The Argentine Anti-Corruption Office approves the guidelines for the implementation of Integrity Programs.

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In compliance with the provisions established by Executive Order No. 277/18, by means of Resolution No. 27/2018 (B.O. 4/10/18), the Argentine Secretary of Public Ethics, Transparency and Fight against Corruption approved the guidelines that companies shall take into account at the time of drafting and, as the case may be, reviewing, their integrity programs.

It is worth recalling that, except for contractors of the Argentine Federal Government, the drafting and implementation of an integrity program is not mandatory. However, companies should have an integrity program if they want to prevent their exposure to criminal consequences in case they are involved in a corruption offense[2] given that Section 9 of the Law on Corporate Criminal Liability No. 27.401 includes its implementation as one of the three requirements in order to achieve such purpose[3].

Comparison with the project object of prior consultation. The rule is substantially similar to the regulation previously published on the website of the Anti-Corruption Office within the framework of the public consultation promoted by said agency.

Possibility to explain the reasons for the integrity program implemented. Among the highlights of the new regulation, it can be mentioned that for the Anti-Corruption Office it is extremely important that companies may explain the foundations of their programs to the applicable authorities, because such explanations may be essential in order to consider such programs as "adequate". We should also remind that the aforementioned Section 9 establishes that the program must be "adequate" under the terms of Sections 22 and 23, i.e. the sections regulated by the guidelines issued by the Anti-Corruption Office. The Anti-Corruption Office advises not to copy models or rely on prefabricated receipts or solutions.

"Adequacy" of the program. According to the provisions of Section 22 of the Law, the Anti-Corruption Office shall consider that a program is "adequate" if the actions, mechanisms and internal procedures "bear relation" to the risks of the activities, the size and economic capacity of the company. This means that the mapping of risks should be more meticulous where the latent threat is greater, and the resources should be more numerous. As regards the "size", it is expected that companies with larger sizes will proportionally allocate more material and human resources to their programs.

Initial risk assessment. The initial assessment of risks is crucial for the Anti-Corruption Office. So much so that for the mapping of risks the Anti-Corruption Office proposes the prior creation of a process that clearly defines the scope of such mapping in order to delimit the kind of risks to be considered that, at least, and without limiting a broader definition, should include the offenses established in Section 1 of the Law.

In order to identify the corruption risks, it is also important to define the sources of information to be used that should include the key areas of the company, public information, statistics, from specialized sources, surveys and interviews to key or strategic actors of the company. This information, duly processed, is poured into a matrix that identifies the risk scenario. Then, the risk rating is calculated taking into account the probability of occurrence (without analyzing, at this stage, the already existent controls) and the potential impact that such occurrence may have on the company. This allows the prioritization, which consists in assigning a priority to the risks identified with the highest probability of occurrence and with the greatest harmful effect.

The aforementioned shall give rise to the determination of controls and other measures for the mitigation of risks. The result is often translated in a rating table where each control receives a quantitative rating and observations.

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[2] As from the effective date of the Regime (March 1, 2018), the companies might have been more exposed than we may think because according to the provisions established in Section 2 of the aforementioned Law, companies are also liable for the acts of third parties that act in their benefit or interest, even if such third parties lack any capacity to act in their representation, provided the company ratifies, even impliedly, the acts of such third parties.

[3] In order to be exempted from penalties, the program must have been implemented before the act in question and its violation must demand an effort of those who intervened in the commission of the offense. The other two requirements are: the spontaneous report of one of the offenses provided for in the law as a result of a detection activity carried out by the company, and the return of the unduly benefit obtained by the company.

The residual risk measures the risks remaining after considering the application of mitigation measures to each risk. This measure shows how vulnerable a company is in front of corruption risks. The initial risk assessment process concludes with an action plan, which should reflect the level of exposure that a determined company ultimately decides to accept: The greater residual risk and lower acceptable level, the greater the resources that the company should allocate to face the risks. The options may include to abandon a risk (which includes from the abortion of a business or transaction to the termination of a relationship with a client or supplier); to mitigate the risk (the Anti-Corruption Office states that the elements of a program should be interpreted in this sense: they shall be more or less useful depending on their efficacy to reduce the possibility of occurrence of a risk or the impact on the company, the adequacy or not of each of the elements shall be considered from such point); to transfer the risk (according to some authors, this should not be an option), or finally, to assume the risk, in case none of the previous options is available, but, as the Anti-Corruption Office warns, this should be a limited option in cases of risk of corruption. In addition, the Anti-Corruption Office established that: "A Program that regularly and permanently coexists with assumed corruption risks would hardly be adequate".

