INTRODUCTION

Corruption is a disease that affects the whole of humanity, in Mexico represents between 7 and 9% of the gross domestic product, according to estimates made by the World Economic Forum.

Government procurement is equivalent to 15% of the gross domestic product in the Nations Member of the Organization for cooperation and economic development, according to 2007 data, why it efficiency in public procurement is an increasingly more important issue.

The phenomenon of corruption in public procurement may have the effect that the cost of goods and services be increased by 20% or more,[1] which represents an escape from public resources which weakens and restricted to the Government to address public needs of taxpayers.

The affected public procurement system of high rates of corruption that leads to inefficiency in this matter, does not detonate the economy and generates the undue of healthy economic development to the detriment of society in general.

There is a single tool, or isolated effort which can tackle corruption in public procurement, control of such evil must be strategic and have several lines of action, the administrative deregulation that allows individuals to know the rules clearly certainly paid to that purpose, (currently in Mexico have been removed 15, 688 rules),[2] [2], efficient internal control by means of audits and of course the collaboration of the society and the international community in response to the globalized world in which we live are instrumental.

Most common corrupt practices such as bribery are consumed with the participation of agents acting with a common goal, but from two different extremes, the public and the private sector conspire to maximize their profits at the expense of the community.

The current legislation, such practices considers them as criminal offences in the criminal sphere, but administrative matter only provides the absence from the public server, without that be punished to the other party to use the Act.

[1] The OECD data visible in www.oecd.org/document/18/0,3746,es_36288966_36288553_46888018_1_1_1_1,00.html
[2] See: http://www.funcionpublica.gob.mx/index.php/programas/contador-de-normas-eliminadas

For this reason, the present paper is intended to show the characteristics of the current system of sanctions to the private sector in public purchases of Mexico, through references of their background, to competent authorities, its constitutionality, the alleged punishable, the stages of the procedure, its guiding principles and sanctions that are regulated, so that it can be a diagnosis on their functionality in the control of corruption in the field.

The need for ad hoc against corruption in public procurement rules is justified too, known through needs the diagnosis concludes the little existing functionality of the current regulations to combat corruption, the subject becomes to think of the design of the legislation permitting this task.

So is studied the recommendations of the Organization for Economic Co-operation and Development, relating to the subject and the considerations taken into account for to emerge the initiative of the Federal anti-corruption law in public procurement.

The second part of the work, intended to be an analytical exercise of new regulation components and their functionality to combat corruption and the challenges posed by the inclusion of such a rule to the national legal order.

CHAPTER I
THE CURRENT SANCTIONS SYSTEM IN
PUBLIC PROCUREMENT

I. The current Law

Brief history

The history of administrative contracts in Mexico arises in the colony. It has documented that the first procedure of public procurement was carried out in 1767 at the time of the viceroy Carlos Francisco de Croix (1766-1771) in the form of public auction, the object of this contract was to build a drainage of the city of Mexico to solve the problem of flooding that was the capital.

In that context, procurement procedures continued during the Colonial era, to later be recognized in the Constitution of 1857, highlighting in particular article 72, faction XXII, which established that

it is the express power of the Congress of the Union: *Make laws on general communication routes and posts and emails.*

Furthermore, the Constitution of 1917 established originally in its article 134 the following: *all contracts that the Government has to hold to the execution of public works will be awarded by auction, through calls for proposals, so that submitted proposals in a sealed envelope It will be opened in public Board.*

The political Constitution of Mexico, between 1917 and 1982 period regulated on a limited basis of public procurement law, because that stated only as regards the recruitment of public works, and the requirement that his award was carried out by auction which is the constitutional history of the public tender.

Between 1917 and 1982 but the Constitution did not recognize the existence of contracts for procurement of personal property in the Federal public administration, there were three laws that regulated at the federal level, the administration of this type of contract.

1. Act of inspection of acquisitions on December 30, 1965,
2. Acquisitions inspection law of May 6, the 1972
3. Law on purchases, leasings and warehouses of the Federal Government on December 31, 1979

The direct antecedent of the procurement procedure known as bidding it comes with the publication of the law of public works, on December 30, 1980, establishing in its article 30 that *public works contracts shall be awarded or carried out, through public tenders.*

It is important to mention that in 1982, the then presidential candidate, Miguel de la Madrid Hurtado, flag his bell with the ideology known as *Moral renewal* which was due to conditions *prevailing* in our country where it was generally breathing a feeling that the Government wrongly oriented public spending.

In that regard, was inspired by article 134 constitutional reform, contained in the Decree of December 27, 1982, published the next day, and which stated:

Article 134.- The economic resources available to the Federal Government and the Government of the Federal District as well as their respective parastatal public administration, will be administered with efficiency, effectiveness and honesty to meet the objectives for which it is intended. Acquisitions, leases and disposals of all kinds of goods, provision of services of any nature and the contracting of work carried out, shall be awarded or carried out through public tenders by open call that freely submitted proposals in a sealed envelope with solvents It will be opened publicly, in order to ensure the best available conditions in terms of price, quality, financing, opportunity and other relevant circumstances the State. When invitations to tender referred to in the preceding paragraph are not suitable to ensure such conditions, laws establish databases, procedures, rules, requirements and other elements to demonstrate the economy, effectiveness, efficiency, impartiality and honesty to ensure l

1. **The planning, programming the budget.** These stages are governed by the principle of annuality, as a general way to run them and only exception the multi-annual path.

2. **Procedures for recruitment.** Regulation is intended to give priority to public tendering, in order of the third paragraph of article 134 constitutional and only as an exception the use of other means of procurement as an invitation to when least three people and direct award.

In all cases of emergency, the convener shall conform to the principles of economy, effectiveness, efficiency, impartiality and honesty, governing public contracts, contained in article 134 of the political Constitution of the Mexican United States, so regardless of the procedure to be used. These principles, as he said, constitute the legal scaffolding on which must hire the State to meet the needs of society.

3. **Contracts.** Minimum requirements for the administrative contracts, types of contract (fixed price, flat-rate price, open, etc.) guarantees for the Government, conditions for the modification of the same and forms of termination of the contracts (suspension of service, early termination, contract termination).

4. **Offences and penalties.** Sets the alleged low which is considered the private sector for infractions of the law, on the one hand provides generic offences, i.e. any violation of the legislation may be reason to hold the offender to a sanctioning administrative procedure and on the other hand, regulates specific cases of punishment bringing about a penalty that includes a prohibition to enter into contracts that the use of federal resources, regardless of the authority to carry out the procedure of recruitment.

5. **Settlement of disputes.** Dispute resolution is something core in the public procurement system, there are the following legal institutions:

   a) **Bid Protest.** Defined as an instance of challenge for the private sector interested to oppose certain acts of the procurement procedure, that instance is intended provide legal certainty in recruitment procedures, monitor that she is carried out with legalitytaking on the challenge of be as expeditious as possible due to the delay in them can have consequences, on the one hand the delay of the procedures, which is relevant because the satisfaction of public needs is postponed, either, that their decisions are nugatorias and may not have effects due to material failure to comply to them that arises with the consummation of the contract.

   b) **Conciliations.** Consistente in a procedure of friendly composition where the authority, urges the parties, buyer and supplier, to reach agreement on the points of the contract in dispute, without force binding to compel the parties to perform certain actions to reconcile the discrepancy.

   c) **Arbitration.** Only is planned as a possibility that the parties may agree in the contract the existence of the settlement of disputes through such a mechanism, i.e. the only arbitration is constituted by means of arbitration clause in the respective contract.

In this context, the object of the present paper is the sanctioning administrative proceedings to the public sector, stressing that in the Mexican case is the Secretary of the public service, unit of the Federal Executive, who has the powers[3] to deal with such proceedings.

Administrative sanctions and their constitutional considerations

The State has authority to suppress conducts that are contrary to the rules governing a society, such conduct may occur as crimes or offences and administrative offences.[4] The first attend the criminal amice and the latter to the administrative.

[3] In terms of articles 62 fraction II and 80 fraction (I) paragraph 6 of the regulation inside of the Secretary of the role public.

[4] See: Valls Hernández Sergio, criminal administrative law available in http://www.juridicas.unam.mx/publica/librev/rev/jurid/cont/21/pr/pr28.pdf

It should be noted that the doctrine has developed a discussion in relation to the material location of the sanctioning administrative law, for the close link with the criminal law, placing it as a branch within the latter, causing the development of the theory of administrative criminal law.

Says Lawrence Martín-Retortillo Baquer, in his work the administrative fines: refers to administrative fine to purpose than the one that is imposed by any authority of any of the public administrations, in accordance with the rules of the administrative procedure, either the common or General, already some special.

The object of study not is intended to draw the material location on sanctioning administrative law, in any case valid relationship with the criminal law, is that the two are part of the jus puniendi of State[5].

The power state to suppress the behavior is limited by the principles of legality and legal certainty with which they have ruled; in the Mexican legal system articles 14 and 16 constitutional contain fundamental rights to balance the power of the authority against individuals, so that any acts of nuisance must comply with certain requirements of validity.

Thus administrative sanctions have their constitutional basis in article 21 and 22 of the own Constitution which in its leading share point:

> **Article 21.** The investigation of offences corresponds to the public prosecutor's Office and the police, which will act under the leadership and command of that in the exercise of this function.
>
> The exercise of the criminal proceedings before the courts is up to the public prosecutor's Office. The law shall determine the cases in which individuals may exercise criminal proceedings before the judicial authority.
>
> The imposition of penalties, modification and duration are own and exclusive of the judicial authority.

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[5] See: Mariano Magide Herrero, constitutional limits of independent administrations, pag 337

> It is the responsibility of **the administrative authority the application of sanctions for violations of administrative regulations and police**, which only consist of fine, arrest for thirty-six hours or work for the community; But if the offender not payee the fine that would have imposed, this was permute by the corresponding arrest, not exceeding in any case of thirty-six hours.
>
> **(…)**

The provision reproduced above, you can see that it is both the basis of the sanctions in criminal matters for the Commission of crimes, such as those relating to administrative sanctions for infringements to the administrative regulations and police.

In this regard, administrative sanctions, specifically concerning administrative violations of government regulations is conceived and police, which strictly speaking may have the first problem for the imposition of sanctions in administrative matters in public purchases or any other material that would not meet nature indicated by the Constitution problematic that this resolved and that should address more forward, in order to continue with the analysis of the different constitutional provision which addresses the issue of sanctions in administrative matters, see:

> **Article 22.** Penalties of death, mutilation, infamy, branding, flogging, sticks, the torture of any kind, the fine excessive, the confiscation of property and any other unusual and far-reaching penalties are prohibited. Every sentence must be proportional to the crime that sanctions and the legal asset affected.
>
> Confiscation application of property of a person shall not be considered when it is enacted for the payment of fines or taxes, or when the has ordered a judicial authority for the payment of civil liability for the Commission of a crime. Nor shall be deemed seizure confiscation to order the judicial authority of the goods in case of illicit enrichment in terms of article 109, the application for the status of insured goods causing abandonment in the terms of the applicable provisions, or of goods whose domain is declared extinct in judgment. A procedure that will be governed by the following rules shall be established in the case of extinction of domain:
>
> **(…)**

For its part, the article hint establishes prohibitions to the authority, such as, that you can not impose excessive fine, or penalty transcendental, what constitutes a fundamental guarantee for individuals, of nature prohibitive, translating it to the authority, to exercise the jus puniendi, has as limit those considerations in the case that to impose such sanctions to individuals, pain that does not respect them are guarantees that violate and then then subject to protection of the Federation.

