct anti-corruption due diligence before engaging third parties, such as agents, consultants and distributors. However, there are some industries (car dealership, real state companies, banks, insurance companies, among others) that are obligated to conduct due diligence on their possible new clients (if transactions exceed certain amount), to prevent money laundering.

However, this type of practice is becoming more and more common.

### 35 Is it common practice for companies in your jurisdiction to conduct anti-corruption due diligence in the course of mergers, acquisitions or joint ventures?

No, it is not a common practice for companies to conduct anti-corruption due diligence in the course of mergers, acquisitions or joint ventures. The typical due diligence performed (not focused in possible corruption) is the review of the following documents:

- bank statements;
- incorporation articles, the statutes and other official company documents;
- companies' Book of Order Minutes;
- stock transfer records;
- tax returns;
- loan of documents;
- policy and procedure manuals;
- budgets;
- business plans;
- employment contracts and/or contracts with unions;
- employee compensation plans, including salaries, bonuses and increases;
- insurance and payment policies;
- documents indicating compliance with government regulations;
- pending litigation; and
- possible claims against companies.

### 36 Have shareholders of publicly traded companies in your jurisdiction initiated civil actions related to any company's violation of anti-corruption laws?

We have found no such cases.



**37 In the past three years, what do you view as the most notable legislative, regulatory or enforcement developments with respect to the anti-corruption landscape in your jurisdiction?**

The most notable state regulator is the Financial and Economic Analysis, because in its fight against money laundering, it has implemented broad regulations to control and prevent money laundering. The law on this matter is clear and defines the industries that must comply with certain aspects of control, and this law is regularly updated.

**38 Describe any other significant challenges (eg, legal or cultural issues) to anti-corruption enforcement, compliance or internal investigations in your jurisdiction.**

Ecuador has made progress in the fight against corruption. However, there is still a long way to go to change the corruption culture, which is embedded in certain institutions, companies and people. For example, common phrases exist, such as “the president might have been corrupt, but at least he built roads that lasted a couple of years.”

Positive trends include the government promoting that state-owned companies and some institutions become certified in the ISO 37001 Anti-bribery, and chambers of commerce (such as the International Chamber of Commerce in Ecuador, the Ecuadorian-American Chamber of Commerce and the Quito Chamber of Commerce) promoting compliance and ethical behaviour within its members.



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Partner at Paz Horowitz, with more than 10 years of experience in corporate law and M&A, mediation and arbitration, compliance & anticorruption and public procurement.

#### **Education**

- Master's degree (LLM) in international commercial law, Litigation and Arbitration, New York University, School of Law.
- (Candidate) Online LLM, Organizational Ethics and Compliance, St Thomas University 2019–2020.
- Lawyer magna cum laude, Universidad San Francisco de Quito.
- ISO 37001 Certification, Anti Bribery Lead Auditor and Lead Implementor.
- Qualified mediator, in progress.
- Candidate for a master's degree in business law from the Universidad San Francisco de Quito.
- More than 100 hours of certifications in mediation, negotiation, anti-money laundering, compliance, tax handling and tax update.
- Professor at Universidad San Francisco de Quito, Introduction to Oral Litigation.



**Esteban Vivero**  
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An attorney with experience in compliance and corporate law. Advises on money laundering prevention and anti-corruption.

#### **Education**

- Master compliance officer, Universidad Complutense de Madrid, Madrid, 2018–2019.
- Certification ISO 31000 (Risk Manager), Implementing Risk Matrix, Quito, 2019.
- Certification ISO 19600 (Compliance Management System).
- Certification as mediator granted by Universidad San Francisco de Quito, Quito, 2019
- Lawyer, Universidad San Francisco de Quito, 2018
- Certification ISO 37001 (Anti-bribery Management), Implementer anti-bribery management models, Lima, 2018.



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A full-service law firm, founded in 1991, Paz Horowitz Abogados delivers practical and cost-effective legal services based on its motto “Doing well by doing it right”.

Whether a multinational enterprise, an investment fund, a local start-up, or international NGO, the firm delivers the legal power and understanding needed to fulfil clients’ goals. For Paz Horowitz and its clients, this means, ‘doing well by doing it right’.

The law firm focuses on quality rather than size to build its team, and when it comes to accepting new clients, it focuses on their business ethics and corporate responsibility.

Paz Horowitz was the first law firm in Ecuador to sign the UN Women’s Empowerment Principles and to join the UN Global Compact. Also, was recommended in Ecuador for The Latin America Corporate Counsel Association in Compliance and Anti-Corruption.

The firm and its lawyers are constantly recognised from the most important international legal guides.

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