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Mexico

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Overview

July 19, 2017 marked the entry into force of the General Administrative Responsibilities Law (*Ley General de Responsabilidades Administrativas*, the "Responsibilities Law"), which is at the core of the new National Anticorruption System (*Sistema Nacional Anticorrupción*, the "SNA"). With this, the four new statutes that constitute the SNA have entered into force, whilst only three of the four statutes that were amended as part of the SNA have become effective; namely, the amendments to the Federal Criminal Code have not yet taken effect.

There are fundamental aspects of the SNA that are still pending. On the enforcement front, the appointment of the Anticorruption Prosecutor – which is the trigger for the amendments to the Federal Criminal Code – has not yet occurred as a result of a political impasse in the Mexican Senate. Evidently, this is not a minor pitfall as the deficient enforcement and forensic capabilities of prosecutors in bribery cases is what has allowed corruption to flourish in Mexico.

The designation of an Anticorruption Prosecutor who will be responsible for training specialised staff and developing modern infrastructure to investigate corruption offences on a systematic basis is probably an unsettling thought for some of the political forces that have been busy delaying the appointment. The delay in the appointment of the Justices of the Federal Administrative Justice Court with jurisdiction over corruption cases is also unfinished business before the Senate.[1] All things considered, with Presidential and Congressional elections in Mexico taking place on July 1, 2018, further delay in the appointments will represent a political cost for the stakeholders; accordingly, there will be a great incentive for the Senate to finally appoint the Anticorruption Prosecutor and the Administrative Court Justices during the Congressional period that commences on September 1, 2017.

Another fundamental aspect of the SNA that is still lagging is the adoption of local anticorruption systems by each of the 32 States that constitute the Mexican Federation. Some of the State legislatures were barely on time to enact their own version of the SNA by the July 18, 2017 deadline; despite the last minute enactment by some of the States, the underlying operational aspects of these systems are not functioning properly. Other States simply did not enact the corresponding local legislation before the deadline and are still struggling to do so. Getting this record straight with the States will not be an easy task for the Coordinating Committee, which must ensure this happens according to its mandate contained in the General Law of the National Anticorruption System (*Ley General del Sistema Nacional Anticorrupción*, the "SNA Law").

Not everything with the SNA has been missed deadlines and unfinished business. There have also been developments that highlight the SNA's commitment to transparency. The appointment of members to the Citizens Participation Committee followed an exemplary process that resulted in the nomination of five respected members, including its Chairperson, Ms. Jacqueline Peschard. Moreover, the Citizens Participation Committee has taken a firm stance against the sluggish deployment of the SNA at a local level:[2] on August 7, 2017 the Citizens Participation Committee filed Constitutional procedures (*amparos*) before a Federal Court, requesting that States that are lagging behind in the implementation of their respective local anticorruption systems be forced into doing so and that local laws enacted that are in conflict with the SNA be corrected.

Considering the recent developments of Mexican anticorruption legislation outlined above, this chapter will explain the guiding principles of the SNA, namely: (i) coordination and accountability; (ii) enforcement; and (iii) private party liability and compliance. We will conclude this chapter by referring to recent enforcement activity and the next steps following the enactment of the SNA.

Coordination and accountability

One of the main challenges in Mexico when implementing legislation for nationwide observance, such as the SNA, is to ensure compliance with the Federal system enshrined in the Mexican Constitution. In essence, under the Mexican Federal system, matters not specifically reserved in favour of the Federal Government by Mexico's Federal Constitution are within the sovereignty of each of the 32 States which make up the Mexican Republic.

Prior to the adoption of the SNA, the absence of a nationwide accord to coordinate anticorruption laws and enforcement at the Federal and State levels resulted in a lack of Federal-State as well as interstate cooperation for fighting corruption. As would be expected, the diverging regulation of corruption throughout the land created wide legal gaps that have been astutely relied upon by public and private persons. While, for example, in 2012, the Federal Congress passed the Federal Anticorruption Law in Government Procurement (*Ley Federal Anticorrupción en Contrataciones Públicas*) and on that same year the State of Nuevo León overhauled its anticorruption framework, other States such as the State of Mexico still relied on a couple of outdated articles in their criminal codes and a set of patchy regulations applicable only to Government officials.

The first step towards allowing a comprehensive and far-reaching anticorruption framework were the amendments to the Mexican Constitution published on May 27, 2015, which laid out the philosophy of the SNA: a coordinated nationwide system of Federal and State laws and Government bodies charged with the enforcement of the same. Such Constitutional Amendments contemplated the passing of implementing legislation for the SNA.

The SNA Law created the Coordinating Committee (*Comité Coordinador*), which is the body responsible for deploying and coordinating the SNA at the Federal and State levels. Specifically, the Fourth Transitory Article of the Constitutional Amendments imposes an obligation on State legislatures to create or adjust local legislation to be consistent with the Federal SNA.