In this context, in relation to which the Constitution provides only for the possibility that there are administrative penalties for breaches of police and administrative regulations, and that they may only consist in fine and arrest, this does not imply that the legislator is unable to provide any other type of administrative penalty.

Therefore the intention of the constituent of 1917 was not refine the sanctions that could impose the administrative, hence authority to temporary banishment to suppliers or bidders to participate in recruitment procedures provided for in the Act of procurement, leases and services for the Public SectorIt is not a violation of paragraph 21, first paragraph, of the Federal Constitution.

The above is corroborated the content to the records that gave rise to the thesis number 2a. LI/2006 and 1st L/2000, underpinned by the second and first rooms of the full Court of the country, following the heading and content:

> **Disabling temporary of suppliers or bidders.** Article 60, fraction IV, and penultimate paragraph, of the Act of procurement, LEASES and services of the public SECTOR, which provides for such a sanction, not VIOLA article 21, first paragraph, of the FEDERAL Constitution, to be different to the fine or arrest (legislation in force as of July 8, 2005). While it is true that the aforementioned constitutional provision provides that it is up to the administrative authority the implementation of the sanctions for violations of administrative regulations and police, which will "only" be fine or arrest for 36 hours also it is that this does not prevent the ordinary legislator provide other types of sanctions, to the extent that the intention of the Constituent Congress of 1916 was not narrowing which could impose the administrative authorities to individuals, then in the message and draft of Constitution of Venustiano Carranza from 1st. December of 1916, and the opinion read in the 27th ordinary session of the Constituent Congress of January 2, 1917, recognized that the fine or arrest are not the only sanctions that can be upgraded in the legal field, because that for economic or personal sanctions such transcendence was special emphasis on establishing limitations in its

application, but does not regard to only those could be envisaged and imposed; in communion with the diverse article 73, fraction XXI of the Constitution which provides, without restriction, the Faculty of the Congress of the Union to legislate on offences against the Federation and set the punishment that they should be imposed. In that regard, article 60, fraction IV, and antepenultimate paragraph, of the Act of procurement, leases and services of the Public Sector, does not violate article 21, first paragraph, of the political Constitution of the Mexican United States, because he expected the sanction of disqualification from suppliers or bidders to participate in recruitment procedures or "at the conclusion of contracts, different to the fine or arrest"[6]

Procurement and public works. ARTICLES 41, SECTIONS VI, VII AND XII, AND 88 OF THE ACT, THAT PREVENT THAT UNITS RECEIVE PROPOSALS OR CONCLUDE CONTRACTS WITH PHYSICAL OR MORAL, OR PEOPLE THAT THEY THE CARRIED OUT, WHEN THEY HAD PROVIDED INFORMATION THAT IS FALSE Or who have acted with MALICE or bad faith in any process for the holding or award of A contract or that has been done in contravention to the law, do not violate article 21 of the FEDERAL Constitution. The above-mentioned precepts of the law of procurement and public works which established as administrative penalty which prevent that dependencies get or that individuals submit proposals or holding contracts for areas subject to the Act, when they had provided information that is false, or that they acted with malice or bad faith in any process for the award or the conclusion of a contract or that it was effected in violation of the law, do not violate article 21 of the Federal Constitution so while it is true that the said constitutional provision provides that the judicial authority is the State body with attribution deprivation to apply penalties for criminal acts and that the administrative authority for the imposition of sanctions for breach police and governance regulations which can only be fine or arrest, it is also that in the Mexican legal field administrative authorities not only may impose the penalties provided for in the aforementioned paragraph of the basic law, but also those arising from the violation of administrative laws as indicated in the first above-mentioned precepts, which is not a sanction which can only impose the judicial authority or not a fine that it constitutes a custodial sentence. This is the case, because in accordance with the provisions of article 73, section XXI, of the Federal Constitution, corresponds to the Congress of the Union define crimes and misdemeanours against the Federation and set correspondingly taxable punishment, for that implies that the legislator in the sphere of competence, with the attribution of determine the punishments applicable to both offences and administrative offences, while in the case of these aforementioned faculty is limited to the

[6] Published on page 322 of the Federation Judicial Weekly and its Gazette, volume: XXIII, June 2006, ninth time. Registration 174893.

penalties provided for in the above-mentioned article 21, because those are only link with the administrative regulations of police and good government and not with laws issued by the Congress of the Union."[7]

In conclusion study of the constitutional bases allow the legislator to regulate administrative sanctions beyond government regulations and police, as well as that its consequences are various fines and the arrest, since in the field of public procurement as well as consisting of the fine punishment the regulation prohibits the present proposition or conclude contracts with the Federal Government, thus being unconstitutional as already demonstrated.

Jurisdiction to impose sanctions in the field of public procurement.

The competition to learn about issues related to sanctioning matter in public procurement in Mexico, is responsible for the Secretary of the public function[8]

On April 15, 2009, it was published in the Official Journal of the Federation, reforms to the internal regulation of the Secretariat of public service, by means of which emerges the General Directorate of disputes and sanctions in public procurement, and thereby expressly regulates the distribution of competences in the matter of penalties, subject to the same to the origin of the procurement procedure.

In effect the Ministry of public administration and the Internal Control bodies, through its owner responsibilities, have powers to deal with issues relating to sanctions and they are distributed as follows:

1. **Natural competitors or original.** The Secretary for the civil service, at the central level has powers to hear matters relating to procurement procedures concluded by:[9]

    - Own Secretary of the public service and
    - States and municipalities, the Federal District

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[7] Published on page 237 of the Federation Judicial Weekly and its Gazette, volume: XII, December 2000, ninth time. Register 190623.

[8] Secretary of State which has authority audit with regard to the various departments and entities of the Federal public administration.

[9] In terms of article 62 section II of the regulation inside of the Secretary of the role public.

2. **Competition derivative.** The Secretary for the civil service at the central level, has the power to hear and determine matters relating to procurement procedures, held by the departments and entities of the Federal public administration only in an emergency, remain the owners of responsibilities of the Internal Control bodies[10] attached to these who must be aware of course. For effect that the Secretary for the civil service at the central level can know of matters relating to the subject, such attribution is subject to the determination of the Secretary for the civil service, without it there is alleged of origin that operate, so that power is discretionary.

It should be noted that in some internal Control bodies in the absence in its structure the authority who may know a subject, i.e. the holders of responsibilities, the attraction of the subject is forced by what the Secretary for the civil service at the central level should know the mattermediating the formal determination of its holder to effect that such competition is effective.

Sanctions in the scope of public procurement.

Spelt the constitutionality of administrative sanctions, and the competent authorities to deal with such matters, dealt with the item relating to the sanctioning system prevailing in the area of public procurement. The provisions governing the subject established specifically its regulation, both the Act of procurement, leases and services of the Public Sector, as the law of public works and related services, stipulate a special chapter concerning offences and penalties in the public sector in their respective titles.

The Act of procurement, leases and services of the Public Sector (LAASSP) and the law of public works and related services (LOPSRCM) lay down that any infringement of these provisions shall be punished with sanctions contemplated there.

The system of administrative sanctions is based on two types, the first one sets the generic offences, i.e., any infringement of the laws of matter gives rise to the imposition of a fine (in terms of articles 59 and 77 of the Act of procurement, Leases and services of the Public Sector and the public works Act and related services correspondingly) the typical example of this course is the

[10] In terms of article 80 fraction (I) paragraph 6 of the regulation inside of the Secretary of the role public.

failure to comply with the legal obligation to them corresponding to the suppliers or contractors to display some of the guarantees that are required by regulation,[11] this failure translates into an infringement to a legislative provision, as a result there are elements for sanctioning administrative procedure and effect of accuse him of such infringement in its case impose the appropriate punishment.

For its part, the latter of these, is it may be called specific offences, while establishing specific assumptions and defined consequences, these are provided for in articles 60 and 78 referred laws of which undertake their study later.

So we have two types of cases punishable, the first of these, as it has been said, corresponds to the generic offences and the second to the specific. Both have assessed a different type of sanction, while providing for the first for as a result the fine, the latter stipulate in addition to this consisting of disqualification sanction to present proposed or conclude contracts with the State.

In that regard, the generic offences can be considered as not serious, while only pecuniary sanction is established for them, and for specific offences are established as consequences the two penalties, fines and disqualification, so well can be classified this as serious as was more severe penalties.

So sanctions referred to in the regulation in the field of public procurement are fine and disqualification for presenting proposals or concluding contracts with the State, and the same consist as follows:

- **Fine** $ **$7,064 to $138,860 USD**[12]
- **Disqualification: 3** months to **five years** to enter into contracts with the State

It should be noted that the fine imposed constitutes a tax credit so it corresponds to the service of tax administration in terms of their powers take steps of recovery through the procedure of implementation.

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[11] Article 48 of the Act of procurement, leases and services of the Public Sector and identical in the law of public works and related services.

[12] Consider the exchange rate at 12.2 pesos mexicanos per Dollar

In this regard, the type of sanctions presents sufficient incentives so agents have temptations respect of violating the rule to get a contract because the benefit is considerably greater than the punishment which involves regulation.

As regards the penalty consisting in the prohibition regulation provides that disqualification must be published in the Official Gazette of the Federation and in CompraNet[13], effect after publication in the latter, publication takes place immediately after has been notified to the punishable the same so for purposes of disqualifying Executive.

As mentioned beforehand, the regulation on the subject provides punishable specific clauses, emphasizing that in general terms they are matching among those referred to in the Act of procurement, leases and services for the Public Sector and those laid down in the law of public works and related services, some slight differences to argue, being the cases to which refer us as follows:

1. **No formalization of contract.** Incurred in no formalization of contract which has result awarded in a procurement procedure and without just cause not submitted to sign it.[14]

   In terms of purchases, leasings and services from the public, it is necessary to the formalization of contract occurs twice in a span of two years, while as regards public works, the punishable case establishes that it is enough with a formalization of contract to the effect that the punishable is subject to sanctioning administrative procedure

Should be noted that the most recurrent cause in the Commission of such offence attends the awarded to participate in the recruitment procedure was interested in diversity of games and the outcome of the invitation to tender do winner of only some of them which translates into that it is not profitable and decided not to sign the contract. Additionally has one of the causes of failure in

[13] CompraNet is defined in article 2 of the Act of procurement, leases and services for the Public Sector, is accessible to the public in general and the organizers have the obligation to verify the previous respective list to receive a proposition for analysis or enter into any contract. Such a system is located in https://compranet.funcionpublica.gob.mx

[14] See article 60 fraction I and 78 fraction I of the Act of procurement, leases and services for the Public Sector and the public works Act respectively.

the signing of an agreement attends to the unsustainability of the proposal for poorly made propositions, i.e. contributions that are offered are errors by absence or bad information.

2. Termination of contract in two units. This offence is consummated when they will have terminated you to the punishable a contract for two or more organizers within a period of 3 years from the notification of the first recession.

Contractual termination, materializes through (regulated in the laws of matter) administrative procedure in which due respect guarantees of due process, issued the respective resolutions updating the course punishable, they may be criticized the behavior being studied here, except that an authority, either administrative or judicial has determined the suspension of the effects of any of the resolutions.