Design guidelines and corroboration standards and questionnaires. The guidelines provide general design parameters for the implementation of each of the elements (both the mandatory and optional elements to be included in an integrity plan) mentioned in Section 23 of the Law and that may be taken into account in the definition of the program. The guidelines also include a corroboration questionnaire for each element that serves to evidence the work performed in each case. It is worthy mentioning that the Anti-Corruption Office said that these questionnaires may help the authorities at the time of evaluating a determined program, notwithstanding that the Anti-Corruption Office also stated that the negative answer to any of the questions included in such questionnaires does not "necessarily" constitute an indication of lack of adequacy of the program.

Tone at the top. Now analyzing the elements, the Anti-Corruption Office first considers the "support of the high management to the program". Despite of being a mandatory element for the law, the Anti-Corruption Office deems it as a basic and fundamental element in order to consider that a program is "adequate", also stating that it would be difficult to determine that a program is adequate if it lacks this element (that, as mentioned by the Anti-Corruption Office, more than an element, it is a requirement immanent to the operation of any integrity program). The declaration of values by the Board of directors of the company, its image and presence in the communication of the message and its participation in the ethics committees (if any) or in the training activities are some of the alternatives posed by the guidelines for the implementation of this element, all framed within the visible idea that the Managing Body does not tolerate corruption in any form.

Code of Conduct. Then, the guidelines consider the content that a code of ethics or conduct should include, which is an essential part and one of the three elements that any integrity program that intends to receive the benefits of the legal regime should compulsorily include. There are no sacramental forms, and there may be a sole code or numerous policies, proceedings or protocols, or a combination thereof. However, the Law promotes the approval of the code and, once approved, its continuous update by the Board of Directors. Such code does not need to be limited only to corruption risks but it may set the rules for other risks (such as internal fraud, environmental damages, safety, health and hygiene at work, etc.).

The guidelines connect the code to other elements when they establish, as a necessary condition, that the code must duly inform the obligation to report any infraction by means of using, among others, the reporting channel. The code is the foundation for the appropriate behavior of all the members of the company in all relevant aspects and, among other things, it must prohibit the payment of bribes and establish rules on matters such as lobbying, financing of political campaigns and political contributions, gifts to public officers, conflicts of interest, etc.

The Anti-Corruption Office encourages the participation of workers in the drafting of the code of conduct (which, while admirable, might conspire against the purpose of having a code or its updates ready in reasonable periods of time) for the purposes of having the greatest number of points of view possible within the company. The guidelines also recommend the use of a language understandable by all the members, without exception (a level of education higher than the mandatory education should not be needed in order to understand the code), preferring the use of direct, short and firm messages by means of an active and colloquial style.

Finally, emphasis is placed on the adaptability of the code to the particularities of the different geographies where the company operates and on its effective communication to all members, admitting its extension to third parties as regards whom specific guidelines could also be drafted, always in accordance with the code.

Interactions with the public sector. Then, the guidelines address the second mandatory element, i.e. the integrity in the interactions with the public sector for the purposes of preventing unlawful acts in bidding procedures and in the execution of administrative contracts. This compulsory element is in line with the requirement established in Section 24 of the Law that establishes that the existence of an "adequate" integrity program is a condition precedent for companies to enter into contracts with the Argentine Federal Government. The Anti-Corruption Office focuses on the control of the interactions that the members of the company may have with public officers empowered to assign state-owned resources and responsibilities during the whole procurement process (including those individuals in charge of drafting determined projects, the publication of the calls for bids or anything related to the receipt and opening of bids, or who form part of the examining or receiving commission, carry out the works inspection and work advance certificates, or are entitled to make payments). It also makes reference to public officers who may grant licenses and permits, or who are in charge of a collection activity or exercise a regulatory activity.

From the company's point of view, focus is placed on the commercial, sales, purchases and marketing sectors, agents and legal representatives (whose behavior must be reasonably supervised due to the responsibility for the acts of a third party), institutional and governmental relations areas, distributors and persons in charge of the delivery of goods, technical representatives at worksites and persons in charge of works execution, financial areas, and payments.

