Legal duties and liabilities for entities according to the General Law of Administrative Responsibility and other legislations

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In order to provide needed background to the new rules established in the General Law of Administrative Responsibility ("GLAR"), we will first lay out the general rules of civil liability that are indirectly applicable –in accordance with article 1 of the Federal Law of Adversarial Administrative Proceedings and article 118 of the GLAR– to the liabilities regime applicable in administrative circumstances. We will then analyze the global practices from multinational corporations which, we consider, gave lieu to this new regulation of the GLAR. We will then provide as conclusions, some considerations of the corporate practice from the perspective of an in-house lawyer responsible for the surveillance of such due practices, such as from a compliance official standpoint.

I. Entities general rules of liability

The general rule of liability for entities strives from fault-based liability or *aquilian*, which has a roman origin in the *Lex Aquilia de Damno Dato*, the cornerstone of which, according with scholars, are: wrongful misconduct, harm, fault, causal link and the resultant damages and lost profits. All of these aspects become liaised by reason of direct connection, a matter that results in many more implications than those to be described in this text.

In this regard, the Federal Civil Code establishes that:

“Article 1910. Anyone who causes damages as a consequence of his wrongful misconduct, is obligated to repair it, unless it may prove that the caused damage results as a consequence of the fault or inexcusable negligence of the victim.”

That said, in the case of entities, under the fiction correlative to the legal personality and the direct representation of its dependents, the fault-based liability results from the performance of its bodies and legal representatives. This matter is specifically established in the following:

“Article 1918. The legal entities are liable for the damages and lost profits that its legal representatives cause in the performance of their duties.

Article. 1924. The employers and owners of commercial establishments are obligated to repair for the damages and lost profits caused by its workers or dependents, in the performance of their duties. This liability ends if the employers or the owners may prove that in the production of the harm there is no fault or negligence attributable to them.”

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1 Castresana Amelia, Derecho Romano. *El arte de lo bueno y lo justo*; Editorial Tecnos Madrid, 2013, p 249
In both cases the damage repair consists, through the choice of the damaged one, either on the reestablishment on the previous situation or on the payment of the damages and lost profits according with the following:

“Article 1915. The damage repair must consist, by election of the damaged one, on the reestablishment on the previous situation, when possible, or on the payment of the damages and lost profits. (…)”

“Article 2108. A damage is considered as the loss or undermining suffered on someone’s patrimony, as a result of the breach of an obligation.”

“Article 2109. A lost profit is considered as the loss from any licit gain, that would have been obtained through the due compliance of an obligation.”

In both cases, with regards to individuals such as with regards to entities, the burden of proof over the will full mis-conduct of the infringer is essential to claim and collect from him any indemnification. Specifically, in the case of the entity, the burden of proof results in additional complexity as per the need to determine a direct causal link between the will full misconduct of an agent itself and the caused damages and loss profit.

Certainly, with regards to evidence, the Federal Civil Code establishes that the damages and lost profits must be shown as a direct and immediate consequence of the unlawful conduct of the infringer.

“Article 2110. The damage and lost profits must result as an immediate and direct consequence of the breach of an obligation, whether they have been caused or that they will necessarily be caused.”

That said, –considering only one of the multiple variables that may be involved–, if an entity has various legal representatives, and in the assumption that said entity can only act through those representatives, then it becomes more complicated for the one who suffers the damage caused by the unlawful acts of such representatives, to determinate the conduct, prove it and make the entity liable. In the same way, in the presence of a multiplicity of employees, agents and/or representatives it would be particularly unfair, but also –and very specifically–, risky for an entity to result liable for the acts of just one of their dependents, when the entity, aims to act always in accordance with the Law and, to do so, implements and sets in place the proper instruments and paths.

That said, the liability attributed to an entity for the acts of third parties, as consequence of the fictional essence and the effects of the acts from its representatives, may result on a jeopardy to said entity, such as on an injustice.

If the upper management of an entity does not look for, is aware, nor authorizes the undertaking of unlawful conducts by its employees, any sanction imposed upon said entity as per the actions of its representatives as a result of the implied fiction of the representation, even within the limits of its faculties, while driven by an illegal aims, would result on monetary, administrative and potentially criminal consequences for the entity and its high administration.
However, the principle of law at stake allows to such entity to prove that the acts of the representative that have been unlawful or negligent are not necessarily attributable to the entity if it has taken the reasonable actions to prevent, control or sanction such conducts.

Certainly, the fault or negligence of the representative should not be possible to be attributed full-fledged to the entity if this one took and may bring related evidence therewith, the needed actions to offset the willful mis conduct that—*in reason of the fiction of law*— is attributable to said entity as previously referred upon. The willful misconduct would be considered as *levisima* exceeding any reasonable expectation of what scholars have classified the role model of a *bonus pater familiae*.