Otherwise, the authority may continue with the respective sanction procedure even and when any of the resolutions are contested, this only if it doesn't exist, as mentioned, a measure prudential judgment affecting the effectiveness of the Act, as not to lose sight that the resolutions of termination constitute an administrative act, which is valid and enforceable at the time of its notification,[15] without losing sight of the problems which would be the fact that this decision has been challenged and is yet to be resolved by judicial authorities.

3. **Non-compliance with Contractual.** The course punishable in study, required for updating the existence of the following:

   - **a)** Contractual breach fully documented.
   - **b)** That the breach was attributable to the supplier or contractor.
   - **c)** The existence of causal link between the breach and the production of damages.
   - **d)** The gravity of give them us damages caused.

[15] In terms of article them 8 and 9 of the Federal law of administrative procedure.

The case study, intended to punish the private sector when they engage in non-compliance with contractual and given the supposed warned, stressing that in case of updating the conduct planned there not has its origin in an act of corruption.

4. **Provide false information or acting with malice or bad faith in a procurement procedure in the conclusion of a contract or during its term, or, in the presentation or outlet of a request for conciliation or of an objection;**

The legal provision in study, contains various punishable assumptions, which may occur in isolation or in the form of contest of offences, for which the authority shall analyze the facts to determine the existence of one or more of them and thus demonstrate its update individually.

Below are the typical cases that occur in the East course and the tools that has the authority to detect them:

FALSE INFORMATION	TOOL TO DETECT
Professional certificate	Site Web of the Secretary of education public:[16] http://www.cedulaprofesional.Sep.gob.MX/cedula/indexAvanzada.action;JSESSIONID=d3f4b422bf204e25aaf66a46b497
Warranty policies	Website of the Association of companies Afianzadoras, BC[17] http://www.afianza.com.MX/index-3.html
Degree of content	Collaboration with the Secretary of the economy to that effect in terms of their powers verify the origin of the goods subject to the procurement procedure.

What guidance the present assumption is that the bidder leads with honesty to the convener to make the will to form at the time of the decision on what proposition more convenient in the State, it is not flawedbeing that the second room in the thesis that reproduces voted thereon to along the following lines:

[16] The consultation of the information is available to the public in general in accordance with articles 25 and 32 of the rules of procedure of the regulatory act article 5 constitutional ° relative to the exercise of the professions in the Federal District and is intended to expand the search criteria of professionals who register their titles and have identity card Professional with effects of patent.

[17] Such a tool in the product of the collaboration agreement signed by the Secretary for the civil service and the Association of companies Afianzadoras of Mexico.

> **"Procurement, LEASES and services from the public."** Article 60, fraction IV, of the Act does not infringes Article 28 of the Constitution of the United Mexican States (legislation in force as of July 8, 2005). The quoted provision legal to provide that the Ministry of public function disable temporarily any bidders or suppliers to participate in recruitment procedures or to contracts covered by the Act of procurement, leases and services for the Public Sector If they provided false information or acted with malice or bad faith in any procurement, in the conclusion of the contract procedure or during his term, or in the presentation or outlet of a complaint in an audience of conciliation or a nonconformity purpose of safeguarding the substantial dishonesty principle governing such procedures of recruitment, it does not violate article 28 of the political Constitution of the Mexican United States prohibiting monopolies, because it only restricts the procurement of services leases and procurement of goods with natural or juridical persons who is them has been disqualified, without that prevent that other suppliers or bidders participating in awards which respected the principles that govern such agreements of wills to be granted by the State, related to ensure the best conditions of employment for the State, in order to prevent that in future cases the same participants or suppliers may violate such procedures.[18]

In terms of the above is that the punishable case of false information, is a tool for inhibiting the bidder leads with falsehood deliberately, and the convener has the accurate information you need to evaluate and train their will without any defect.

Unlike most of the alleged punishable, the submission of false information, may have originated in an act of corruption as it would be the obtaining of an apocryphal document for submission in a procedure for recruitment, in this case corruption emerged out of the procedure and the actors in the consummate her, regularly come from the private sector (the applicant for the document it paid for him and the manufacturer of the apocryphal document).

When the information obtained in such a way, is displayed in the recruitment procedure act is punishable in administrative procedures in terms of the provision here commented without

[18] Federation Judicial Weekly and its Gazette. Ninth time. Second room. XXVII, January 2008. Subject (s): constitutional, administrative. Thesis: 2a. CCV/2007. Page: 572.

prejudice of the criminal emerging crime of use of false document[19] which intends to vitiate the intention of the authority, in order to make believe that it complies with any requirements of the call.

Accordingly, this course if it is a tool for the control of corruption, which although bounded to the display of false information, acting with malice or bad faith, currently works to inhibit that bidders from being corrupted in order to obtain such documents and these are presented in various procurement procedures, highlighting is that corruption in this case only comes in both private sector which is the agent that the consumption in order to mislead the authorities.

5. **Those who hire consulting services if it is proven that total or partially the consideration paid to the service provider has been received by public servants directly or indirectly.**

The update of the course if it represents an act of corruption where the players involved (the public servant who received part of the consideration) public sector and service provider that I attach part of their remuneration.

The punishable case study, intended to avoid simulated recruitment or the purchase consideration for the acquisition of a contract, the design of this course presents problems as soon as the legislation is not complete to point of restrictively that behavior is punishable in the case of matter of procurement of services leaving it outside other contracts.

Additionally, the problem with this type of conduct is probative, because due to its nature it is complex to the investigating authority to gather the information properly, and in the best cases such conduct are persecuted and is punishable only in relation to the involved public server, but the private sector remains unpunished, representing zero risk in the Commission of such conduct.

[19] It does not lose sight that on these facts the actors who consummated their behavior can be prosecuted in criminal proceedings by the consummation of crimes, which is not the subject to study.

In this regard, emphasizes that they exist in the past 10 years only have 17 procedures of punishment which has the consequence that there is every incentive to make public sector incurred in this type of practice, the probability of processing is almost non-existent.

6. **When a disagreement is superseded or declared unfounded and it has been determined that it was submitted with the purpose of delaying the process of recruitment.**

The course punishable, originates as a cost to the private sector that seeks to challenge acts of bidding in a frivolous manner and with the purpose of delaying the procedure, to support the updating of this course, this cannot be sustained when it has dismissed the objection or declared unfounded and also exists the application for suspension of the acts, which reflects the intention of delaying the procedure, no matter that it has been granted or not.

The study of the punishable assumptions, we can conclude that the sanctioning system in the field of public procurement in Mexico, is designed to ensure that operators comply with the rules of the procurement procedure, but not as instrument ad hoc for the control of corruptionfor better understanding illustrated:

PUNISHABLE ASSUMPTIONS	PURPOSE
No formalization of contract	Raise the cost of not signing a contract
Contractual termination	Punish repeated breaches
Non-compliance with contractual	Encourage contractual compliance
False information	Avoid to the convener have information that vicie willingness
Consulting services	Typical behaviour of corruption
Dissatisfaction	Inhibit the presentation of frivolous disagreements

In terms of the above, we have that all assumptions made punishable only two of them could be considered are designed to control corruption, i.e. the submission of false information and concerning the recruitment of consulting on which the civil servant receives part of the consideration which means that the legislation is not designed in order to tackle corruption in public procurement.

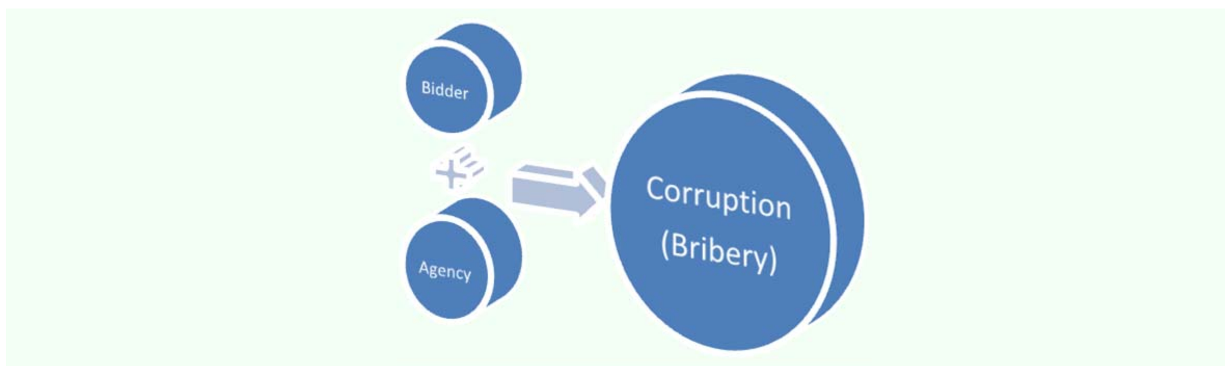
a) Research stage

Once the authority has concluded the stage of research and has come of the information needed depending on the type of penalty concerned, should start sanctioning administrative procedures in terms of provisions of the Federal Administrative Procedure Act, in particular to the fourth title.

The stage of research, is not regulated specifically in laws of matter, this stage includes since the sanctioning authority has knowledge of the alleged Commission of the irregularity, until it has recollected the information you need to declare inadmissible due to the absence of the respective offences with which we conclude the dossier either, the start of sanctioning administrative procedure, stressing that both determinations should be materialized with the requirements to be met by administrative acts.

The laws of matter traditionally require to units and contracting entities submit supporting documentation of the acts allegedly constituting infringement within a period of fifteen calendar days following which had knowledge.[20]

So the Notitia criminis[21] in terms of those provisions, was reserved for the convener, which is considered limited, particularly because it has been acknowledged that one of the most common methods to consummate the corruption in his kind of bribery, with the participation of two agents, **a)** the briber, which is usually in the private sector and **b)** the bribed understood this as: a person who performs a public office and accept directly or indirectly a bribe,[22] which is illustrated below:



[20] This in terms of the provisions of articles 60 penultimate paragraph and 78, last paragraph of the Act of procurement, leases and services for the Public Sector and the law of public works and related services with the same respectively.

[21] See the article by Martínez Yánez Nora Mary problems JURÍDICO-PRÁCTICOS of the figure of the complainant on the procedure administrative sanctioning, where refers to this concept is essentially understood as the right to communicate to the Administration the facts allegedly constitute visible infringement in https://www.rexurga.es/pdf/COL131.pdf

[22] Bribery In Public Procurement: Metods, actors and counter-measures, OECD 2007, Chapter 4 pag 45

According to the above, one of the defects which had the law of the matter is that you granting the monopoly of the denunciation of acts allegedly constitute an infringement precisely to one of its actors, i.e., the convener, which evidently not encouraged the complaint but on the other hand, could constitute an incentive more than this is conducive.

Through the amendments to the regulations of the laws governing public procurement, published in the Official Gazette of the Federation on July 28, 2010, wide the possibility of denunciation to anyone so strengthen the sanctioning system oriented agents comply with the regulation, but not as standard ad hoc anti-corruption according to what has been seen here.

Thus, according to the legal infrastructure that has the sanctioning system contained in the legal provisions in the area of procurement, leases, services, public works and services related to the same, the sanctioning authority has several sources of knowledge about alleged breaches of the laws of matter which may represent an increase in the possibilities for punishing the punishable conduct.

b) Stages of the administrative procedure

The administrative penalties procedure has inquisitive nature, while the authority must bring together the necessary elements that sustain the accusation that is going to make to the punishable, this procedure must substantiate in accordance with the Federal law of administrative procedure, namely the fourth title, and is composed of the following stages:

1. **Home of procedure.** Once the authority has concluded the stage of research and has come of the necessary information according to the type of penalty concerned, should disclose to the punishable conduct against him for the purposes that present their defense and offer evidence.[23]

2. **Defence of the punishable.** The alleged violator will have 15 working days from her notified the administrative act containing the start of proceedings, to express their arguments of defence and provide evidence.