The guidelines explain that these procedures may be incorporated to the code of ethics or be established in a separate document, provided they are consistent with such code. Among other things, the guidelines suggest to include: a clear identification of public officers as risky counterparties, resorting to the definitions established by international conventions; specific reference to zero tolerance to bribery or illegal payments made on behalf or in the interest of the company; disincentives to any participation or collaboration in fraudulent acts conducted by public officers; clear policy on gifts to public officers in accordance with the provisions of Executive Order No. 1179/16, the prohibition to make campaign contributions on behalf of the company in line with the provisions of Law No. 26.215 on politics financing, and the obligation to internally communicate the existence of relationships with senior officers that ease compliance with Executive Order No. 202/17.

Training to directors and employees. Thereafter, the guidelines consider the third and last mandatory requirement to the integrity programs related to the existence of periodic trainings on the integrity program aimed at directors and employees. The Anti-Corruption Office assigns a fundamental importance to this element in the understanding that a deficient training constitutes one of the main causes of program failure. The Anti-Corruption Office also states that this training should not consist only in the transmission of knowledge but it should also be aimed at the effective comprehension and internalization of values, and should not become a mere disclosure of contents. Training should also be implemented based on a risk prioritization, and should be aimed first at those members of the company who are likely to face corruption risks during the performance of their regular tasks. The available resources and operational needs shall determine the training modality (in person, online or other), its frequency (annual, biannual, etc.), the format of documents, the resources to internal trainers or the external support and the evaluation methods thereof. The guidelines recommend, among other things, the participation of the high management in training activities, the provision of incentives to the staff aimed at promoting participation, and the adoption of orientation instances that include advise in case of specific consultations. Finally, the guidelines exhort large companies to get interested in the training of all SMEs that form part of their value chain.

Due diligence to third parties. Thereafter, the guidelines address the proceedings aimed at verifying the integrity of third parties, including the performance of due diligence on business partners, suppliers, distributors, agents and dealers at the time of executing agreements with them. This is one of the optional elements of the programs, but its relevance is very important in relation to the acts of the third parties that may act in the interest or for the benefit of the company. Again, let's recall that it is not necessary that such third party has powers of representation. For corporate liability for the acts of third parties to operate, it is enough that the company ratifies the acts of such third party, even in an implied way. The Anti-Corruption Office recognizes that it is more difficult to impose behavior standards to individuals that are not under a direct subordination relationship. However, the Anti-Corruption Office considers that it is important to have policies implemented in order to know the counterparties with which companies operate, and the companies must understand the characteristics of the relationship. In addition, it is important to control that the third party is actually performing the work for which it was hired and that its compensation is in accordance with its work. The guidelines also advise to properly transmit to third parties the integrity policies of the corporation and demand their compliance, and to control the actions of third parties in such activities that may be perceived as acting on behalf, for the benefit or in the

interest, of the company in the context of the businesses that are carried out. Given that nobody can control all third parties all the time, the expectable is to implement controls priorized by risk, from highest to the lowest intensity according to the characteristics and risk profile of the third parties.

The actions that may be implemented according to the Anti-Corruption Office range from voluntary surveys in the form of affidavits with general information on the aforementioned elements, and controls over the trajectory, reputation and backgrounds of the third parties, to the implementation of periodic monitoring and deeper due diligence procedures, and the performance of audits in case of third parties with alerts or with a higher risk. Among the less obvious high risk indicators, we can mention the little or no experience of the third party in the relevant industrial sector or the absence of public information about its activity and trajectory. Among others, the guidelines mention the following indicators: the reluctance to provide information or the participation in its capital stock of public officers or their family members, the requirement of compensations based on variables hard to measure or unusual payment methods (indirect payments) or that make it difficult the identification of the final recipient, the offering by the third party of guarantees of success, the third party's reluctance to incorporate anti-corruption clauses in the agreements, the multiplicity of commercial activities non-compatible with each other and the existence of relevant court sentences.

The guidelines also consider that, as part of the due diligence, the company must request the incorporation of certain provisions into the agreements that formalize the services, including the commitment of the third party to comply with the integrity policies of the company, the extension of controls and the conduction of trainings, and the right to terminate the agreement and impose penalties in case of violations to the programs.

The Anti-Corruption Office acknowledges that the control expectations in SMEs should be graduated, being expected that, as opposed to large companies, the SMEs may not maintain the efforts to control the compliance of third parties regardless of the determination in the transmission of the policies. The guidelines also exhort to register and document all actions in order to be able to evidence the seriousness of the efforts made.