In order to insulate the Coordinating Committee from the whims of Government and politics, the SNA Law provides that it will always be chaired by a non-Governmental person that is a member of the Citizens Participation Committee (*Comité de Participación Ciudadana*). The Citizens Participation Committee is also a body created by the SNA Law, which is composed of five reputed independent members of civil society that were selected through

a rigorous vetting process that involved the Mexican Senate in order to guarantee their credentials and impartiality. The selection process for the Citizens Participation Committee members concluded on January 30, 2017, and resulted in the appointment of persons from some of the most recognised academic institutions and civil organisations focused on advancing transparency and anticorruption policies in Mexico.[3]

The other members of the Coordinating Committee shall be representatives of the other bodies that play a role in the adequate functioning of the SNA: (i) the head of the Superior Federal Comptroller (*Titular de Auditoría Federal de la Federación*); (ii) the Head of the Anticorruption Prosecutor (*Titular de Fiscalía Especializada de Combate a la Corrupción*); (iii) the Secretary of Public Function (*Secretario de la Función Pública*); (iv) a representative of the Council of the Federal Judiciary (*representante del Consejo de la Judicatura Federal*); (v) the Chairman of the Access to Public Information and Data Protection Institute (*Presidente de Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*); and (vi) the Chief Justice of the Federal Administrative Justice Court (*Presidente de Tribunal Federal de Justicia Administrativa*). At its quarterly meetings, the Coordinating Committee must adopt all measures for the deployment of the SNA.

Once all of the members of the Coordinating Committee have been appointed to their positions,[4] this engine of the SNA will be ready to be put in motion. The SNA Law also contemplates the executive bodies that will enable the Coordinating Committee's mission: namely, the Executive Secretariat and the Executive Commission, which will act through the executive authority of an individual appointed as Technical Secretary. In such regard, the Coordinating Committee appointed Ricardo Salgado Perrilliat, a former member of the Access to Public Information and Data Protection Institute, as Technical Secretary on May 30, 2017. Needless to say, the quality and talent of the individuals nominated to such positions and the budget allocated to the new bodies will be paramount to the successful deployment of the SNA. Thus far, the budget allocated by Congress to the SNA for the year 2017 is in the amount of MXP$214,374,000 (roughly US$11.9 million) and for 2018 the amount of MXP$222,385,000 (roughly US$12.3 million). A greater budget would have been ideal to "kick start" the SNA, especially considering the costs that would be involved in developing an advance technological platform to support the Digital National Platform; in any event, it will be up to the Coordinating Committee to use the available resources efficiently.

One of the main responsibilities of the Coordinating Committee is to prepare and deliver an Annual Work Plan imbedded with mechanisms for its periodic evaluation and adjustment. Coordination with the State anticorruption systems is also the core of the Coordinating Committee's mandate. There will be considerable expectation as to the contents of the Coordinating Committee's initial Work Plan as it will set the tone for implementation of the SNA.

Another challenging task facing the Coordinating Committee will be the development of the Digital National Platform (*Plataforma Digital Nacional*), which is envisioned as a state of the art IT system linking all bodies of Federal and State Government for the sharing of data. The SNA is designed to build on real-time information at the Federal and local level regarding the transparency declarations of Government officials, information about sanctioned officials and private parties, public complaints on administrative offences and acts of corruption and procurement process records. The use of state of the art technology should be top of mind for the Coordinating Committee when approaching this project so that capabilities such as artificial intelligence, which is already being developed for detecting

terrorist activity, are built into the platform. Otherwise, the Digital National Platform runs the risk of becoming a gargantuan system for collecting unconnected data.

The vast attributions of the Coordinating Committee are enhanced by an accountability system which ensures that each of the authorities involved in the functioning of the SNA does its job. On the one hand, the Coordinating Committee's mandate will be measured against its Annual Report in which it will disclose the progress of its initiatives and results. On the other hand, pursuant to article 36 of the SNA Law, State legislatures must enact statutes providing for similar standards of accountability to be observed by the local bodies implementing the SNA, including adequate procedures for complying with recommendations handed down by the Coordinating Committee and the publication of reports describing anticorruption initiatives, risks and the results of recommendations.

Enforcement

Ineffective enforcement of laws is a challenge faced by many Mexican institutions and is a challenge that the SNA intends to correct on the front of the fight against corruption. To that end, the SNA has taken a two-pronged approach that consists of: (i) empowering existing Government institutions in charge of enforcing the new legal framework; and (ii) the enactment of substantive laws that delineate the obligations of Government officials and private parties while regulating in more detail the corrupt practices that will be punished.