[23] See article 71 of the Federal law of administrative procedure

Received their testing and of defence of the punishable must deliver agreement in which the authority to decide on the admission or desechamiento of the respective evidentiary means, in terms as provided in article 50 of the Federal law of administrative procedure.

3. **Allegations.** Hear the offender and health all the evidence offered, the instructor of the procedural authority must open the stage of allegations to the punishable manifest what its law suits.[24]

4. **Resolution.** Is the administrative act by means of which the authority takes the decision to sanction or not the offender must assess all precise arguments and evidence in the file, whereas for the purposes of punishment the corresponding **1.** Damages occurred by reason of the infringement; **2.** The intentional nature or establishing non of the action or omission of the infringement; **3.** The gravity of the infringement, **4.** The conditions of the offender and recidivism.

The administrative penalties procedure, should meet due process guarantees, both to the principles that govern the penal system, such as:

- **Presumption of innocence.** Is one of the fundamental rights in the Mexican legal order, but it is also understood as a principle of penal order, which has its antecedent in the French Revolution of 1789[25] with the abolition of feudal rights and the issuance of the "Declaration of the rights of man and the citizen", which was that every man should enjoy to be innocent of any breakdown to the law in both not him has pleaded guilty.[26]

  Similarly, the principle of presumption of innocence is embodied in the Universal Declaration of the human rights of 10 December 1948, highlighting that the article 11 stipulates: *1. everyone charged with criminal offence has the right to be presumed innocent until proven guilty in accordance with the law and in a public trial in which he has had all the guarantees necessary for his defence.*

[24] In terms of article 56 of the Federal law of administrative procedure

[25] Conf. Carlos M. de Elía, code procedural criminal of the province of Buenos Aires, p. 23, Ed. library Forum, year 2001.

[26] Article 9 of that document states: since every man **is presumed innocent** while it is not found guilty, if judged necessary to stop it, all rigor than necessary to seize his person must be severely punished by the law.

(…)

In addition to this, there are various instruments that holds the principle as: American Convention on human rights published on May 7, 1981 in the Official Gazette of the Federation and the International Covenant on Civil and political rights published May 20, 1981, in the same medium.

This principle is enshrined in the legal order Mexican in the Constitution, as has sustained it criteria of power Judicial.[27]

Can be noted, that the principle of presumption of innocence is currently under discussion, with regard to the scope and terms of its interpretation, since that principle, regularly has been understood as strict rigidity, which are sufficient to convict someone tests neverleaving aside any elements of belief, and must be accepted and assess the totality of the evidence for the purpose of a start with a known fact and through comprehensive assessment of the means of conviction, can reach the historical truth[28]

- **Application of retroactivity for the benefit of the offender.** This principle of criminalhas its antecedent in the Universal Declaration of human rights of 10 December 1948, highlighting that the article 11 lays down: *(...) 2. No one shall be sentenced for acts or omissions at the time were not criminal under national or international law. Nor more serious than the applicable penalty shall be imposed at the time of the Commission of the offence.*

  In general, administrative sanctions should be analyzed and described as pursuant to the provisions that were current at the time in which the acts establishing them were consummated their, is also true that, with these standards must prevail an exception for the retrospective application for the benefit of the offender.

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[27] Thesis visible in the Federation Judicial Weekly and its Gazette ninth time volume for August 2002 XVI, constitutional matters and criminal, Pag. 14, registration 186185

[28] To see more on this topic, see The presumption of innocence of Miguel Angel Aguilar Lopez available at: http://www.reformapenal.inacipe.gob.MX/PDF/Numero8(3aepoca)/01AguilarLopezSP.PDF

This derogation has basis because it is reasonable to extend the area of administrative sanctions the principle of criminal law which is derived from the individual guarantees consisting in the prohibition of the retroactive application of the rules to the detriment of any person, so this ban in the opposite direction, can be understood that the retroactivity of legal provisions is possible, when it brings as a consequence a benefit to the individual, because of the close identity that keep the criminal matters with the sanctioning administrative law on which must be estimated that if the legislature subsequently to the Commission of the offending Act amended regulations providing a less harsh sanction, the applicable standard must be the existing derived from the legislative intent of regulate identical made offending, with different result.

In this regard, the case-law 8/98 of the Supreme Court of Justice of the nation, argues that said principle not only it is applicable to the criminal matter, as it is the following:

TAX FINES. THEY SHOULD APPLY IN RETROSPECTIVELY STANDARDS THAT ARE BENEFICIAL TO THE PARTICULAR. If the imposition of sanctions (criminal or tax) is aimed at maintaining law and order through punishment, to a greater or lesser extent, imposed by the State which incurs an infringement, should be considered that fiscal penalties are similar to criminal sanctions in nature and therefore, retroactive use of the standards that will benefit the individual, sticks by the constitutional article 14 and to the principle of retroactivity in criminal matters accepted by the jurisprudence, law and doctrine, where, as punishment imposed by the State, should be made to greater equity in its imposition, pursuant to the provisions for article 1. of the Constitution.[29]

- **Non bis in idem.** The doctrine of Daniel Maljar,[30] refers that in the material side who committed a wrongful act, not may be punished twice for the same Act, and on the other hand in its process points out that a very fact may not be subject to two different processes.

  Therefore, any person who commits a criminal offence or administrative offence cannot be tried or punished twice for violation of the same legal right to identity of conduct.

[29] Ninth time, registration No196642, second room, Judicial Weekly of the Federation and its Gazette, 7 March 1998, administrative matters, thesis. 2a. / J. 8/98, p 333

[30] Maljar Daniel e., sanctioning administrative law, ed. Ad Hoc, Buenos Aires, 2004, pp 245-246

- **No reformatio in perjus.** This principle serves conviction or administrative decision can't be based on facts that not have been made known to the accused prior to this, since this would imply that he has been deprived of the opportunity to defend himself in the procedure

Considerations on current law and its functionality to control corruption

The above considerations, respect for the sanctioning system in the field of public procurement, allow us to have a diagnosis for their functionality in connection with the control of corruption.

The reform of the regulations of the laws of matter, published in the Official Gazette of the Federation on July 28, 2010, represents a modification of great relevance for the purposes of increasing the possibility that the people who comment infringements are punished, as the monopoly of the notitia cleverer who possessed the convener has been removed.

It would be natural to thereby to increase the affairs relating to sanctions because anyone can denounce acts allegedly constitute infringement, but this does not imply that the control of corruption in public procurement see benefit, as mentioned, the alleged punishable are not designed to punish corrupt practices more common, such as bribery or collusion.

La doctrine[31] e[7] has recognized that the systems of sanctions can be classified due to the purpose that have sanctions such as: **a)** enforcement, the rule establishes measures intended to force the subject to a term of the authority; **b)** Indemnified, which serves that the offender will have to pay the administrative penalty under the criteria for compensation for violating the rule of law and; **c)** punishment, this last its immediate purpose is repressive, while it is not aimed at that the punishable meets broken standards or obtaining that the penalty imposed this directly related to the production of the damage caused.

The current system so we can locate in the category of the disciplinary punishment, since they bear no relation to the fulfillment of the breached rule nor with the extent of benefits or of damage to both have an appraised ceiling.

[31] See: Lomelí Cerezo Margarita right Prosecutor Represivo, Porrúa, Mexico, 1998, page 8

In this regard, the design of the sanctioning system current to contain sanctions type punishment represents an incentive for discussed violations, this in response to that on many occasions the amounts of the contracts are, in minor cases, at a cost of hundreds of millions of pesos, for example: the purchase of medicines for the health sector, the construction of a bridge or road the income of a ship for Petroleos Mexicanos, the construction of a forming water, or the creation of a computer complex system, to name a few; This due to that, even while the expectation of being caught increased with recent reforms, involves them no risk important in which case they are prosecuted and punished, due to the payment of the fine not exceeding in any case, it is fully profitable and even considered as an additional cost of the project, without implying a greater impact in the business, in this case, the sanction of disqualification may be a counterweight to this default.

On the other hand, the stage of research to be regulated specifically, significantly limited the efforts of the authority for exhaust lines of research that have been set.

Stated in this chapter does us that punishable assumptions referred to in the legislation are designed to ensure that operators comply with the rules of the procedure of recruitment and not as an instrument ad hoc control of corruption in public procurement. In any case, the punishable allegeds that could be related to the control of corruption (submission of false information and act with malice and bad faith, as well as receiving compensation for awarding contracts for advice), have a very limited scope both in the field of the notitia cleverer and legal infrastructure to investigate these facts.

It is necessary to create a mechanism to fight corruption in the public procurement system, in which be regulated in specific acts of corruption that currently occur and that generate all kinds of harmful effects (expensive shopping, low participation) in the procedures, and detrimental to the competitiveness of the country, among others to allow the sanctions to be effective and dissuasive that represent a high cost and risk to those who decide to walk the path of the corrupt practical.

Mexico and the Organization for economic cooperation and development (OECD)

The participation of Mexico as a member of the Organisation for Economic Cooperation and Development (OECD), because of its importance are needed Mexico background with that agency.

1. On July 5, 1994, was published in the Official Gazette of the Federation the "Decree of promulgation of the Declaration of the Government of the United States Mexicans on the acceptance of its obligations as a member of the Organisation for Economic Cooperation and Development" with what Mexico was formally integrated as a member of this e Organization, acquiring a series of focused commitment to the development economic.

   One of the themes that holds special significance for this international body, is fighting corruption, specifically to bribery as a phenomenon that occurs on a global basis in international transactions.

2. As first step to combat this type of practice, in May 1997, the OECD Member States, adopted a non-binding legal instrument, known as recommendation revised of the Council on combating bribery in international commercial transactions, which is the antecedent of the Convention on combating bribery of foreign public servers in transaction business international.

Subsequently, Mexico, had ratified the Convention referred to earlier on 22 April 1999, entering into force on 26 July 1999, emphasizing that currently has been ratified by 38 States[32]

3. The Organisation of Economic Cooperation and Development (OECD), in the context of the process of evaluation with regard to the implementation of the commitments undertaken in the Convention on combating bribery of foreign public servers in international business transactions, also known as Convention Anticohecho, he made the following recommendation:

   Recommendation 5 c: In order to meet the standard of other signatories of the Convention, review the current provisions on moral people for: eliminate the prerequisite of the condemnation of a natural person, remove the prerequisite of crime must be committed with the means provided by the moral

[32] Including the States members of the OECD, and in addition South Africa, Argentina, Brazil, Bulgaria, Estonia, Israel and Slovenia.

person "to do so"; ensure that State-owned firms and the companies of State control should be subject to liability under the offence of transnational bribery; significantly increase the level of the sanctions.

The earlier transcribed recommendation was developed in the light of the study to the Mexican legal system in relation to the obligations contained in the Convention Anticohecho Mexico.

This study focused on the reforms made by Mexico to their criminal system which is made possible the sanctions of criminal to the individuals, when they meet the requirements contained in article 11 of the Federal Criminal Code.[33]

Similarly, was included in the tenth title crimes committed by public servants, chapter XI, bribery to foreign public officials, article 222 Bis, same that provides for the offence of international bribery.