This way, the section *in fine* of the abovementioned article 1924 recognizes such principle of law and establishes explicitly that: “(...) *This liability ceases if the employers or the owners bring evidence over the lack of fault or negligence attributable to them in the production of the harm.*”

The burden of the proof of such dispositions lays on the entity. The burden of proof may however become positive, since—*considering the impossibility of proving a negative fact on a legal process*—it turns a good praxis of the higher management, allowing undermine the fault or negligence of the acts of the representative that could be attributable to the entity.

What the Federal Civil Code establishes in the mentioned article, has been qualified as good *international practice* of multinational corporations. The actions of the representatives have been merged through different mechanisms and proceedings that the Anglo-Saxon influence has classified and named as “*compliance practices*”.

With a conspicuous emphasis, during the last decade, these corporations have developed codes of ethics, investigation procedures, accountability mechanisms, procedures of internal and external oversight, as well as training programs with the purpose, not only to be able to prevent unlawful or negligent conducts of its dependents, but also—*and for the merits of this text*—towards being able, through the implementation of these measures to allege having taken internal due diligence steps needed to offset in a court of Law liability resulted from the acts of the representatives, agents, employees, etc, in case of claims by third parties.

—Based on our experience, this international praxis has focused on two aspects: In the first place, over the internal behavior needed to address concerns related to sexual and labor harassment. In a second place, praxis has targeted external conduct of dependents with the aim to address liabilities deriving from interaction with government authorities that entertain businesses that could foster corruption practices. Over the next lines, we address the second referred topic and praxis, as regulated by the GLAR.

II. **Multinational companies praxis**

In our experience, the possibility of the entities incurring on violations of the law by the dependents actions, has been addressed —*based on the considerations and the search of the previous objectives*—through the following mitigating actions:

\[\text{(i)}\] **Codes of ethics and/or conduct**

The publication of intern regulations that confirm the vision and mission of the organization and underscore the respect of a Legal environment and a zero-tolerance policy against corruption practices (such as, bribery, unlawful participation, embezzlement or traffic of influences). Indeed, regardless of said practices prior inclusion on criminal legislation, their deficiencies and opportunities areas, have *given* lieu to the new enacted act, the GLAR. The main target seems to publicize and spread out a culture of legality so that in one hand employees or representatives can
not allege ignorance of the norms and unlawful practices are reduced, so that on the other hand related internal due diligence focus is evidenced so that the burden of proof of the adoption of the needed internal measures is eased out reducing, in this way, the exposure of the entity as established on the previous section.

(ii) Continuing training procedures

In accordance with the enactment of respective codes of ethics and conduct, the practice of the multinational enterprises to mitigate the risk of the potential unlawful, fault-based or negligent conduct, from its employees and representatives, is complemented through training systems managed either on site and/or online. Through these systems, the message of legality is recalled two or three times per year by requesting the submission of periodic tests that are liaised to labor evaluations and that are delivered to upper management through the labor chain of command. Beyond the existence of referred codes per se, this approach allows, said multinational companies to ensure both: (i) that its employees have due acknowledgement and compliance with Legal environment as a permanent tool of their daily routine and (ii) develop resourceful arguments of proper and proactive due diligence in case of an undue behavior by representatives and agents, to offset jeopardies thereto.

(iii) Accountability control proceedings, audits of expenses on representations and punishments.

Any incurred expenses by the representatives and agents of the companies may easily be used for illicit purposes, involving and making the companies liable either by the usage of credit cards from the company or by payment receipts. Any track of record of unlawful benefits given to public officials as a quid pro quo vis a vis unlawful benefits may be qualified as an illegal conduct striving the consequent jeopardies for the companies.

The setting into place of control mechanisms and strict authorization processes, with questionnaires and independent files from other proceedings, result on a standard measure that mitigates internally the possibility of unlawful fault-based compromises from the representatives and employees for which the Company could be attributed with responsibility. In the development of the tasks of audits and control, the imposition of labor sanctions to the infringer that are permitted by the law it results an standard practice. Likewise, is worth mentioning that these sanctions are ruled in the labor Law field, but the publicity of the codes and the legality before referred result on a fundamental element to avoid also the labor contingencies when such measures are implemented. That said in addition to the possibility of arguing as mitigation proactive actions vis a vis corporate corporations’ liability referred o herein.

(iv) Report proceedings, telephone or anonymous communication lines.

The lack of reports regarding inadequate situations, perceived by any employee, result sometimes from the absence of security or certainty from the employees towards the confidentiality of their reports and the security that there will be no retaliation. The establishment of report lines, telephone or anonymous communications lines, result on an international praxis to foster the transparency and the report of situations “speak-up policies” that could end up on a liability imposed to the company and further permits the allegation of an internal due diligence looking to avoid these situations.
III. **Dispositions of the General Law of Administrative Responsibility**

As a consequence, from the above referred *ratio iuris*, the principles of entities liability, as well as the multinational praxis, respectively referred on the previous sections I and II. the enactment of the GLAR sets forth the liability of the entity on the undertaking of severe administrative faults, qualified by the same GLAR, according to the following:

The general principle of liability established on the Federal Civil Code is repeated *prima facie* according with the following:

“Article 24. The entities will be sanctioned in the terms of this Law when the actions related with severe administrative faults are undertaken by the individuals that take action on behalf or in representation of the entity and seek to obtain through said conducts, any benefit for such entity.”

