

MEXICO'S CORRUPTION DISRUPTION

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How well equipped is Mexico to tackle corruption? (Credit: istock.com/michelle943)

Gardere foreign legal consultant Andres Alvarez and associate Alejandro Ortiz Palacios analyse the structure of Mexico's new National Anti-Corruption System and consider what still needs to be done to make it an effective tool in the country's fight against corruption.

Mexico has been fighting corruption for a long time. The Mexican Central Bank estimates that it costs the country the equivalent of 9% of gross domestic product. One of the first agencies in charge of investigating corruption and sanctioning government officials' corrupt behaviour was the General Comptroller's Ministry of the Federation, whose accomplishments were average, at best. In 1994 it changed its name to the Ministry of Comptrollership and Administrative Development and its focus changed to modernising the public administration, rather than investigating corruption. In 2003, the ministry changed its name again to the Ministry of Government Affairs and the emphasis on investigating corruption was readopted. The efforts continued and included implementing international conventions to prevent corruption, including that of the OECD.

Notwithstanding these efforts, and perhaps because of disappointing results, the general perception of corruption in Mexico has worsened. On 27 May 2015 the government amended article 113 of the Mexican Federal Constitution to create a new national system that would target corruption. This system, the National Anti-Corruption System (NACS), was to be integrated by members of the public and private sectors and governed by three main new laws on anti-corruption matters; the General Law of the National Anti-Corruption System, Organisational Law of the Federal Court of Administrative Justice and General Law on Administrative

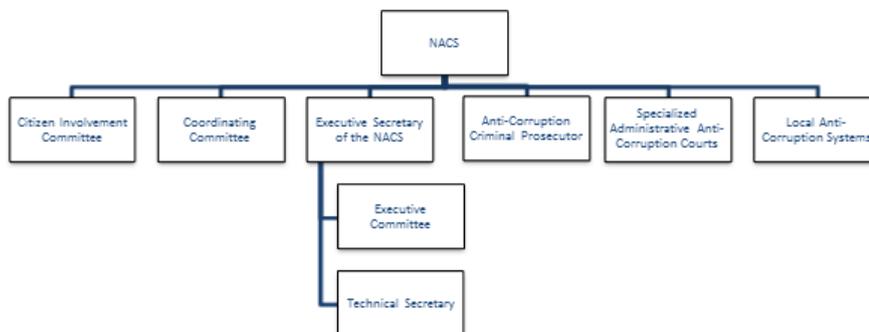
Liabilities (GLAL). These laws were published in the Mexican Official Gazette on 18 July 2016 and become fully effective almost exactly one year later.

The integration of the NACS

The NACS has both an institutional and a regulatory component. The inter-institutional structure of the NACS provides for the multiple bodies that will integrate the system and includes the involvement of both private and public sectors. The regulatory component of the system comprises a set of new statutes encompassing administrative and criminal laws, as well as specialised prosecution rules. While technically both components form the NACS, in practice, only the institutional component is known as the National Anti-Corruption System.

The NACS is formed by (i) the Citizen Involvement Committee (CIC); (ii) auditing and human rights safeguarding government agencies that existed prior to the amendments, which along with the CIC integrates the Coordinating Committee (CC); (iii) an Executive Ministry of the CC; (iv) a new Anti-Corruption Prosecutor not yet appointed; (v) new federal courts specialised in administrative anti-corruption matters, which are not yet operational; and (vi) the local anti-corruption systems, which need to be integrated in the same terms as those federal government.

Integration of the NACS



The Citizen Involvement Committee (CIC)

The CIC is a constitutional autonomous body formed by five non-government individuals who have proven their prestige and honesty in defending transparency and accountability and fighting corruption. Its main purpose is to provide assistance to the CC and serve as a liaison between the NACS and the social and academic organisations that work closely on these matters.

The CIC is in charge of proposing new integrity and anti-corruption policies; promoting inter-institutional coordination; proposing guidelines for a National Digital Platform that facilitates compliance with the procedures, obligations and provisions regarding corruption, prosecution and administrative responsibilities; launching a citizen complaint and reporting system proposing to the CC non-binding suggestions for public bodies/government entities; and assessing and auditing the operation of the NACS. The CIC members were appointed and formally installed on 30 January 2017.