As shown the recommendation made by the Organization for Economic Cooperation and Development (OECD), was not satisfactory because it points out that criminal type contains excessive requirements for the configuration of the crime, which is why these recommendations can be summarized in the following:

- Eliminate the requirement to convict a person, for the origin of the sentence the person morality.
- Delete the need that felony is accomplished through means provided by the person of the criminal type morality.
- Set up as subjects of the penalties to the companies state that consume acts that set the bribery international.
- Significantly increase the sanctions.

In terms of the above, according to the aforementioned Agency, the Mexican legal system lacks useful tools to punish the companies that carry out acts of bribery in public procurement.

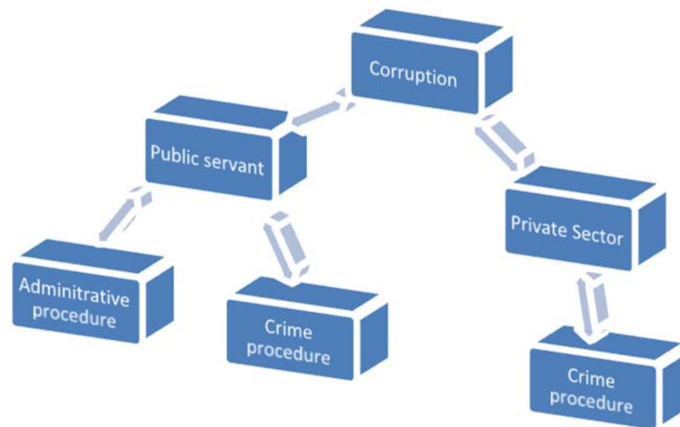
[33] **Article 11.-** when any member or representative of a legal person, or a company, Corporation or company of any kind, with the exception of the institutions of the State, **commits a crime with the means for that purpose the same entities to provide**, of mode that is committed in the name or under the umbrella of social representation or for the benefit of it, the judge may, where only specified by law, order in the judgment the suspension of the Association or its dissolution, when deems it necessary for public security.

Material location of anti-corruption tools

The livelihood of the recommendations of the Organization for Economic Cooperation and Development (OECD), points out that there must be a balance between the agents that are conducive to bribery for effect to be punished in an equitable manner and thereby develop efforts to reduce impunity in this regard the Convention on combating bribery of foreign public servers in international business transactions, says:

> **Article 2.**
> **Responsibility of moral persons**
> Each Party shall take the measures necessary, in accordance with its legal principles, to establish **the responsibility of moral persons** for the bribery of a foreign public server.
>
> **Article 3.**
> **Sanctions**
>
> 1. Bribery of a foreign public servant shall be punishable by effective, proportionate and dissuasive criminal penalties. The scale of sanctions will be comparable to that applicable to the bribery of public servants of the party and, in the case of natural persons, include deprivation of liberty sufficient to enable the mutual legal assistance and extradition.
>
> 2 In the case that, according to the legal regime of a party, criminal responsibility not applicable moral persons, that party shall ensure that these individuals will be **are subject to effective, proportionate and dissuasive non-criminal sanctions,** including monetary penalties for bribery of foreign public officials.

In the Mexican legal system, the behaviour of corruption in public procurement are punished, in the case of public servants, from the criminal sphere, (Federal Penal Code) and administrative, (Federal law of administrative responsibilities of the public servants) while in the case of individuals only punishes individuals in criminal matters without legal consequence one at the administrative level, require that there is no scope for moral persons who consume acts of bribery, even and when your employees have been subject to criminal proceedings, societies continue to participate in recruitment procedures illustrated below:



In this order of ideas, the recommendations of the Organisation for Economic Cooperation and Development (OECD), in respect of each of the fields (criminal and administrative) for the purposes of creating the desired balance are synthesized here:

- **Criminal.** In the legal systems of the States party to those who accepted the theory of the criminal responsibility of moral persons, this must be conceived as a **direct responsibility** of such persons legal.

- **Administrative.** The Organization for cooperation and development (OECD), does not require reforms to the legal systems that do not contain direct criminal responsibility of moral persons (as it is the case of Mexico at the federal level), but in this case, requires that administrative sanctions covered, must have the characteristics of "effective"", proportionate and dissuasive."

In this respect, the reforms to the Mexican Regulation is can locate both in the criminal sphere, through amendments to the criminal code to the effect that acceptance of the criminal responsibility of moral persons in a direct way either opt for the creation of a system of ad hoc administrative sanctions which would be acceptable by the scheme of equivalence recognized in the Convention and for speedy reference cited:

2. This Convention seeks to ensure a **functional equivalence** among the measures taken by the parties to sanction bribery of foreign public officials, **without requiring uniformity or changes in the fundamentals of the legal regime** of a part.

In that context, the first to consider is the material location of reforms to determine if legal reform, in terms of punishment of companies, is that relating to the criminal or administrative, to what the advantages and disadvantages of each area are established.

CRIMINAL	
Advantages	**Disadvantages**
The range of available punishment is more severe (deprivation of liberty).	Long and very effective procedures that would lead to impunity in offending behaviour.
Greater social impact in these procedures.	High cost of the Administration to substantiate these procedures. Lack of specialization in the field.
	The penalties were imposed many subsequent to the Commission of criminal conduct, which means that the sanction is not exemplary, nor has the desired repressive effect.

ADMINISTRATIVE	
Advantages	**Disadvantages**
Characterization of corrupt conduct and extension clauses allowing that the various forms of Commission are punished.	The propensity of the courts to grant suspension that remaining sanctions effectiveness.
Fines with restitutorias features; Exemplary disqualification, due to the imposition of sanctions in a short time of its Commission.	The long string of rebuttals that exists at the administrative level (application for review, contentious trial, appeal, etc.)
Authorities for the detection of the offending behaviour and instruction of the procedures.	

In this regard, the adjustment to the regulation of Mexico is that it must be to the administrative rules, the diagram of functional equivalence, creating an ad hoc system not only punishing the conduct of domestic and international bribery, but also the various forms of corruption which are consumed in public contracts as it would be the collusion, influence peddling, simulation to evade the sanctions, extortion, among others.

In that context, it is necessary to modify the legal scaffolding for individuals (individuals and corporations) engaged in acts of corruption are subjects of expeditious and transparent procedures with dissuasive sanctions in the Commission of such illegal.

CHAPTER II
THE NEW SANCTIONS SYSTEM

The new system of penalties for the private sector, is now designed in the initiative presented by the holder of the Executive Federal of Mexico: Federal anti-corruption law in the field of public procurement[34] which was approved by the Senate of the Republic on April 5, 2011.

In the same arises as a sanctioning system ad hoc for the fight against corruption and complementary to the system of sanctions which currently governs in the field of public procurement to effect that functions as an inhibitor of corrupt practices which currently have a high rate of presence and that as has been said remaining competitiveness to Mexico.

It is important to mention that with this initiative Mexico would be inserted into its legal order legislation which will have two purposes, complete the system of sanctions in public procurement and control corruption by criminalizing corrupt behaviour with effective and dissuasive sanctions, which raise the cost of your Commission making the national legal order with international harmonious.

Thus stands out that the explanatory statement of the initiative of law Federal anti-corruption in public procurement, points out that the momentum of this legislation, due to the Mexico

[34] The study of this initiative is to the version that was presented by the Federal Government, without lost of the fact that the same may be modifications prior to their approval.

commitments of their active participation and interest in dealing with this problem at the international level is important, as seen below:

> (…) Another important aspect that should be considered to make the legal system which has been submitted for the consideration of this sovereignty, is found in the various commitments undertaken by our country in terms of the international anti-corruption conventions, in which Mexico has been active in your subscription ratification, implementation and evaluation.
>
> The instruments which has subscribed to the Mexican State, and whose main objective is to combat and deter the phenomenon of corruption, include the following:
>
> The Inter-American Convention against the corruption of the Organization of Americanos… States
>
> The Convention on combating bribery of foreign public servers in international business transactions of the Organization for cooperation and development financial
>
> The Convention of the United Nations on the Corrupción…

The said initiative creates a system of sanctions to the ad hoc public sector to control corruption with effective and dissuasive sanctions, which are aimed to suppress corrupt practices both at affecting the market for public procurement in Mexico.

Content of the initiative of the law

a) Purpose and material scope

The initiative is intended to regulate the persons (moral and physical) administrative liability for the Commission's conduct in: a) public procurements and; b) international business transactions[35]

In the first case, the application of the law includes public procurement in the broad sense, that the own-initiative in its article 2 fraction III establishes the scope of the concept of public procurement and as described below:

> **III. hiring public Federal:** previous acts, recruitment procedures, as well as any other act or procedure which derive from them, including the acts relating to the conclusion, implementation and enforcing contracts to

[35] Article 1 of the initiative of the law Federal anti-corruption in public procurement

> procurement, leases, services, public works and services related to the same carrying out units and entities of the Federal public administration; the public trusts not considered State-owned entities and mandates and similar contracts, the Attorney-General, the administrative units of the Presidency of the Republic and the federative entities, municipalities and political bodies administrative boundaries territorial of the Federal District with total or partial federal funding and the authorities responsible to that referred to in article 4 of this law, in terms of the legal systems in the field of public procurement and regardless of the special regime of recruitment or the schema that is used for its realization. In this concept will be considered including the acts and proceedings relating to competition or call for proposals or public tender for the granting of permits and concessions of federal character or its extension, as well as any other authorization or procedure relating to public procurement;

As mentioned, the initiative defines public procurement in the broad sense, taking the following scope:

- In respect of provisions which regulate procurement, leasing, services, public works and services related to the same.[36]

In terms of provisions of the laws of the referred subjects the public procurement procedure begins with the publication of the call and concludes with the issuance of the judgment, so corruption discussed previously and even in the performance of the contract they fall within the scope of the law.

Not only are conducive to acts of corruption, in the procurement procedure, a significant number of cases occurs in events leading to it, with the aim of establishing requirements that limit the participation of bidders and even address a priori conditions for particular participant is winner so you may punish such conduct.

- Public trusts not considered entities parastatal.

The creation of the trust funds of this nature in the past have generated much concern about the transparency with which handle resources in them, this related to the weak legal scaffolding makes it difficult to control of resources. Recruitment procedures are performed in these trusts and are

[36] Law of purchases, leasings and services of the Public Sector, Act of public works and related services with the Mismas and the law of public works and related services with the Mismas and any other governing such matters.

therefore subject to occurring in the same acts of corruption, that is why they take into account in the scope of this law.

- Contracts and mandates analogues.

As stated, the intention of the legislator is to create a system of sanctions on private ad hoc that allow you to control corruption in its various forms of Commission and fields of application which is why considering the term contracts and similar mandates is constituted as a clause of extension by providing forms that can occur to carry out acts that are intended to carry out a public procurement in the broadest sense.

- Call or competition or bidding for the granting of permits and concessions of a federal nature or its extension.

The issue of permits and concessions offered by the State is included, as the same are institutions which are important with the growth of Mexico and therefore to the extent that they are free of corruption can encourage competitiveness just remember that sectors such as telecommunications, mines, and communications (roads and ports), work largely on the basis of concessions that allow them to explore a good domain public.

In conclusion, the initiative aims to have an important material scope because the own wording allows you to include federal procurement in a very broad sense, which includes clauses of length according to the various forms and special regimes in which it can carry out, in this regard, the special arrangements for PEMEX is,[37] as well as any other order to regulate the contracting public.

b) subjects

The personal scope of the legislation provides for moral and physical persons involved in recruitment procedures, as well as those relating to the obtaining of permits and concessions.