Institutional empowerment

The capabilities of four existing institutions have been enhanced to fight corruption. The amendment of the enabling statutes of three of these public bodies, and a brand new enabling statute for one of them, translates into a process of institutional empowerment that cuts through the administrative, prosecutorial, judicial and Government spending audit functions at the Federal level. Thus, the SNA not only creates the framework for institutional coordination, but affords more comprehensive and articulated tools to the authorities responsible for its enforcement. Also, as mentioned, the States of Mexico have the Constitutional mandate to create an equally comprehensive and effective institutional environment.

The Ministry of Public Function (*Secretaría de la Función Pública*) ("SFP") has long served[5] as the agency of the Federal Executive in charge of acting as the comptroller of public service. At the start of the current administration of President Peña Nieto, the SFP had been scheduled to disappear and while it lingered into its sunset it earned a reputation for complacency and turning a blind eye at serious corruption and conflict of interest situations. In contrast, the SNA amendments repealed the decree whereby the SFP had been set to disappear, and relaunched the SFP though the amendments to the Organic Law of the Federal Public Administration (*Ley Orgánica de la Adminsitración Pública Federal*) ("LOAPF"). In an effort to return dignity and respect to the position of Secretary of the SPF, the amendments to the LOAPF provide that he or she must be ratified by the Senate and must file his or her transparency declaration. In line with this, the amendments restate the core functions of SPF, which include the appointment of external comptrollers and internal comptrollership bodies (*órganos internos de control*) to each of the agencies and the conduction of investigations for unethical and corrupt behaviour within such agencies.

On the prosecutorial front, through the amendments to the Organic Law of the General Prosecutor of the Federation (*Ley Orgánica de la Procuraduría General de la República*), a new Specialised Office of the Prosecutor (*Fiscalía Especializada*) has been created for investigating and indicting corrupt practices (the "Anticorruption Prosecutor"). With this

change, the General Prosecutor's Office through the Anticorruption Prosecutor shall be accountable for probing corruption cases, developing investigation capabilities specifically aimed at evidencing the existence of corrupt practices and pursuing criminal charges against offenders. This new development introduced by the SNA should be able to reverse the prior trend where no division of the General Prosecutor's Office was particularly focused on corruption cases and, as a result, prosecution was isolated, random and often concentrated on petty bribes.

The Federal Tribunal of Administrative Justice (*Tribunal Federal de Justicia Administrativa*) ("TFJA") has long been a respected institution of the Mexican State. In the context of the SNA, the TFJA's enabling statute was repealed and its prior name changed;[6] however, the institution remains the same including its respected judges and staff. The novelty of the reform is that in addition to trying cases related to the legality of administrative and tax laws and of Federal Government actions, the TFJA is now responsible for trying cases related to corruption offences. To that end, a newly created Special Chamber (*Sala Especializada*) of the TFJA has jurisdiction over cases brought against Government officials involving "Serious Offences" identified in the Responsibilities Law as well as "Offences of Private Parties". One of the challenges for TFJA will be the form over substance principles that apply to the enforcement of administrative laws, pursuant to which courts must "pigeonhole" conducts within the rigid frame of the legal provisions. Another challenge will be the extremely high burden of proof that the accusations under the Responsibilities Law will need to meet, as TFJA judges must observe a "beyond reasonable doubt" standard.

Finally, the Superior Federal Comptroller (*Auditoría Superior de la Federación*) (the "ASF") is a body within the structure of the Mexican House of Representatives (*Cámara de Diputados*) with technical and procedural independence for reviewing and auditing the Federal Government's spending. Through the corresponding Constitutional Amendments and the new Federal Oversight and Accountability Law (*Ley de Fiscalización y Rendición de Cuentas de la Federación*), the audit process of Federal spending has been streamlined and is now linked with the SNA enforcement mechanisms: the ASF must notify the TFJA and the Anticorruption Prosecutor of any findings of corrupt practices.

Substantive provisions

(i) *Background*

During the heated debate surrounding the SNA reform, the Responsibilities Law was the centrepiece that drew the most attention from the media and the general public. The Responsibilities Law owes its notoriety to being the first "citizens' initiative" in the history of Mexico to be voted into law.[7] For that to happen, the draft legislation had to surmount the burdensome process of gathering signatures from at least 0.13% of registered voters: roughly 120,000 signatures. The high-quality draft legislation, which had been carefully prepared by a group of able academics from recognised research institutions and think tanks – with the collaboration of a well-selected group of experts – quickly gathered the support of 634,143 signatories.