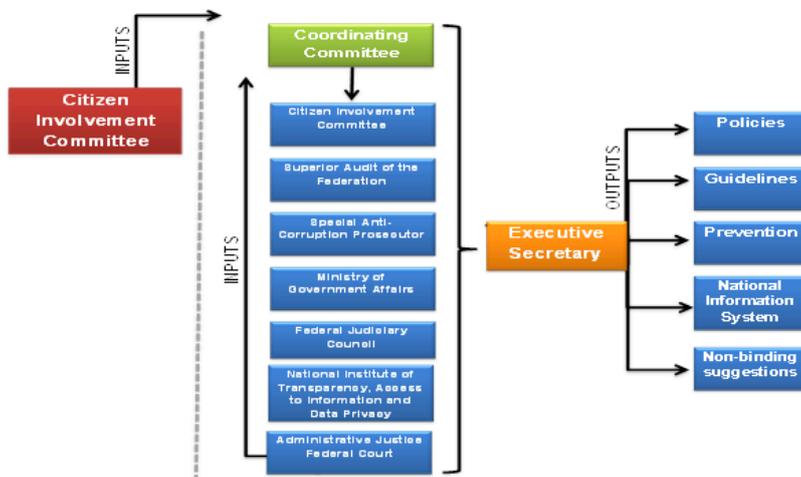
The Coordinating Committee (CC)

The main functions of the CC are to (i) design, approve and promote the national anti-corruption and integrity policies and assess them on a regular basis; (ii) request information to all public/government entities regarding the compliance with the national anti-corruption and integrity policies; (iii) coordinate with the preventive, audit and prosecution authorities; (iv) issue an annual report on the matter; (v) issue and follow-up on non-binding suggestions to public bodies/government agencies; (vi) coordinate with the Local Anti-Corruption Systems; (vii) create a National Digital Platform that facilitates compliance with the procedures, obligations and provisions regarding corruption, prosecution and administrative responsibilities; and (viii) provide information to preventive, audit and enforcement authorities.

The CC is formed of seven entities, including the CIC's chairman, who in turn chairs the CC. Its resolutions need to be approved by a simple majority of its members and its executive branch is the executive secretary of the NACS, which is presided over by the technical secretary of the NACS.

The CC has already been installed and the Technical Secretary appointed; however, the Anti-Corruption Prosecutor has not yet been appointed.

Interaction between NACS elements:



Executive Secretary of the Coordinating Committee

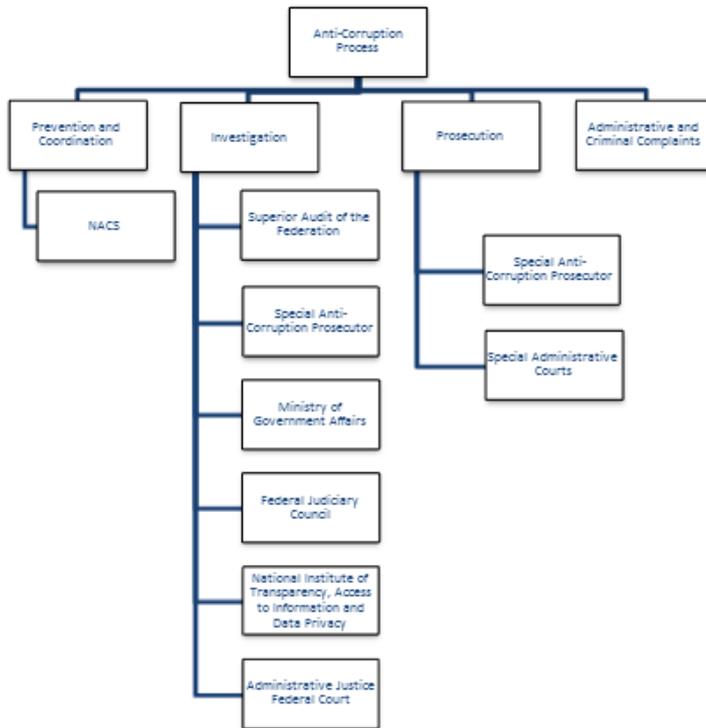
The Executive Secretary of the Coordinating Committee is an autonomous body of the Mexican government with technical and managerial independence. It is based in Mexico City and its purpose is to provide technical support and assistance to the CC.

Anti-corruption prosecutor and specialised federal courts

The anti-corruption prosecutor is a specialised individual whose sole responsibility consists in the criminal prosecution of corruption related cases, from both public and private sectors.

Specialised courts, which are not functioning yet, will hear and solve administrative liability issues related to corruption cases, from both private and public sectors.