[37] Act of Petroleos Mexicanos, published in the D.O.F. on November 28, 2008, does not grant authority to the Ministry of public administration for fine to bidders, but only allows the disqualification.

It highlights that it aims to create a system of responsibilities of the public sector, that allows to distinguish when a subject of law acts directly and in what cases does so indirectly, what for higher compression is divided in the following way:

- **Direct participation.** Acts makes them the moral or physical person in its own name and for their benefit, so to determine their participation should be considered as follows:

  - **Legal person:** Through their representatives, proxy, or by any means legal representation or employment relationship that links the moral person that is acting in the tenders or contests.

  - **Natural person:** In this case always will be the person who is participating in the procedures for recruitment and contests.

- **Participation indirectly.** Because of practices carried out in indirect participation procurement procedures to commit acts of corruption is very common, which may occur in the following ways:

  - **Person moral diverse.** Which acts on behalf of diverse moral person, either because, which wants to stay hidden is a legal impediment to participate directly, for example a penalty of disqualification, either, such participation arises in that the truly concerned does not comply with the requirements laid down in the procedure in questione.g. years of experience in some activity, being that these practices underlying the figures known as figureheads or namely.

  - **Natural person.** That incite, propose and carry out acts of corruption on behalf of others, without having any link with the participant in the tender or competition, or that link is limited to agency or intermediation as its sole objective is to close the business to take a Commission from the amount of the same.

In this regard, legislation allows that to be punished persons acting in direct or indirect, should be to assess the degree of participation in the conduct, in a way that not only is punished to persons

involved in the procedures for recruitment or contests, but also to those who helped in consummate unlawful behaviour, whether you've made it as a Manager or what is commonly referred to as namely.

Corruption by its nature is consummated with behaviors that take place in the penumbre, so it is very common that people acting on behalf of another, developing acts pretending to act in their own interest are used for its Commission, but only appears in reality to a diversity of wills and the interest is only of the person you want to stay hidden, such persons are recognized at law as figureheads.

On the simulation of acts, the doctrine[38] and the case-law have stated consistently that there is this figure must occur as follows:

- Voluntary declaration dissatisfied with the intention.
- That has been agreed by their agents
- In any case which tends to produce a false concept of the reality.

In the same way has been established that the Commission on the simulation of acts, may be basically three:

1. Absolute, simulation which refers to the intention of hiding the existence of business.

2. **On simulation**, which occurs when it is intended to conceal the nature of a business and;

3. La interposition, understood as the simulation of the person who actually performs the business, which is a very common form of acts of corruption in public procurement, which occurs normally in order to evade a legal ban as it would be a disqualification to contract with the State or the case that there is conflict of interests with the convener.

The interposition of person has been established which has two types: **a)** that Act on behalf of itself, but in the interest of diverse person, acquired rights and obligations, but transferred them to a third and; **b)** the figurehead or namely, that a person who lacks own will and which has been created or is used to hide the true identity of the contractor, in this case the benefits of the business are enjoyed by the true contracting but using the name of this.

[38] See: Ferrara Francisco, Simulation of Legal Business, Edi Revista de Derecho Privado, Madrid, 1960, Capitulo VII

This figure represented a way in the Commission of corrupt conduct very unusual because it minimizes the risk of being surprised and also the possibilities of that is punishable are null and void according to the legal scaffolding that prevails in Mexico.

Aim is to attack the various forms of Commission of violations including the simulation of acts through the figure of the figureheads or men of straw as had has also recognized them, there is a history in Mexico that allow to give life to this figure and in the field of public procurement would be of great useful for the purposes pursued, tackle corruption and control their effects for the benefit of economic development and competitiveness of the country.

The formal legal appearance of people, up to an hour is a room for impunity in the Commission of corrupt behaviour, the why should pursue individuals and moral acting by itself or in the interest of others in order to simulate events and set up in business with the Government Federal a corporate veil that allows them to not be persecuted or punished, technique that is described in the thesis of visible jurisprudence in the Federation Judicial Weekly and its Gazette XXVIII, thesis November 2008: I.4o.A. J/70, page: 1271,

> **Technique of the "lifting of the veil of legal entity or corporate veil". HIS DOCTRINAL support and justification for his application in the procedure of investigation of practices MONOPOLISTIC.** In practice preferential conditions or privileges enjoyed by the individuals not only have been used for effects and licit to pursue, but that, on some occasions, have wrongly been exploited to make abusive of rights or constitute fraud or simulation behavior before the lawwith different implications that denote an improper use of the personality of moral entities, generating effect on the rights of creditors, third parties, the public purse or society. That is why the negative aspect of the performance of some moral people justifies the need to implement media or suitable instruments to really know if the origin and purpose of the acts made by those are legitimate, to prevent the abuse of tuitivos privileges enjoyed by. Then, with the use of these instruments is intended, apart from the outer form of the legal person, enter inside to appreciate that there are real interests and economic effects or underlying business or they beat withinin order to put a stop to fraud and abuse by those privileges, the legal entity can commit, in terms of articles 2180, 2181 and 2182 of the Federal Civil Code. For this purpose, you can make an absolute separation between the social person and each of the partners, as well as of their respective heritages, and analyzing its aspects personnel, goals, strategies, incentives, results and activity, to find a substantial identity between them with

> certain common purpose, and see if it is feasible to establish the existence of a specific pattern of behavior after the appearance of a diversity of legal personalities. This is what sustains doctrinally to the technique of "lifting the veil of legal entity or corporate veil". Therefore, the justification for applying such a technical to appreciate the facts and determine if they are constitutive of monopolistic practices in accordance with article 10 of the Federal law on economic competition, in the investigation procedure, is to know the economic reality that lies behind the forms or appearances jurídico-formales.

On the other hand, section III of article 2 of the said initiative provides:

> Article 2 are subject to this Act
>
> (...)
>
> III. the national natural person or moral to participate, either directly or indirectly, in the development of international commercial transactions.

This fraction provides a mechanism so that they are also subjects of this law, those participating of Mexican nationality who have committed acts of corruption in a foreign State, which aims to put a cost, until now non-existent, to corrupt practices that made the Mexican companies abroad and also contribute to Mexican companies in the conduct of its business is lead with high ethics abroad.

As regards international bribery, Mexico duty in terms of the Convention combating bribery of foreign public servers in international business transactions, to punish the conduct of their nationals abroad, which represents the extraterritoriality of the initiative in such cases.

Not be lost of the fact that the initiative, not only provides the possibility of punishing Mexican companies that they consume the infringement of international bribery, but you can punish all conduct that are regulated in the same, giving him a most significant impact In addition to the same seeks to encourage foreign authorities to make the knowledge to the Mexican authority such practices by the international complaint referred to in article 14 section III of this initiative.

c) Distribution of powers to implement the anti-corruption Federal law on public procurement

The mechanism of distribution of competence of the law is essentially laid down in article 3, 4 and 5 of the initiative where relevant, of where we can appreciate that it is the Secretary of the civil service, the internal organs of Control and the owners of their respective areas of complaints and

responsibilities will be entitled to know of the matters arising from the public procurement that held the Federal public administration and the Attorney-General, as well as those that made the federal entities with whole or in part from federal funds.

In this regard the distribution of competences is the same fate that the relative to the current sanctions regime[39] for what they won't repeat any formulates it, but we define to highlight the small differences, as follows:

Adding exclusive competence regarding matters that are committed in the field of international commercial transactions, as notes it explicitly article 5 second paragraph in relation to the number 9 and 2 fraction III of the initiative of the Federal anti-corruption law on public procurement.

On the other hand, article 3 section I, of this instrument indicates as authorities to the internal organs of Control and their respective areas of responsibilities, and complaints out that due to their nature according to the rules can be distributed in the following way:

- **Owners of internal organs of Control and holders of responsibilities.** As authorities who know of the sanctioning administrative procedure
- **Holders of the areas of complaints.** As in charge of the stage of research.

In this regard is that they will be distributed the powers in relation to the nature of the proceedings, i.e. those relating to research and to the administrative penalties, which obviously will have to be repeated at the central level, by providing the system of high specialization of authorities at each stage.

The Faculty of interpretation of the law for administrative purposes in the Federal public administration and the Attorney-General, is carried out by the Secretary for the civil service and in the case of the Judicial legislative and other bodies are empowered to implement the initiative in the field of public procurement to perform.[40]

d) Punished conducts

[39] Above pages 7 and 8

[40] See article 4 of the initiative of Federal anti-corruption law in the field of shopping public.

Some of the commitments to the Organization of economic cooperation and development (OECD), derived precisely from the Convention on combating bribery of foreign public servers in international business transactions, is to punish people who comment international bribery, situation that is regulated in the criminal sphere and which due to its classification has not had the expected results, in the now that purpose is reflected in the initiative envisaged, which means that the Mexican companies that engage in such infringement administrative outside the country for commercial transactions International may be punished under the terms of the legislation which is discussed.

To do so, Mexico would constitute an extraterritorial sanctions system, in which the law reach companies who have committed acts of corruption outside its territory, being reciprocal and harmonious with the legal systems of the Member countries of the Organisation for Cooperation and Economic Development (OECD), which will serve to strengthen the competitiveness of Mexico.

So, in the chapter of second irregular conduct, relating to acts of corruption that have a high incidence in government procurement and that are currently established only in criminal matters (crimes), as she has exhibited widely in advance what aims to impose costs for the private sector who commits acts of corruption, with exemplary sanctions.

One of the cornerstones of the new system of sanctions is based on the construction of administrative types disciplinary-specific, which contains the assumptions of its update, which are provided for in article 8 of the leading initiative; given its importance and for the purposes of the study are reproduced and discussed individually.

The punishable cases regulate conduct typified in criminal matters and that in his studio in the present articles provide you a name Although this denomination may be arbitrary, its purpose is to describe them as more as possible according to their nature.

I. Bribery and international bribery

> **Article 8.** Any of the subjects referred to in sections I and II of article 2 of this Act, would incur responsibility when in the procurement of a federal nature, directly or indirectly, make the following behaviors:

I Promise, offer or give money or any other gift to a public server or to a third given by the latter, with the aim of getting that public server perform or refrain from performing an act related to their duties or with another public servant, in order to obtain or retain a benefit or advantage, regardless of the acceptance of the gift or the result obtained;

Also it would incur responsibility when the promise or offer of any gift made to an individual to mediate contract with any unit or entity involved in the procurement of Federal.

The bribery of domestic and international public procurement, with the highest incidence are one of the practices in recruitment procedures, this is of particular importance to counter its effects.

In this regard, is to establish a conduct which is currently not regulated in the administrative area and consequently there is no risk to individuals proposed dadivas public servants which has the power of decision to award contracts.

Currently, if a bidder offers a lot of money in exchange for an advantage in the recruitment procedure in order to be awarded, the only risk is to find an honest public servant who does not accept your offer, in such case will have to enter the legality and participate on equal termsmaking the cost of the supply of bribery, zero so there are incentives to make it continue.

Sanctioning administrative type, in its personal scope, includes the practice of bribery by the use of third parties (managers, or any person acting on behalf of another) as already explained in advance, such practices are complex of credit due to the number of persons who may participatethe great challenge is to reach the brain that strategically plans to corrupt operations on their behalf, subject to address later.

Similarly, provides international bribery, when a national will to carry out this type of practice abroad, for the above in response to the Convention on combating bribery of foreign public servers in international business transactions, that the letter points out:

Article 1.

