I. Introduction. Constitutional Background.

One of the most relevant modifications within the National Anti-corruption System (“NAS”) refers to the possibility of establishing sanctions for the commission of administrative faults to individuals and legal entities.

In this regard, the Mexican Constitution states in Article 109 that individuals and legal entities, may be sanctioned for the commission of crimes -section II-, and/or for the commission of administrative faults -Fraction IV-.

Therefore, in the present note we will consider the provisions contained in the General Law of Administrative Responsibility (“GLAR”), regarding those acts and omissions considered as administrative faults committed by individuals and legal entities -even though they could refer to any other type of responsibility- and the sanctions in such regard, specifically addressing the compensation for damages and lost profits caused to the Public Treasury or to federal, local or municipal public entities.

II. Administrative Faults by Individuals and Legal Entities // Damages and Lost Profits Sanction.

On July 18, 2016, the GLAR was published in the Official Gazette of the Federation, along with the other secondary laws that make up the National Anti-corruption System -i) General Law of the National Anti-corruption System; ii) Organic Law of the Federal Court of Administrative Justice; iii) Law on Fiscalization and Accountability of the Federation; iv) Organic Law of the General Attorney’s Office; v) Federal Criminal Code; and (vi) Organic Law of the Federal Public Administration-.

In this regard, the aforementioned Law came into effect the following year, that is, on July 19 of the year 2017 and it constitutes public order and general observance Law throughout the Republic, which was created to establish, among others, responsibilities, obligations and sanctions to the public servants, individuals and Legal Entities, for the acts or omissions in which they incur.

In this sense, it should be specified from this moment that the GLAR establishes, among others, administrative faults, these being the administrative faults considered as serious and not serious and faults of individual and legal entities. In this regard, the administrative faults by individual and/or legal entities, are linked to those faults classified as serious, and those procedures correspond to the Federal Court of Administrative Justice.

Considering the above, it is convenient to refer to serious faults in order to clearly identify the subject matter of the sanctions subject of the individuals and legal entities are the following: (i) bribery, (ii) embezzlement, (iii) diversion of public resources, (iv) misuse of information, (v)
abuse of functions, (vi) action under conflict of interest\(^1\), (vii) undue hiring, (viii) hidden enrichment or concealment of conflict of interest, (ix) influence peddling, (x) concealment of public servant, (xi) contempt, (xii) obstruction of justice\(^2\).

Identified the serious faults, now it is important to point out those acts of the individuals and legal entities linked to the serious faults previously referred, because it is obvious that the individuals and legal entities could not be linked in the commission of the considered serious faults.

In this respect and in terms of the GLAR, the administrative faults of individuals and legal entities are: (i) bribery; (ii) illegal participation; (iii) influence peddling; (iv) submission of false documentation to obtain a benefit; (v) obstruction in the investigation; (vi) collusion; (vii) misappropriation of public resources; (viii) undue hiring of public servants and (ix) particular faults in a special situation.

In this sense, it is worth referring in particular to the aforementioned faults, in order to identify those that could represent damages and lost profits to the Public Treasury or to federal, local or municipal public entities.

The foregoing, because one of the sanctions that may be imposed for administrative offenses committed by individuals and legal entities, refers precisely to the compensation for damages and lost profits caused to the Public Treasury, or to the assets of the public entities.

In this regard, in the event that damages and lost profits are caused, then the resolution issued by the Federal Court of Administrative Justice, shall indicate the existence of the causal link between the administrative offenses committed by the individuals and legal entities and the damage caused; the valuation of the damage or lost profit caused; as well as the compensation amount, specifying the criteria used for its quantification.

In such regard, we should initially refer to the administrative faults committed by individuals and legal entities and contained in the GLAR:

(i) Bribery, consider such as the individual who promises, offers or delivers any unjustified benefit to a public servant, either directly or through a third party, in order to prevent the public servants to perform or to refrain from performing a related act with its functions or those of another public servant, in order to obtain a benefit or advantage, for itself or for a third party.

Also, (ii) the individual or legal entity who performs acts or omissions to participate in administrative proceedings will incur in illegal participation -federals, local or municipal- notwithstanding that by law or resolution of the competent authority they are prevented or disqualified from doing so. It is also considered unlawful participation in administrative

\(^1\) In terms of article 56 of the GLAR, privileged information is defined, as that obtained by the public servant due to his functions and that is not public domain. The restriction period will be up to one year.