During its passage through the Mexican Senate and House of Representatives, the debates around the initiative focused mainly on its provisions related to the transparency declaration that Government officials must complete and file, including three types of information: (i) asset declaration; (ii) conflict of interest declaration; and (iii) tax return information. Hence the popular name that the Responsibilities Law received throughout its legislative process: "Law 3 of 3"(*Ley 3 de 3*), as well as the widespread belief that its scope is limited to its transparency declaration provisions. Actually, the Responsibilities Law is the statute that,

together with the amendments to the Federal Criminal Code (*Código Penal Federal*), lays out most of the substantive provisions of the SNA.

(ii) *The Responsibilities Law*

The Responsibilities Law is a comprehensive statute that regulates anticorruption in a number of ways. With respect to Government officials, it lays out the standards of conduct and sets forth the mechanisms and procedures for the filing of transparency declarations and sets forth the "Serious Offences" and "Non-Serious Offences" for which they may be punished. As regards private parties – including both individuals and legal entities – the Responsibilities Law sets forth a catalogue of "Acts of Private Parties" that are punishable as well as compliance standards that, if followed, may result in reduced fines. Finally, the Responsibilities Law regulates, at length, the procedures to be followed by the SFP and the ASF in the investigation of Serious Offences, Non-Serious Offences and Acts of Private Parties and the judicial process with respect to Serious Offences and Acts of Private Parties before the TFJA.

Moreover, the Responsibilities Law expands on principles that had been sketched in precursor legislation,[8] namely: (i) it does not limit punishable conduct to bribery, but rather contemplates other practices that are equally noxious in dealings with the Government, such as collusion, influence peddling, presentation of deceiving or false information and covering up banned bidders;[9] (ii) it contemplates large monetary penalties applicable to private parties, both individuals and legal entities; (iii) it sets out that the performance of corrupt practices through an agent or intermediary will be attributable to the principal; (iv) it punishes cases of bribery committed with a foreign Government official; and (v) it sets forth some general principles for receiving leniency treatment upon self-reporting.

(iii) *Criminal legislation*

The amendments to the Criminal Code are scheduled to enter into force on the same date that the head of the Anticorruption Prosecutor is appointed by the Mexican Senate, which has not yet occurred as this chapter goes to press. The amendments to the Federal Criminal Code reorganise existing legal provisions into a Section renamed "Crimes arising from Corrupt Situations" and incorporate the necessary references to the SNA legal framework. The substantive amendments to the Federal Criminal Code, however, are not the most innovative feature of the SNA: for the most part, conduct criminalised prior to the amendments continue to be contemplated in substantially the same terms, including bribery, intimidation, abusive exercise of authority, influence peddling, embezzlement of Government funds and illicit enrichment.

Moreover, the amendments to the Federal Criminal Code forewent the opportunity to improve the wording that defines some of the criminal conducts. For example, the definition of bribery (*cohecho*) retains narrow language that requires the actions prompted by the bribe – or the promise of a bribe – to be within the functions and employment of the relevant Government official. In other words, in order for there to be a determination of criminal liability for bribery, the Federal Criminal Code requires that the relevant Government official be formally vested with the authority to carry out an action or inaction in exchange of which he or she has received something of value.[10] By way of example, in the context of bribery occurring in a procurement process, the narrow language retained by the Federal Criminal Code could lead to the acquittal of a Government official that receives something of value in exchange for having the award issued in favour of one of the bidders, provided that such official does not have the formal authority to issue the award – but causes another Government official that has the formal authority to do so.[11]

Another notable example of the improvements that the amendments to the Federal Criminal Code failed to address, is that paragraph II of article 222 which sets forth the definition of bribery (*cohecho*) as it refers to private parties does not expressly include the possibility of the punishable conduct being committed through an agent or intermediary (*interpósita persona*). This presents an essential inconsistency because the definition of bribery (*cohecho*) as it refers to Government officials in paragraph I of article 222 expressly provides for the commission of the crime through an agent or intermediary. Thus, a private party could argue and rely upon a strict interpretation that the definition does not apply to its conduct when committed through an agent or intermediary and that it is therefore not criminally liable, whilst the Government official involved in that same conduct would not be able to avoid criminal liability on that same basis. Another anomaly is that the private party could be held liable under the Responsibilities Law for giving a bribe through an agent or intermediary but not under the Federal Criminal Code.

The most relevant development on the criminal front, however, does not arise from the amendments to the Federal Criminal Code, but rather it flows from the new National Code of Criminal Procedure (*Código Nacional del Procedimientos Penales*, the "Code of Criminal Procedure"), which entered into force nationwide, at both Federal and State level, on June 14, 2016. In addition to implementing a uniform criminal procedure and oral hearings, it introduces the novel concept under Mexican law of determining criminal liability against legal entities. In this regard, article 11*bis* of the Federal Criminal Code links certain criminal offences, including, specifically, the crime of Bribery (*Cohecho*) to the provisions of the Code of Procedure which contemplate criminal enforcement against legal entities independently of the criminal liability that may be found with respect to the individuals involved.