The offence of bribery of foreign public servers

1. Each Party shall take such measures as may be necessary to establish in accordance with its case-law is a criminal offence which a person deliberately to offer, promise or give any undue pecuniary or other

advantage to a foreign public servereither do so directly or through intermediaries, to benefit from it or to a third party; to enable this server to act or refrain from doing so in relation to the performance of official duties, in order to obtain or to stay with a business or any other undue advantage in the management of business international.

2. Each Party shall take the necessary measures to establish as a crime the complicity, including incitement, assistance, incitement or the authorization of an act of bribery of a foreign public server. Attempt and conspiracy to bribe a foreign public servant shall constitute criminal offences to the same degree that so are attempt and conspiracy to bribe a public servant of that part.

3. The offences set out in paragraphs 1 and 2 above thereafter are referred to as "bribery of a foreign public server".

In this regard, the initiative of the Federal anti-corruption law commented would have extraterritorial application, which seeks to be reciprocal with countries that have in regulating penalties for international bribery, which would put Mexico in a better position in the international arena, on the issue of corruption in public procurement.

The 34 member countries of the Organisation for Economic Cooperation and Development, OECD)[41] have the commitment in the framework of the Convention on combating bribery of foreign public servers in international business transactions, regulate and punish bribery over beyond its borders, when its national outside, practiced it as a sample of the above, is exposed:

a) United States of America with the Foreign Corrupt Practices Act (FCPA)

- The foreign Corrup Act, **(FCPA)** was promulgated since 1977, contains provisions anti bribery which include the prohibition of influencing foreign in their ability to official to do or leave officials from performing an act in violation of its legal, duty or to obtain any undue advantage in order to help to obtain or retain any business.

- It includes the requirement to keep corporations books and records that reflect with precision and its operations, as well as the development and maintenance of a proper internal controls system accounting.

- Economic penalties imposed for acts of corruption in the FCPA, come to see up to two times the amount of the contract, are mutas that they combine the features of the so-called

[41] Article 1 of the initiative of the law Federal anti-corruption in public procurement

penalty punishment and penalties restitutorias (restitutorias because with the amount of the fine was reintegrated to the state what was spent)

- The Department of Justice of the United States of America, has been working in coordination with the FBI, to carry out covert operations relating to crimes of corruption (bribery international) the result has been the capture of a network of corruption composed of entrepreneurs who bribed a suspected official of Africa (it was actually an agent of the FBI).[42]

b) The United Kingdom, with the Bribery Act 2010

- The antecedent of this Regulation comes from 1889-1996 with the PCA Prevention of Corrupt Acts.
- The Bribery Act 2010, provides with precision and criminalizing the bribery of domestic and international[3] and also establishes as a crime of lack of prevention of bribery by the people who work on behalf of a company.
- Companies can avoid conviction if he proves that it has appropriate procedures to prevent bribery.
- The fine have character of unlimited and the maximum penalty was increased from 7 to 10 years in prison.

II. Collusion/conspiracy

> **II.** Run with one or more subjects of this law actions that involve or have as their object or effect to obtain a benefit or undue advantage in the procurement of Federal;

Prior to the study of the definition proposed by the initiative of the Act before us, it is pertinent to point out some aspects of collusion in general.

a) Concept of collusion

[42] See: http://www.fbi.gov/news/stories/2010/january/fcpa_012610

Conspiracy people physical or moral to influence the market constitutes a form of corruption in which its agents are in the private sector, is considered corruption private, by the personal scope of who her consume. In this type of corrupt practices, the public sector is not involved, but instead is victim of corruption, because it is prey to the existence of prices in a market distorted voluntarily to maximize benefits of topple members.

Collusion is an essentially economic term prohibiting the agreement of the agents to the detriment of consumers and own a market efficiency.

The doctrine of Richard Posner[43] defines administrative such as: *Collusive practices consist of practices by which competing firms voluntarily eliminate competition among themselves so as to become able to restrict output and prices rise.*[44]

For its part Khi V. Thai[45] Notes: *Collusion practice is an arregment between two or more parties designed to archive an improper purpose, including influecing improperly the actions of another party.*

Robert Porter referred to in this regard: *Collusion includes circumstances where some firms act in unison to raise the prices that they charge their customers, or to lower the price that they pay to acquire goods or services, or to otherwise inhibit competition. These actions are usually surreptitious, either because they are illegal under antitrust laws or because they are intended to be kept secret from the victims.*[46] .

In relation to this kind of corruption the owner of the Federal Competition Commission noted:[47] *Collusion is the most serious of anti-competitive practices, because it is has a more immediate and more damaging consumer impact. In flat terms, it's a conspiracy among competitors to charge, in a coordinated manner, prices exaggerated by its goods or services. Collusion is not anything other than an attack against the consumer*

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[43] Richard A. Posner received the A.B. from Yale University in 1959 and the LL.B. from Harvard University in 1962.

[44] **Posner A, Richard,** Exclusionary Practices and the Antitrust Laws, University of Chicago Law Review, Vol. 41, no. 3 (Spring, 1974), pp. 506-535, Published by: The University of Chicago Law Review.

[45] International handbook of public procurement, Edit by Khi V. Thai, International Public Procurement: Concepts and practices, pag 21

[46] Porter, Robert H., Detecting Collusion, Review of Industrial Organization (2005) 26:147–167 © Springer 2005 Department of Economics, Northwestern University, Evanston, Illinois 60208, U.S.A.

[47] Speech on January 13, 2011, visible at: www.cfc.gob.mx/images/stories/Noticias/Comunicados2011/discursoeduardoperezmotta.pdf

José Ángel Gurría, Secretary General of the Organization for cooperation and economic development (OECD) in relation to the same phenomenon expressed:[48] *collusion in tendering processes takes place where companies competing to supply goods or services they agree previously in order to make their offersusually in order to ensure that the buyer pay more.*

Collusion in the bidding is a problem affecting public procurement globally and that costs billions of dollars taxpayers of the countries members of OECD.

Thus, we see that of collusion refers to the extermination of the competition in order to obtain greater benefits through the rise in prices as a natural consequence, which is reflected in an affectation of the market and consequently of its consumers.

b) Problem of collusion

It has been argued that markets are derived from the information available, that is involvement by pointing out a category in according to the degree of the information you have, as we see below:[49]

> The efficient market theory, there are three scenarios, depending on what is understood by information available:
>
> a**)** **Weak.** Prices include information derived from the historical evolution of prices and volumes. It can therefore, by analyzing the patterns followed by contributions in the past, not be derived any rule that allows to obtain extraordinary profits. Is a concept close to the one used by the analysis technician.
>
> **b)** **Semifort.** Prices include all available public information. In other words, prices do not include only the information that makes reference to the volumes and prices, but also the reference to its foundations (growth in results, financial situation, competitive situation...) This is the concept close to the one used by the fundamental analysis.
>
> **c)** Fort. Prices include all the information about a company, including the nonpublic or privileged.

In this context, is that in public procurement, unfortunately the phenomenon of weak information occurs frequently, which irremediably condemned that these contracts have consequences for the State to pay a price higher than for a good or service that is available in the market.

Thus the problem of collusion increases when consumer (victim of collusion) is the proper State to which the surcharge which is paying for the goods or services constitute a diverted public resources

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[48] Speech of the Secretary General of the Organization for cooperation and economic development (OECD) January 13, 2011, available at www.oecd.org/document/18/0,3746,es_36288966_36288553_46888018_1_1_1_1,00.html

[49] Description obtained from the financial economic Glossary available at http://www.abanfin.com/modules.php?name=Glosario & op = content & tid = 314

which seriously affect the primary state role limited economic capacity of the public body to deal with a greater number of public needs.

The consequences of the collusion at the expense of the State, are devastating for all countries, the Organization for Cooperation and Economic Development (OECD)[50] in this regard says: cartels may increase the cost of goods and services because of a 20% or more the first victims of a cartel are the same customers. When those customers are government agencies, the cartels harm to taxpayers and the economy as a whole.

The fullest form of collusion is the creation of a poster, with the aim of increasing profits to the detriment of consumers.

Is worth mentioning that the collusion in the classical tradition of the economy, beginning with Smith[51] be together two elements that made that it stimulated the formation of cartels, the first one attends to the propensity of maximize the profits of the private sector and the second to the little effort to criminalize this type of practice that rested on the idea that posters are too unstable.

In this regard, Richard Posner develops theories concerning economic regulation, which is the one concerning the public interest and argues that the regulation is proportional to the demand of the population to correct the inefficient market practices by what if a market is distorted must regulate to maintain the efficiency of the same not to mention existing criticism about this theory.[52]

Regardless of the theory mentioned in advance and their criticisms of respect, the fact is that collusion has been recognized as a disease which limits free competition and that as such he should be punished by the internal regulation, in this respect Richard Porter says: *Detection and deterrence of collusion are a longstanding antitrust problem. Collusion includes circumstances where some firms act in unison to raise the prices that they charge their customers, or to lower the price that they pay to acquire goods or services, or to otherwise inhibit competition. These actions are usually surreptitious, either because they are illegal under antitrust laws or because they are intended to be kept secret from the victims.*

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[50] Op. Cit
[51] Posner Richard A., Corporation Theories of Economic Regulation, The Bell Journal of Economics and Management Science, Vol. 5, no. 2 (Autumn, 1974), pp. 335-358
[52] Op. Cit

The free market and free competition, are aspects that naturally produce beneficial consequences for consumers, that they are in an atmosphere of efficient market, on the other hand, enabling the collusion is the corporate struggle to make the highest profits, and in a number of important cases that includes absorb costs that may be required.

c) Regulation against collusion

Before such distortions, the collusion of bidders in public procurement as well as other conduct punishable, are regulated in criminal matters[53] with the particularity that this course already exists within the administrative, specifically in article 9 of the Federal law on economic competition, which in its leading part sets:

> Article 9th.-Absolute monopolistic practices are contracts, agreements, arrangements or combinations between competing economic agents each other whose object or effect is any of the following:
>
> IV. establish, enter into or coordinate positions or abstain in tenders, competitions, auctions or public almonedas.
>
> The acts referred to in this article will not produce legal effects and economic agents who commit them become creditors to the penalties laid down in this law, without prejudice to the criminal liability that might result.

The article reproduced in advance, defines the concept of practice monopolistic absolute serving that any agreement which has the object or effect distorting statements in public procurement, which leads us to conclude that the protected legal right in this assumption is free competition.

It is important to mention that according to the political Constitution of the Mexican United States, in particular in its article 23, precept that collects the principle Non bis in idem, which governs the criminal, and it is reared on sanctioning administrative mattersIt is prohibited to punish someone twice for the same conduct in the same area.

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[53] Specifically collusion in criminal matters is regulated in the Federal Penal Code, article 253, section I, paragraph (d)) that points out: are acts or omissions which seriously affect domestic consumption and are sanctioned with imprisonment from three to ten years and two hundred to thousand days finethe following: (...) **(I).**-The related necessary or widespread consumer goods or raw materials needed to prepare them, as well as raw materials essential for the activity of the domestic industry, which consist of: (...) (**d).-** any agreement or combination, in any way that is done, producers, industrialists, traders or transporters, to avoid competition with each other and bring as a consequence that consumers or users pay prices exaggerated.

Indeed, the principle of Non bis in idem, already explained in the previous chapter prohibits that a person will punish twice for the same wrongful act, that in such a case would be happening already as the Federal law on economic competitionas well as the initiative of the Federal anti-corruption law on public procurement, establishes penalties for the same fact, collusion.