\(^2\) Such being considered as when the public servants: (i) Carry out any act that simulates non-serious fault during the investigation of acts or omissions qualified as serious faults; (ii) The omission of initiation the corresponding procedure before the competent authority, within a thirty day term, from the moment they become aware of any conduct that could constitute a serious administrative fault, the negligence of individuals or an act of corruption, and (iii) reveal the identity of an anonymous witness.
proceedings, when a person or and legal entity intervenes in his or her own name, but in the interest of another or other persons who are disabled or disabled. It is important to mention that in this last scenario, both will be sanctioned.

The GLAR stipulates (iii) as traffic of influence, the person that induces the authority to use its economic or political power, real or fictitious, on any public servant, with the purpose of obtaining for himself or for a third party a benefit or advantage, or to cause harm to any person or public service, regardless of the acceptance of the server or the Public Servants or the result obtained.

It will be considered an administrative fault (iv) that an individual and/or a legal entity files false or altered documentation or information or simulate compliance with requirements or rules established in administrative procedures, in order to achieve an authorization, benefit, or to harm another person or legal entity.

Similarly, (v) individuals and/or legal entities that have significant information related to an investigation of administrative offenses, and provide false information, deliberately and unjustifiably delay the delivery of the same, or do not respond to the requirements, will incur obstruction of investigation, as long as, they have been previously imposed with such enforcement measures in accordance with the applicable provisions.

It is noted that (vi) the individual and/or the legal entities will commit collusion -by itself or by some intermediary- when one or more persons and/or legal entities, regarding government acquisitions, execute acts in order to obtain a personal benefit. It will also be considered as collusion when individuals and or legal entities, agree or enter into agreements between competitors, in order to obtain an undue benefit or cause damage to the Treasury or the assets of public entities.

(vii) It is stated that any person will be held liable for carrying out acts by means of which the public resources, whether material, human or financial, are inappropriately used or diverted from the object for which they are provided. Sanctioning even as misuse of public resources by the failure to render accounts in order to prove the public resources were diligently used.

It is considered as an administrative fault, (viii) the hiring in within a one-year term of a former public servants, in order to obtain privileged information that he has acquired directly because of the cause of employment, position or commission in the public service, and directly allows the employer to obtain a benefit. In this case, the former public servant and the employer will be sanctioned.

The adobe in connection to the (xi) special administrative faults considering those as such committed by candidates for public elected posts, members of electoral on campaign, transition teams, union leaders which request, accept, receive or pretend to receive money; values; etc. either for themselves, or for his electoral campaign or for any of the aforementioned people.

Therefore, and as previously stated, the above mentioned administrative faults, could be sanctioned, among others, with the compensation for damages and lost profits caused to the Public Treasury, considering that any of the relevant faults could harm or cause such damaged
and/or lost profits to the State, especially when the individuals and/or the legal entities obtain a personal benefit for themselves of a third party.

Then if such personal benefit is obtained, then the State is necessarily being harmed, by both the damages and the lost profits. Therefore, it is important to mention that both damages and lost profits have impact in the State’s assets. 3

Bearing in mind the above, it is important to mention that in order to sanction the individuals and legal entities, the opinion by the Federal Court of Administrative Justice, shall indicate not only the existence of the causal link between the administrative offenses committed by individuals/legal entities and the damage caused; but also, the valuation of the damage or lost profit caused; as well as the compensation amount, specifying the criteria used for its quantification.

In such regard, initially it is to be considered, that in order to demonstrate the damages and lost profits it is only necessary to prove (a) the existence of the administrative fault -illegal act-, (b) the economic harm caused to the State -damages and lost profits causes to the Public Treasury- and (c) the relation within the aforementioned illegal act and harm.

Therefore, it could be mentioned that if the illicit act and the damage caused are to be proven, then the third element is evident, because the relationship between the first mentioned elements is to be at least easily recognizable, since we are referring to a perfectly defined administrative fault by the GLAR, and the damages and lost profits refer precisely to harm caused to the Public Treasury.

The above notwithstanding that the GLAR states that in the resolution by the competent Court, is also to (ii) make an assessment of the damage or injury caused, (iii) as well as determine the amount of compensation, specifying the criteria used for its quantification. Which could seem as a matter of evaluation and quantification, related to the sanctions when dealing with public money, but that in essence refer at least to an additional obstacle for the authorities.

The foregoing, because the requirements established in the GLAR could not be met, in order to determine the compensation for damages and lost profits caused to the Public Treasury, unless the three essential elements previously referred are proved -illegal act, damage and causal link-, in connection with the valuation of the damage or lost profit caused; as well as the compensation amount, specifying the criteria used for its quantification.

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