Articles 421 through 425 of the Code of Criminal Procedure set forth the principles pursuant to which liability against legal entities may be determined, including penalties that a judge may order upon a finding of criminal liability; namely fines, disgorgement of assets used in connection with or that result from the criminal conduct, publication of the judgment and dissolution of the legal entities. The judge may also order the following measures: suspension of activities; closure of its places of business; prohibition to continue conducting the activities in the course of which the criminal conduct was committed; banning from procurement procedures; receivership to protect employees and creditors; and a public warning. Upon assessing the harsh consequences that may attach to a legal entity, the judge will have to take into account the extent to which there has been a failure to exercise due control of the relevant entity, the quantum of amounts and its legal nature and annual volume of business, as well as the entity's level of compliance with applicable laws and regulations.

Two other novel legal concepts have been introduced by the Code of Criminal Procedure which are also very relevant in the context of the new legal framework applicable to corrupt practices. On the one hand, articles 191 through 200 of the Code of Criminal Procedure contemplate the possibility of entering into a consent decree, whereby certain conditions and obligations may be agreed between the criminal offender and the prosecutor, which if complied with by the former, may suspend criminal liability and may ultimately extinguish it. On the other hand, the standard of proof requires that guilt in criminal proceedings be determined upon a finding that is beyond reasonable doubt. The novelty of both concepts is bound to present both opportunities and challenges for prosecutors and defence attorneys. Specifically, from the perspective of the SNA and the anticorruption framework, the alternative of seeking a consent decree will not be available in a bribery case where

the bribe exceeds MXP$36,500 (roughly US$2,000). Regarding the standard of proof, prosecutors will need to introduce evidence that convinces the judge beyond reasonable doubt, something that is bound to raise the bar on prosecutors' diligence.

Finally, a new concept laid out in the Code of Criminal Procedure which is particularly relevant in the context of corruption investigations, is the obligation to report contained in article 222. Previous criminal statutes did not set forth an affirmative obligation to report, although under certain circumstances not reporting could rise to the level of abetting a criminal conduct. The new statutory obligation imposes a duty to report on whoever "has certainty" (*le conste*) that a situation that is likely to be determined as a criminal conduct has taken place. The threshold that would need to be met in order to comply with the duty to report would thus seem quite high as the certainty of a situation that could rise to the level of a criminal conduct would have to rise above a mere suspicion. As with other novel concepts contained in the Code of Criminal Procedure, it will be some time before judicial precedents delineate the scope of the duty.

Private party liability and compliance

Liability of private parties

One of the overarching principles of the SNA is to make private parties co-responsible with Government officials for acts of corruption. To that end, the Responsibilities Law creates a catalogue of conducts labelled "Private Party Offences". Such catalogue essentially restates the conduct currently punished by the previously existing Federal Anticorruption Law on Public Procurement (the "Anticorruption Law") (see endnotes 6 and 7), but broadens their scope of application as they must no longer be linked to public procurement procedures; rather, the punishable conducts capture any corrupt dealings with Government officials. As explained in the section entitled 'Institutional empowerment' above, the TFJA is the judicial body with jurisdiction over such conducts.

The legal consequences of committing Private Party Offences are also amplified *vis-à-vis* what is contemplated in the Anticorruption Law. The penalties that may be assessed against private individuals include fines of up to twice the amount of the benefits obtained or, if no benefits have been obtained, of up to roughly US$550,000; private individuals may also be held liable for damages caused to the Government's finances as well as debarment for three months to eight years from contracting with the Government at any level (Federal, State and Municipal). In the case of legal entities, the finding of Private Party Offences may also result in a fine of up to twice the amount of the benefits obtained or, if no benefits were obtained, of up to roughly US$5.5 million, liability for the damages caused to Government finances and debarment from Government contracting for three months to 10 years. Other measures that may also be imposed upon private legal entities include suspension from activities related to the corrupt practices for a period of between three months and three years and dissolution, provided, in both cases, that a benefit for the legal entity is shown and that management has been privy or that systemic offending conduct is found.

The criteria for assessing the severity of the sanctions outlined above will depend on the seriousness of the offence and whether management of the legal entity has voluntarily disclosed the conduct and cooperated with the investigation or not. Moreover, leniency may be sought by private parties, provided that a procedure for the investigation of the corrupt conduct has not been formally notified and that a precise cooperation protocol is agreed upon with the investigating agency and cooperation commitments are complied with. The first person that submits to a leniency programme may be subject to reductions of between

50% and 75% of the assessable fines and up to total acquittal from debarment. Persons that pursue leniency after the first person has come forward may be granted a reduction of up to 50% of the assessable fines.