It is widely known that, apart from large companies, the rest of the companies would find it difficult both to impose their integrity programs on third parties and to control their compliance by third parties. In any case, considering the scope of the legal responsibility to third parties, the measures implemented should be aimed mainly at detecting, in first place, when it is possible to interpret that a third party is acting for the benefit or in the interest of the company, and, in second place, which acts or facts the company should expressly not validate in order to be able to reject, successfully, the attribution of responsibility, provided that the company has not benefited from such acts.

Due diligence in corporate transformation processes. Item VII of Section 23 of the Law establishes as an optional element of integrity programs the due diligence during corporate transformation processes and acquisitions, for the purposes of detecting irregularities, unlawful acts or vulnerability in the involved entities. The issue caught our attention at the relevant time (see our comment published in abogados.com.ar on January 4, 2018) in relation to the denominated successive liability foreseen in Section 3 of the Law. This rule establishes the transmission of criminal corporate liability to the resulting or surviving company in case of transformation, merger, consolidation, spin-off or any other corporate reorganization. The transmission of criminal liability would operate in cases of transformation and in the different cases of corporate reorganization established in the Argentine Companies Law No. 19.550, as amended. However, at such time we wondered if the reference to the due diligence related to "acquisitions" as an element of the integrity program could create the perception that there is a possibility that the aforementioned "transmission of liability" operates towards the acquiring company in case of business acquisitions, which would imply the broader interpretation of the term "surviving company" used in Section 3, including the acquiring company. At that time, we held that the aforementioned may not be validly held because, in first place, the reference to the due diligence that should be carried out in case of business acquisitions is mentioned as an element of the integrity program (which is optional and non mandatory) and not as a regulatory element of the aforementioned successive liability and, in the second place, such liability is regulated in relation to the "resulting" or "surviving company" and not as regards the purchaser of shares or ownership interests of a company; therefore, an interpretation that admits that the term "acquiring company" is included in "surviving company" is not legally valid.

Apart from the use of certain terms more appropriate for the purchase and sale of shares or ownership interests than for corporate transformations or reorganizations, the regulation of the Anti-Corruption Office on this matter makes reference to the due diligence in corporate transformation transactions, explaining that it is done in the broader sense used by the law. When making reference to the events contemplated by the law, it limits the reference to the legal transactions of

transformation, merger and spin-off contemplated in the Argentine Companies Law.

Further, the Anti-Corruption Office adds that, as this is not a daily activity, the incorporation of this element in the program should depend on how feasible a transaction of these characteristics may be.
Finally, given that the law does not provide for a penalty exemption event in case the due diligence results in the finding of a corruption offense, the Anti-Corruption Office proposes that the judges be the ones who establish the criteria in order to provide a mitigating consideration to the self-reports generated from due diligence activities.

Internal reporting and informant protection channels. While it is an optional element of the program, the Anti-Corruption Office deems it important to establish an internal reporting channel that must coexist with the natural channels implemented by the company, such as conversations with supervisors or superiors, so that, both employees and third parties may report violations to the ethics code, providing for the possibility that the informant may choose to reserve his/her identity or make an anonymous report. We believe that this may end denaturalizing the reporting channel when used by individuals that make an improper use thereof, being difficult in many cases to detect the author of a false report.
While the Anti-Corruption Office explains that it is not a mandatory element, it says that, in many cases, the lack of an internal reporting channel would seem unsustainable, and the company, in any case, should keep an "open door" policy to encourage employees to openly talk about any doubt or concern as regards integrity.

If implemented, the reporting channels should be safe and the confidentiality of the information and the employment of the informants should be guaranteed in order to develop a serious and professional investigation. The management of the channel may be outsourced and, in large companies, such channel should provide support on a 24/7/365 basis. The guidelines propose, among other things, the creation of clear rules for incoming reports, a proper registration, the management and follow-up of reports, the safety and confidentiality of the information stored, and the treatment of information received according to the applicable personal data protection regulations.

The guidelines also establish that it is essential to protect the informant, stating that a program that provides for an internal reporting channel without contemplating, at the same time, the duly implementation of measures tending to protect the physical integrity, tranquility and dignity of the informers that act in good faith is not admissible. The protection should include, among other things, rules that prohibit any agent of the company, from any level, from adopting retaliation measures and, in case of such retaliation, rules that provide for penalties and, if required, a guarantee of legal representation by the company available to the informer.