Anti-corruption process:



Local anti-corruption systems

The amendments to the Mexican Federal Constitution provided that each state within the country would ensure that a local anti-corruption system is created in its corresponding territory, which would mirror the one created at the federal level.

The General Law on Administrative Liabilities (GLAL) is the new administrative statute applicable to all government officials and private entities, whether domestic or foreign, and individuals doing business in Mexico that interface with public officials or participate in government procurement contracts. The GLAL provides for new administrative sanctions for corrupt conduct. For government officials these comprise the suspension, removal or debarment from the public services and economic penalties. For private entities or individuals, the economic penalties can be up to twice the amount of the benefits obtained (or in case no benefits were obtained up to US\$6.2 million); a temporary ban of between three months to eight years for participating in public tender processes or executing government contracts; and dissolution of the entity. Felonies related to corrupt behaviour performed by private individuals were also amended along with its sanctions (see table below). These felonies will become effective on the date

Felonies	Sanctions (years of prison)
Request for illicit use of attributions	6 years – 12 years
Forgery of documents or information	3 months – 9 years
Influence peddling	2 years – 6 years
Bribery	3 months – 14 years
Embezzlement	3 months – 14 years

the general anti-corruption prosecutor is appointed.

It may be worth noting that the liabilities and sanctions may be reduced if companies collaborate with authorities by establishing integrity policies, pursuant to the GLAL. These integrity policies include (i) a procedure and organisational manual; (ii) a code of conduct; (iii) surveillance and audit systems; (iv) whistleblowing mechanisms; (v) training systems; (vi) human resources policies that prevent the recruitment of individuals that could generate a risk to the entity's integrity; and (vii) mechanisms that ensure transparency and public disclosure of the company's interests. It is highly suggested private entities put in place their internal and corporate governance policies in accordance with the GLAL and with the model of integrity policies issued by the Ministry of Government Affairs.

What's missing?

While NACS has already entered into force, there are still several missing items that need to be addressed to make the NACS fully operational. Firstly, the general anti-corruption prosecutor still needs to be appointed, which in turn delays the enforcement of the new felonies related with corruption. Specialised administrative court judges have also not been appointed yet. Both sets of appointments need to be made by the Mexican Senate. The delay in the appointment of these high-level public officials has not resulted in blocking the NACS, but its operating failures will result in a lower social impact.

By 16 July 2017, all Mexican states, including the Federal District, should have put into place the constitutional and legal reforms that implement their own local anti-corruption systems. However, most of the entities have not appointed prosecutors or judges yet. Some of them are missing the incorporation of their own coordinating or citizen involvement committees, and others have not even amended their local constitutions or laws yet.

Over the past 40 years, the government has introduced high-impact reforms aimed at enhancing law enforcement to prevent corruption in Mexico. These changes range from the creation of specialised ministries, such as the Ministry of Government Affairs and its predecessors, to the current prosecution of former governors of states. However, citizens perceive more dysfunction of the interior affairs of the country due to bureaucracy and major corruption scandals. Mexico currently ranks a lowly 123rd in Transparency International's 2016 Corruption Perception Index; dropping 28 places from the previous year. Instead of highlighting its benefits, critics have focused on the fact the NACS is more prone to create additional legal barriers to access justice by creating more government agencies and longer procedures.

Likewise, the CC has been severely criticised due to its composition. Despite the fact the CC's chairman is a citizen representative; its decisions are taken by a majority with an overwhelming presence of government officials. This may provide the sense of a biased decision-making process, if not properly documented and transparent. Moreover, experts have agreed that if there is no political willingness within the CC to perform its duties, the fight against corruption in Mexico will be ineffective.

The lack of appointment of key government officials is the most severe worry regarding the NACS. This omission from the Senate is frequently construed as a lack of political interest in the fight against corruption, rather than a schedule issue stemmed from legislative agendas. This same argument goes to the states.

Recognising these weaknesses, the NACS has nevertheless placed additional emphasis on the fight against corruption. It created independent committees put stricter laws in place. These committees have the authority to constantly audit the performance of the

government at any level, and most importantly, there will be certainty on how good or bad Mexico is doing in fighting corruption. The activities of public officials are also more transparent and actively supervised through the systems' mechanisms and private entities have additional incentives to avoid committing corrupt activities. However, there are still several crucial issues to address. Mexico urgently needs to address these to fight corruption effectively. Although the legal structure created for the system is generally well developed, the NACS is still in test mode. The reason is the lack of political will to appoint high-level officials to allow the system to function effectively.