As described above, the Responsibilities Law reinforces and better prescribes the sanctions currently contemplated by the Anticorruption Law as well as the availability of leniency programmes. There is little clarity, however, as to how leniency will be sought under the Responsibilities Law before administrative authorities and how the TFJA interacts with the criminal prosecution of those same offences. As explained in the subsection on 'Criminal legislation' above, the ability to enter into a consent decree with a criminal prosecutor is only available in cases of petty bribery, whilst in bribery cases involving an amount in excess of roughly US$1,900, the prosecutor would appear to have no option but to bring charges. Unless there is absolute clarity as to how the disclosing person will be aided on both the administrative and criminal fronts, the virtuous conduct of disclosure and cooperation envisaged by the Responsibilities Law will be of limited practical use.

Compliance

The Responsibilities Law gives a preeminent place to the implementation and maintenance of compliance programmes, stressing to that effect that legal entities will be responsible for corruption offences committed by persons acting on its behalf and that result in a benefit for such legal entity. In line with this, article 24 of the Responsibilities Law lays out the elements that a corporate compliance programme must fulfil (*política de integridad*). Such elements are: (i) an organisation and procedures manual that is clear and complete and sets forth the responsibilities of each area and leadership roles; (ii) a code of conduct that is publicly available that sets forth systems and mechanisms for its real application; (iii) adequate and effective control, supervision and audit systems that are consistently and periodically running; (iv) adequate reporting systems, both internal and before competent authorities, as well as sanctions and specific consequences applicable to offenders; (v) adequate training programmes; (vi) HR policies for screening high-risk individuals in the course of recruiting procedures; and (vii) mechanisms for transparency and publicity of interests.

Whether or not a compliance programme is in place for a legal entity will be considered in an assessment of liability for corrupt practices. Thus, a compliance programme that is duly implemented and functioning will serve legal entities that are being investigated for alleged corrupt practices to obtain more lenient treatment with respect to the fines and measures that may be ultimately imposed. By the same token, the lack of a compliance programme may result in harsher fines and measures being imposed.

On the front of gifts and entertainment compliance ("G&E"), the regulatory approach existing at a Federal level before the Responsibilities Law took effect was that gifts and entertainment had to meet a two prong test to be considered unlawful for receipt by the Government official, namely: (i) the gift or entertainment would need to be delivered to a Government official regulating or directly related to the person delivering the gift; and (ii) the gift or entertainment delivered would need to give rise to a conflict of interest. Additionally, a well-established set of regulations had set a cap on allowable tangible gifts which were not to exceed a monetary value greater than 10 times the Unit of Measurement and Update (UMA) (approximately US$40).

Now, Article 7 of the General Responsibilities Law lays out general conduct guidelines to be followed by Government Officials. Paragraph II of said Article imposes an absolute ban on the acceptance of gifts and similar benefits by Government officials without setting forth a *de minimis* exception such as the one that existed previously. Accordingly, although certain

interpretations can be developed around the new principles contained in the Responsibilities Law, to define the regulations of G&E, a clear delineation of such regulations should be expected from the Coordinating Committee.

Recent enforcement activity

State Government corruption

An ongoing, high-profile corruption investigation and prosecution process is being conducted by Federal authorities and the authorities of the State of Veracruz against Javier Duarte, the former Governor of the State of Veracruz and a series of high-level Government officials that served during his administration. The allegations against Javier Duarte and former Government officials include bribery, fraud and embezzlement of Government funds. Specifically, the accusations include the irregular award of Government contracts to "strawman" companies controlled by Duarte and his accomplices which engaged in overpricing and bid-rigging. Publicly available sources and the investigation files prepared by anticorruption NGOs state that amounts diverted through the various schemes used by Mr. Duarte could reach up to MXP$45bn (roughly US$2.5bn).

Javier Duarte was extradited from Guatemala to Mexico on July 17, 2017 and is currently subject to an indictment process before the General Prosecutor's Office (*Procuraduría General de la República*, "PGR"). Moreover, the PGR and the Prosecutor's Office of the State of Veracruz have requested State and Federal Judges to issue a series of injunctive orders for the seizure of a number of properties owned by the former Governor, his close associates and relatives allegedly involved in such actions. Javier Duarte is also subject to a separate investigation involving alleged bribes in the amount of MXP$3.7m provided by certain offshore companies of Odebrecht in exchange of two Government projects regarding the supply of electricity for the State of Veracruz.

Similar investigations are also open against other former State Governors: Roberto Borge of Quintana Roo who has been arrested in Panama and is awaiting extradition to Mexico; Tomás Yarrington of Tamaulipas who has been arrested in Italy and is awaiting extradition to Mexico or the United States; while Cesar Duarte of Chihuaha who has fled from Mexico and is being persecuted by Interpol. What all these cases have in common, is that they do not arise from a systematic and structured investigation process such as the one contemplated by the SNA, but rather, they are all politically driven by the State Governments that took office after the prosecuted and persecuted governors left power.