Internal investigations. The purpose of this (optional) element of integrity programs is that companies adopt an investigation system that, on the one hand, respects the rights of the individuals under investigation and, on the other hand, imposes effective penalties for violations to the code of conduct. The Anti-Corruption Office considers that the analysis and investigation of the reports by the own company is crucial in order to sustain the grounded imposition of disciplinary actions, including criminal and civil actions, as well as to allow the company to adopt other measures tending to avoid the recurrence of the irregularities detected.

The Anti-Corruption Office upholds that the implementation of investigative actions is grounded on the right of the company to freely organize its legal activity and, as an employer, to control its own productive means. This activity is not limited by the own limits of the criminal investigation at criminal courts. The internal regulations of this activity should respect the limits derived from the rights of workers, and cannot affect their right to intimacy, privacy and dignity.
On the other hand, the management of information should comply with the rules for the gathering and treatment of personal information in accordance with the provisions established by Law 25.236.

As a sensitive matter, the guidelines consider the access to media and devices property of the company that may store private information of the employees. The company must take into account the proportionality and inform the employees in advance and in writing about the possibility and right to access to such information in possession of the company. It is advisable to consider policies related to the chain of information custody, witnesses' interviews, and involvement or exclusion of internal areas, depending on the potential involvement in the investigated facts.

The guidelines recommend that the final supervision of the investigation be in charge of the internal control authority, and it is also advisable that the protocol implemented consider the event of active corruption allegedly committed by the high management or general management. The Anti-Corruption Office admits that the implementation of this element may be expensive for a small or medium company, and thus it is reasonable, also in high risk contexts, to moderate the scrutiny and the rigorousness, which does not mean that at least there should be evidence that the owners

of the company were not strange to the events of breach of the duties of loyalty and collaboration.

Internal responsible person. While it is a non-mandatory element, the Anti-Corruption Office understands that, in larger companies and with more economic capacity, it is practically impossible to consider that a program may be "adequate" without a full time individual or team in charge of the development, commissioning and operation of an integrity program. In smaller companies, this role may be added to the responsibilities of an internal profile, and in a small company the owner himself/herself may carry out the role if all workers have direct and regular access to him/her.

The guidelines provide for the functions of the internal responsible person, which include, but not limited to, the following: conduction of the integrity program; management of complaints received; informants protection; leadership in internal investigations; supervision of the program's operation and its continuous improvement, training design, and analysis of the adequacy of the code of ethics to the effective regulations. The individual in charge of this role should have certain skills, including, but not limited to: technical solvency (have knowledge about the discipline and know how to put it into practice); a commercial vision (understand the business and its particularities); persuasive capacity (convince high management by means of his/her words and actions); capacity to communicate, capacity to establish fluid relationships with the rest of the areas and integrity, and must be an honest and credible person.

The hierarchical level of the position may vary depending on the characteristics of the company, but it must be a high management position, similar to the managerial level in large companies, reporting or with direct access to the general management or to the Board of Directors and, in smaller companies, with sufficient influence capacity in the decision-making process. It is important that the responsible person has autonomy and resources for the performance of his/her function: while each company is free to organize and cover the position, these factors must be guaranteed. Further, it is specially important that the role of the internal responsible person be properly synchronized with other functions such as those of the areas of auditing, legal, human resources, risk management, etc., and there may be cases where the organization of responsibility may require the creation of an integrity committee (which may be comprised by the own responsible person, a member of the internal control area and a representative of the high management).

Periodical risk analysis. While this is an optional element, the guidelines highlight the importance that the risk analysis be continuous in order to corroborate that the program continues being appropriate under the law. Moreover, it is advisable that, as the definition of a process is recommended for the initial assessment, the periodical analysis should also have its own procedure, setting the guidelines for its conduction, the responsible parties and the frequency of its review (reasonably, it should be carried out in each annual cycle and should precede the planning of the program for the following year).

Continuous monitoring and evaluation of the program's effectiveness. On the other hand, the program should be monitored, and this must be conceived as a process of continuous learning, adaptation and improvement in which its impact and adequacy must be subject to a periodical monitoring and review. According to the Anti-Corruption Office, at least once a year there should be a rigorous balance on the previous cycle and a programming of the following cycle, which should contemplate the necessary improvements. The actions implemented for such purposes may include, but not limited to, periodic audits of the program, surveys to the members of the company or third parties, the statistical analysis of the functioning of the internal reporting channels or the result of investigations. The monitoring is, ultimately, the responsibility of the high management, and this is similarly important in smaller companies: even when the activity may not be formally established, it is important to have sufficient evidence that the program is being analyzed in practice and that if something is not working properly, the company implements the available corrective and improvement actions.

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