It is then by replicating international referred praxis, that the GLAR lays down as mitigation actions of the legal entities against referred liability the following measures: (i) the enactment of policies of integrity (codes of ethics or conduct), (ii) the establishment of mechanisms of control and audits that supervise the appropriate behavior of the employees, and that punish them when there exist any violations, and (iii) the appropriate socialization and publicity of the code (according with the continuous training practices).

“Article 25. Towards the determination of the liability of the entities referred under this Law, the existence of a compliance and integrity policy will be considered upon. For the purposes of this Law, a compliance and integrity policy shall include at least, the following elements:

I. A clear and complete handbook of organization and proceedings in which the functions and responsibilities of each one of its departments are established, and that clearly specifies the different chains of command and leadership in the whole structure.

II. A code of conduct duly published and socialized for all of the members of the organization, that considers systems and mechanisms of real effectiveness,

III. Appropriate and efficient systems of control, monitoring, and audit that oversight constantly and periodically the compliance of those integrity standards throughout the entire organization

IV. Appropriate systems for complaints, within the organization such as towards competent authorities, as well as disciplinary processes and concrete consequences over those individuals who act on a contrary way of the intern norms or the Mexican legislation.

V. Appropriate systems and proceedings of training and preparation in attention with the measures of integrity that are contained in this article.

VI. Politics of human resources that prevent the incorporation of persons that could be a risk for the integrity of the corporation. These policies are to prevent and avoid the discrimination of any person motivated on the ethnic origin or nationality, the gender, the age, the disabilities, the social condition, the health condition, the religion, the opinions, the sexual preferences, the marital status or any other that
infringes upon the human dignity and that has for purpose to nullify or damage the rights and liberties of the people, and

VII. Mechanisms that guarantee in every moment the transparency and publicity of its interests.”

The foregoing results, especially relevant considering that, as established in the previous section I and in the article 24 of the GLAR referred to before in this section 3, the liability of the entity in the administrative field may result on serious consequences. Beyond of what is predictable in the civil field referred to above and the potential implications on the criminal field, the GLAR certainly sets forth in addition the following, upon the legal entities involved:

“(…)III. In the case of the legal entities:

a) Financial penalty that could reach up to two times the profits obtained, in case of not having obtained any, the equivalent of the amount of one thousand up to one million five hundred thousand times the daily value of the Unity of Measurement and Actualization;

b) Temporal debarment to participate in acquisitions, leases, services or public works, for a period that will not be shorter to three months or longer to ten years;

c) The suspension of activities, for a period that will not be shorter than three months or longer than three years, consisting on stopping, differing or depriving temporarily the particulars from their commercial, economical, contractual or business activities for being related with severe administrative faults established on this Law.

d) Dismantling of the respective company, which will consist on the loss of legal capacity of the entity, for the fulfillment of the end for which it was created, by jurisdictional organ ruling and as consequence of the undertaking, linkage, participation and relation with a severe administrative fault established on this Law.

e) Indemnification for the damages and lost profits caused to the federal, state or municipal Public Treasury, or to the patrimony of the public entities.

In order to impose the sanctions to the legal entities, the content of articles 24 and 25 of this Law shall be considered.

The sanctions established on clauses c) and d) of this paragraph, will only be applicable when the company obtains an economic profit and sufficient proofs of the involvement of its administration or supervision organs or of its partners is provided. Likewise, sanctions will be applicable whenever the entity is perceived to be systematically used towards the undertaking of severe administrative breaches (…)”

It will be considered as an attenuation in the application of the sanctions to the legal entities when the administration, representation or supervisions organs or the partners of the entity report or collaborate in the investigation by providing information and the element that they possess, repair the damages that were to be caused upon. (…)”

Therefore, it results of mayor relevance, in the prevention of unlawful or fault-based conducts of the many employees referred, the publication of such integrity policies. The establishment of clear rules, the training and the intern labor sanction, result on natural inhibitors of unlawful or fault-based conducts from the employees and representatives. Nevertheless, it is not possible to guarantee and to avoid these conducts absolutely. Therefore, for purposes of this analysis, the publication of such politics, within the multinational guidelines referred and specially from the adoption made by the GRAL, become a fundamental tool to mitigate or eliminate the potential liability of the legal entities. Indeed, by implementing everything that a bonus pater familias would
have realized to prevent such unlawful and fault-based conducts, related companies may allege a due compliance that is now further required by GLAR.