Mexican ramifications of the Odebrecht Investigation

During proceedings before the United States District Court of the Eastern District of New York, Odebrecht officials confessed that the Brazilian construction company had paid at least MXP$10.5m in bribes to certain high-level Mexican Government officials. After such information was made public in the United States, numerous exchanges between the PGR and prosecutors in the United States in Brazil ensued during the first and second quarters of 2017, including a trip to Brazil by Mexico's General Prosecutor; however, none of the investigations or findings made by PGR came to public knowledge after that. Then a news article released on August 13, 2017 by the Brazilian newspaper O'Globo took Mexico by surprise as it contained references to the sworn statements of Luis Alberto Meneses Weyll, a high-level officer of Odebrecht, that implicated Emilio Lozoya – former head of Mexico's state-owned oil company Petroleos Mexicanos ("PEMEX"). According to the news, Emilio Lozoya allegedly received US$10m through offshore accounts in exchange for awarding a contract for refurbishing a PEMEX refinery worth US$115m; Mr. Lozoya has categorically

denied the allegations. Because according to Luis Alberto Meneses, the first payments were made while Mr. Lozoya was acting as a campaign manager for the acting President of Mexico, Enrique Peña Nieto, the case has the potential for reaching the highest circles of Mexican politics. However, given the recent developments in this case as this chapter goes to press, its ramifications are yet to be seen.

Conclusions

The SNA represents an important and noteworthy development in the fight against corruption in Mexico. The quality, consistency and comprehensiveness of the legislation implementing the SNA will afford a precious tool to Government and civil society. The deployment of the SNA has been slowed down by the impasse over the appointment of the Anticorruption Prosecutor and the Anticorruption Justices by the Senate. On the other hand, the States of Mexico that, as evidenced by the multiple investigations under way against former Governors, have been ravaged by corruption are ironically late in adopting functional local versions of the SNA. There are, however, committed Mexicans involved in the process that have started to make a difference by using the instruments they have available to speed up the process. The challenge will be to have a fully functional and deployed SNA as soon as possible, before Mexicans and the international community lose the trust and patience they have placed on this historical opportunity.

* * *

Endnotes

1. Even though the provisions of the Responsibilities Law have entered into force including those dealing with the "Offences of Private Parties" and the correlated administrative sanctions, the Special Chamber of the TFJA will be unable to try the related cases until the corresponding Justices are appointed. In order to attend any possible cases involving any of the offences provided under the Responsibilities Law, the TFJA implemented a temporary appointment by means of which an existing regional court of the TFJA will try any corruption matters. Such temporary appointment, however, has raised certain concerns as to the legality of any decision rendered by such court since such appointment contravenes the constitutional mandate that granted jurisdiction only to the Special Chamber of the TFJA. This could also result in further uncertainty as to any guidance that could derive from any decision or precedent rendered by the court considering the fact that such decisions could be challenged based on the regional court's lack of jurisdiction to hear and decide cases involving matters under the Responsibilities Law.
2. Not all of the State legislatures have created or modified local laws implementing local anticorruption systems consistent with the SNA, in spite of the deadline imposed on the States to do so. For example, the States of Chihuahua and Veracruz failed to issue the legislation creating their local anticorruption systems.

   In other cases, State laws contain certain aspects which diverge from those of the SNA. In the State of Morelos, for example, the citizens participation committee of the local anticorruption system is directly appointed by local congress without the vetting process or safeguards provided for the SNA.

   Likewise, the Coordinating Committees of other States are not consistent with the Coordinating Committee of the SNA. In the State of Quintana Roo, for example, the

coordinating committee includes a member of the local congress which has raised concerns as to the committee's impartiality and independence. Quintana Roo also established municipal anticorruption systems and coordinating committees. This has raised concerns as to how will the SNA be able to coordinate and interact with the local and municipal anticorruption systems of the State of Quintana Roo. Similarly, the coordinating committees of the States of Guanajuato, Aguascalientes, the State of Mexico and Mexico City provide for certain mechanisms such as a greater number of members in their respective coordinating committees which dilutes the representation of the members appointed by the citizens participation committees.

Finally, other States, such as the State of Colima, Nayarit, Oaxaca and Puebla have failed to contemplate digital platforms that are consistent with the National Digital Platform of the SNA, which has raised certain concerns as to the effective sharing of information between Federal and State levels on transparency and anticorruption matters.

