

NEW ANTI-CORRUPTION BILL

Currently, a new bill is being discussed at the National Congress that seeks to reform the Public Procurement Statute, the Criminal Code, and the Code of Criminal Procedure, to combat and deter corruption.

The project's identification number is 005 of 2019 in the Senate and 010 of 2019 in the House of Representatives.

The legislative process has already exhausted the debates of the Senate and House of Representatives commissions, pending two plenary discussions so that the project becomes law of the Republic, after presidential sanction.

The reform has three main blocks: administrative measures, criminal measures, and procedural measures.

I. ADMINISTRATIVE MEASURES

Most of the administrative measures outlined in the bill exist already in our legal system. The proposal to indefinitely extend the ban to contract with the Government in corruption cases; the power of unilateral assignment of the contract by the public entity; or the application of anti-corruption regulations in private contracting processes in which public resources are invested are already existing situations in the legal system since the enactment of Law 2014 of 2019, on December 30, 2019.

Perhaps the only novelty in this reform block is the express requirement that when subcontracting exists within the framework of an inter-administrative agreement, subcontractors will fully

apply all the provisions of the Public Procurement Statute, seeking to prevent subcontracting from being ways to circumvent fair selection.

II. CRIMINAL MEASURES

Within the criminal measures, you can find several novelties that are not yet part of the legal system. There are, among others, the following measures:

- a. Benefits for guilty pleas are suspended unless the defendants return or indicate the whereabouts of the money.
- b. The illegal urbanization crime is expanded to include cases of corruption of public officers.
- c. The collusion crime is expanded to cover not only the pre-contractual stage but also any stage of the contractual process.
- d. The omission of control crime is expanded to include compliance officers and heads of internal control as respondents and to cover not only financial entities but all entities required to implement a prevention and administration system of the money laundering and terrorist financing risks.

- e. The omission to report to the authorities crime is expanded to include corruption crimes as crimes whose non-reporting supposes criminal sanction.
- f. The conspiracy crime is expanded, to raise the penalty for professionals who provide advice to hide the illicit origin or destination of resources.
- g. Finally, new crimes are created, and penalties for corruption crimes are raised.

It is imperative to note the creation of a new crime called undue celebration of public trust, which is punishable with a prison sentence of 4 to 12 years, a fine of 50 to 200 legal minimum monthly wages and disqualification for the exercise of Public Rights and functions from 5 to 12 years. Any public official or private party who signs this type of contracts for the management, administration, and execution of public resources destined to promote, develop and maintain physical infrastructure works and projects in all sectors of the productive and social infrastructure, in violation of the principles of the administrative function, public contracting or fiscal management, would be criminally sanctioned.

This new crime is striking since its structure, justification, and purpose can be widely criticized. Indeed:

- The proposed legislation implies a sterile and counterproductive symbolic effort in economic terms. In effect, the norm only fulfills a symbolic function that does not have empirical support on its utility. It is noteworthy that the bill's report does not review any argument in sections III and IV on the justification, necessity, proportionality, efficiency, or efficacy of the proposed rule. On the contrary, punitive populism is being exerted seeking to appease public opinion with the false feeling that something is being done to combat corruption when in reality, only one more norm is being stacked on an already robust anti-corruption normative body.
- The above has counterproductive economic effects. The question arises: How do you want to reactivate the economy, so hit by the pandemic, if excessive burdens are imposed on legitimate and fundamental segments for the country's infrastructure projects? Then, the legislation does not attack the problem of corruption and, on the contrary, discourages the participation of market-recognized fiduciary companies in any infrastructure project.
- Likewise, the new crime is unnecessary, since it already exists in the legal system crimes that include the factual case that the new norm wants to sanction (such as, for example, the crime under article 410 of the Criminal Code). In this sense, it is evident that the proposed criminal policy is incoherent, repetitive and contradictory, which will have interpretative difficulties on what

type of criminal offense to apply, and may even pose constitutional problems due to violation of the principle of equality. This type of situation hinders the work of prosecutors and judges and involves risks of due process that are easily exploited by some attorneys.

- The proposed legislative technique suffers from shortcomings involving severe injury to the principle of legality, the strictness of the criminal law, and the determination of the wrongful act. Specifically, open and broad referrals are made to other regulatory levels without any specificity. It is worth remembering that the Constitutional Court has allowed the so-called blank criminal types as long as the statutory referral is concrete and not abstract or diffuse, as is the case of the proposed rule.
- From the criminal law theory perspective, the punitive equivalence between a public official and an ordinary individual is unacceptable. From any point of view, it is evident that the reproachable action of the public official, bound by the Constitution and the law, is much greater than that of the mere individual, who does not carry the same duties as the public official. Thus, it is contradictory that two different factual situations entail the same legal consequence. Insisting on this deranges the criminal system in

its internal coherence. It renders the intervener's figure irrelevant and disorganizes the messages of general prevention that the penal norms seek.

- The legal description, which links the crime only to productive and social infrastructure projects, is also inadequate since it excessively limits its scope. If the objective is to fight corruption, this must be done in a general and comprehensive manner, and not only by burdening specific economic sectors with criminal risks, which, moreover, have not been sources of corruption in the country's recent historical experience.

III. PROCEDURAL MEASURES

In general terms, within procedural measures, the project seeks to broaden the terms of the investigation, broaden the statutes of limitations, compel public entities and the Comptroller General of the Republic to act as victims in the frame of criminal procedures for corruption conducts.

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