3. The members appointed to the Citizens Participation Committee are: (i) Jacqueline Peschard Mariscal who in previous years acted as a councilwoman of the Federal Electoral Institute and chairperson of the Access to Public Information Federal Institute; (ii) Mariclaire Acosta Urquidi who is the head of the Freedom House organisation which focuses on protection of human rights and freedom of speech; (iii) Alfonso Hernández Valdez who in previous years acted as head of the Research and Investigations department of the Access to Public Information and Data Protection Institute; (iv) José Octavio López Presa who is a founding member of the Causa en Común (common cause) organisation which focuses on advancing transparency and accountability matters; and (v) Luis Manuel Pérez de Acha who has participated in various citizens' initiatives in connection with transparency and accountability matters in addition to heading a law firm specialised on impact litigation.
4. While some of its members, such as the head of the Superior Federal Comptroller, the Secretary of the Public Function and the head of the Access to Public Information and Data Protection Institute are already appointed, the appointment of the Chief Anticorruption Prosecutor is still pending. It is expected that such appointment should be made prior to the 2018 Presidential and Congressional elections.
5. This agency was originally created in 1982 and existed under the name of *Secretaría de la Contraloría General de la Federación*; in 1994 it changed its name to *Secretaría de la Contraloría y Desarrollo Administrativo* and since 2003 has existed under its current name.
6. Before the enactment of its new enabling statute, the Federal Tribunal of Administrative Justice (*Tribunal Federal de Justicia Administrativa*) was previously known as the Federal Tribunal of Administrative and Fiscal Justice (*Tribunal Fiscal de Justicia Fiscal y Administrativa*). Although the word "*Fiscal*", which refers to its jurisdiction on tax matters, was eliminated from its name, it retains such jurisdiction for settling cases related to the challenge of Mexican tax laws.
7. It was only in 2012 that Articles 35 and 71 of the Mexican Constitution were amended in order to include the rights of citizens to present legislative initiatives before the Mexican Congress.
8. With the Responsibilities Law entering into force on July 19, 2017, the Federal Anticorruption Law in Public Procurement (*Ley Federal Anticorrupción en Contrataciones Públicas*) ("Anticorruption Law") was repealed. The scope of the Anticorruption Law was more limited than the Responsibilities Law as it only applied to

corrupt practices occurring in the course of Federal procurement processes. Moreover, there are no reported cases where the Anticorruption Law has been applied, perhaps because it was devoid of an enforcement system such as the one that is being implemented through the SNA.

9. The following practices were considered violations under Article 8 of the Anticorruption Law: (i) promising, offering or delivering money or any other gift to a Government official or a third party (participating in the design or preparation of the call for a public bid or any other act related to the Federal public procurement process) in exchange of such Government official's restraint from performing any act related to his/her responsibilities or to the responsibilities of another Government official, with the purpose of obtaining or maintaining a benefit or advantage, regardless of the acceptance or receipt of said money or gift or of the results obtained in connection therewith; (ii) carrying out any action that implies or has as the purpose of obtaining an undue benefit or advantage within any Federal procurement process; (iii) carrying out any act or omission with the intent or effect of participating in a Federal public procurement process, notwithstanding that such person is restricted by law or a Governmental order from participating in such a process; (iv) carrying out any act or omission with the intent of avoiding or simulating compliance with the requirements or rules set forth in any public procurement process; (v) intervening for the benefit of any person restricted from participating in Federal public procurement processes, with the intent of having such person benefit, either totally or partially, from the relevant contract; (vi) causing a Government official to give, undersign, grant, destroy or deliver a document or a good, with the intent of receiving a benefit or advantage for oneself or a third party; (vii) promoting or using economic or political influence (real or fictitious) on any Government official with the purpose of obtaining for oneself or a third party a benefit or an advantage, regardless of the effectiveness of such influence or the results obtained in connection therewith; and (viii) presenting altered or false documentation or information with the purpose of obtaining a benefit or an advantage.
10. Pursuant to a binding precedent of Supreme Court of Justice of Mexico, the crime of bribery is deemed to have occurred when: (i) money or any other economic benefit is offered or requested, respectively, by a private party or Government official; and (ii) the purpose of said offer or intent is to induce an action or omission of the Government official relating to the duties vested in him/her. *See*, *Cohecho Activo, Elementos que Integran el Tipo Previsto en los Artículos 222 Fracción II de Código Penal Federal y 174 Fracción II del Código Penal Para el Estado de Michoacán*. 1ª/J.99/2001, published in the Judicial Weekly Gazette Book XIV, December 2001.
11. By contrast, the definition of Bribery contained in Article 66 of the Responsibilities Law as it relates to private parties, which as mentioned above will be enforceable through proceedings before administrative courts, does contemplate the situation where a Government official receives a bribe but does not act within his/her authority but causes another official who does have the authority to act instead.

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