We can thus see that sanctions various managerial by disqualification in the second, identical conduct and fine in the first case are covered in the scope of the Federal law on economic competition and the initiative of the anti-corruption Federal law on public procurement, which in principle could be regarded as contrary to law, (for violation of the principle of Roman law non bis in idem) but it is considered that it is located in cases of exceptions, which are needed here:

1. **Diversity of sanctions.** In the event that there is for identical behaviour, diverse nature of sanctions, it is possible that it penalized twice to a person by the Commission of such conduct.

The exception to the principle of non bis in idem is recognized by the judiciary,[54] in the case that the sanctions imposed are of a different nature, decision that establishes the leading part:

> **Business establishments and celebration of shows public in the FEDERAL district, regulation for the operation of. ITS article 141, NO is violation of the article 23 constitutional.** The fact that a same human behavior may be generator of various consequences of right, each of which, in turn, can be affected with diverse sanction, such as the closure, the fine and the cancellation of the license or permit, does not mean that it violates constitutional article 23, which establishes the principle of "non bis in idem", also applicable to the administrative matter. In fact, what this principle prohibits is that a same result of such conduct, is doubly punished with the same punishment, **or own behavior subjected to two different procedures and that in each one of them will impose identical penalty,** what is not happening as laid down in article 141 of the regulation for the operation of commercial establishments and holding of public events in the Federal District, because even assuming that this provision should provide for a single act several sanctions, **This is precisely due to the different legal consequences arising from the conduct, reason why such a device does not infringe the provisions in article 23 constitutional.**

[54] Thesis 2a. XVII/94, visible in the Federation Judicial Weekly 14th, December 1994, PAG. 45.

2. **Identity of sanctions but well legal different.** One of the exceptions to this principle complies to the Federal law on economic competition, as he has said, guardianship legal free competition and turn good initiative of the Federal anti-corruption law on public procurement which seeks to protect good is relative to the dishonesty that is enshrined in article 134 constitutional, why they hold that the existence of two penalties in the administrative field to a person by the Commission of identical conduct is possible, because this fact produced different results, i.e., limit competition and violate the principle of honesty governing procurement public.

In this position, under the line of argument that identical behaviour, produce different results, and effect on legal rights protected different, persons who engage in collusion in public procurement can be punished by criminal means in relation to the update of the content in the article 253 course(, fraction I, subparagraph (d)), and twice in the administrative field, the first relating to the violation of article 9 fraction IV of the Federal law on economic competition and the second derivative of the article 8 section II, of the initiative of the Federal anti-corruption law in hiring public.[55]

However, stresses that in the case of collusion in public procurement, the exception to the principle that the legislator reflected was described in paragraph 1 above, i.e., diversity of sanctions, because, as it has been set out above the Federal law on economic competition establishes as a sanction the consisting of fineWhile the initiative of the Federal Act anti-corruption in public hiring, establishes as a result exclusively the disqualification, which would require of the competent authorities of the application of these rules (Federal Commission of economic competition and Secretary for the civil service)a full coordination between them for the purpose of sharing information on the procedures related to the alleged Commission of collusion in procurement, so that there is harmony in the actions and decisions of the authorities, but above all that the punishment they receive is exemplary not to allow them to continue contracting with the State (disqualification).

d) The OECD, IMSS and the CFC collaboration pioneered the world

[55] Should be adopted in those terms.

It is important to highlight that the Federal Competition Commission, has made important efforts in order to attack the collusion in the market of public procurement, a vulnerable to such practices, it is the drug which is one of the most important institutions of the health sector of Mexico.

Collusion is not exclusive of any sector in particular but simply point out that the Mexican Social Security Institute, is located as the third buyer of goods and services in Mexico and the largest individual public purchaser of pharmaceuticals and other medical supplies, including equipment and medical equipment, for 2009 was spending about $2,500 million in pharmaceuticals and other medical supplies.[56]

The Federal Competition Commission sanctioned, in January 2010, to six companies for committing absolute monopolistic practices (collusion) on sale at the Mexican Institute of Social security of human insulin and Sera injecting, the total amount of the fines imposed totalled 150 million pesos.[57]

Continuing with efforts to combat the collusion in public procurement the Organization for cooperation and economic development (OECD), the Mexican Social Security Institute (IMSS) and the Federal Competition Commission, have signed an agreement for the implementation of the guidelines of the competition Committee of the OECD to combat collusion in the bidding for public procurement, which by words of the Secretary-General, is the first time that this institution collaborates directly with a Government on this issue and ensures that it will serve as an example to other countries member.

III. Simulation (absolute and relative)

> III. Do acts or omissions which have as their object or effect participate in public procurement in nature, notwithstanding that by provision of law or administrative resolution is impossible to do so.
>
> V. intervene in its own name but in the interests of one or more other persons who are disabled to participate in public procurement of federal character, with the purpose of this or these last obtain, totally or partially, the benefits of hiring;

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[56] Speech January 13 2011, avavailable at www.oecd.org/document/18/0,3746,es_36288966_36288553_46888018_1_1_1_1,00.html

[57] Information published available in http://www.eluniversal.com.mx/primera/34482.html

Simulation is a practice that has developed almost as a custom in recruitment procedures, the forms which may occur in these already have been studied in the leading part of the personal scope of the initiative.

Without deepening on the means or methods of execution that have already been studied, it is required that the ratio legis of these legal provisions, is to attack the evasion of sanctions through the use of third parties, i.e., namely or figureheadsactivity that currently is not any cost for offenders persons (passive and active), as to not be expressly regulated in the current system of sanctions is difficult pursuit.

It is worth mentioning that punishable conduct which regulates will give step to deal with business strategies in order to discover their actions under the technique of the corporate veil.

Diverse means of execution occurs when a company for the purposes of participating in a procurement procedure, carries out any simulation of acts to comply with the requirements established on the basis of competitive bidding, for example: is requested that a company has some financial capacity and a degree of experience specific and uses companies sisters or several to appear conditions that do not have.

IV. Extortion

> VI. oblige without right to do so, a public servant to give, subscribe, grant, destroy or hand over a document or some good, in order to obtain for themselves or a third party an advantage or benefit;

Extortion is recognized as a practice that occurs in many areas and concerning public procurement is no exception, so it is intended to give security to public servants for the purposes that the decisions made within the framework of its powers are adjusted to right and are not flawed by threats external.

It does not lose sight that the other practice such behaviour is prosecuted in criminal matters, in any way, will require implementing mechanisms of prevention, as well as those relating to give protection to public servants victims of this conduct, in effect to ensure the development of their activities without fear for their physical integrity, which means a challenging administrative.

The described purpose, can carry out through the issuance of administrative regulations in terms of article 4 of the own initiative of the anti-corruption Federal law on public procurement, but apart from this possibility be needed for resources to be able to respond institutionally to these threats.

V. Traffic of influence

> VII. promote or use its influence, real or fictitious, on any public servant, for the purpose of obtaining for himself or a third party a benefit or advantage, regardless of the acceptance of the server or public servants or the result obtained, and

The traffic of influence is criminalized in the criminal sphere, and the administrative conduct is reproached on this last road to government employees through the Federal administrative responsibilities of the public servants law, specifically article 8 fraction 21st and which points out:

> Article 8-All public servant shall have the following obligations:
>
> XXII.-Failing to take advantage of the position which his employment, Office or Commission gives to induce another public servant made, delayed, or omit doing any act within its competence, that report you any profit, benefit or advantage for Yes or any of the persons referred to in section XI;

Administrative type commented, is emblematic of the need to balance the sanctioning system, as stated, the subjects that cause corruption to be private or public sector so that if the traffic of influence have presence or origin in any of the subjects It is moreover justified regular consequences for each of them and so we have the tools to suppress that people can influence to obtain an advantage that violates the principle of impartiality which governed in this area.

VI. False information

> VIII. present documentation or false or altered information in order to achieve a benefit or advantage.

Collects the sanctioning administrative type that already exists in current legislation, procurement law, lease and services for the Public Sector and the law of public works and related services.

The purpose of collecting such administrative sanctioning basically consists of establishing penalties for all those involved in public procurement of federal nature that are defined in article 4 of the initiative and that it points out:

> **III. Hiring public Federal:** previous acts, recruitment procedures, as well as any other act or procedure which derive from them, including the acts relating to the conclusion, implementation and enforcing

> contracts to procurement, leases, services, public works and services related to the same carrying out units and entities of the Federal public administration; the public trusts not considered State-owned entities and mandates and similar contracts, the Attorney-General, the administrative units of the Presidency of the Republic and the federative entities, municipalities and political bodies administrative boundaries territorial of the Federal District with total or partial federal funding and the authorities responsible to that referred to in article 4 of this law, in terms of the legal systems in the field of public procurement and regardless of the special regime of recruitment or the schema that is used for its realization. In this concept will be considered including the acts and proceedings relating to competition or call for proposals or public tender for the granting of permits and concessions of federal character or its extension, as well as any other authorization or procedure relating to public procurement;

The regulation of this course, repeated in the case of the procurement law, leases and services for the Public Sector and the law of public works and related services with the Mismas, represents an important piece in the other areas of the federal public procurement.

Due to the concurrence of the precepts already listed, this may have resulted in cases of false information will be always ventilated with the most charitable act the offender, the punishable course being studied is caused by an act of corruption prior to its Commission; It is their own, or with the participation of others, so it could be considered that prevail only in the initiative of the law Federal anti-corruption in public procurement, in order to punish more severely this practice.

e) Administrative sanctions

Punishable conduct are directly related to acts of corruption that are currently not sanctioned administrative. Is proposed to deter such conduct through the sanctions called reimburses[58] [1] in order to introduce the system of sanctions a (currently non-existent) cost to bidders who intend to commit acts of corruption, and that is to consist of the existence of effective sanctions, what is related to the strengthening of the research areas, (increase the number of corrupt practices surprised) to the effect that there is the greatest number of inhibitors of such practices and having the effect that the corrupt are high risks in their decision to have an impact on government procurement and that opt for the legality.

[58] See: Lomelí Cerezo Margarita, Right Prosecutor Represivo, Porrúa, Mexico, 1998, page 8

In that regard, mentioned the sanctions proposed in the initiative are to consist of more severe fines and disqualification with cumulative and long periods. Similarly, sanctions are specified by its personal aspect in the Commission of the same, what is said below:

For natural persons:

- Fine of one thousand **$47,098.00 USD** to fifty thousand times the minimum wage **$235,491 USD**
- Debarment to contract 3 months to 5 years.

For moral persons:

- Fine of ten thousand $45,968.00, to two million times the minimum wage $9,419,672[59].
- Disqualification of 3 months to 8 years.

Stresses that administrative sanctions contained in the initiative before us, will allow to punish moral persons and natural persons who acted in representation (legal or de facto), for what should be fully assessed the degree of participation in the Commission of the acts establishing the infringement according to the personal sphere studied in the part relating to the subjects.

The intention of the above, it is innovative and will allow reaching people that say corrupt practices through the use of third parties, and also to the latter, so it is passed to the person who wants to stay hidden, and the namely used, which is intended to impose a cost to this form of consummate the corrupt practice.

On the other hand, the legislator having regard to the principle of Non bis in idem, States that the sanction in the case of collusion referred to in article 8, section II, of the initiative, shall only be disabling, (that the Federal law on economic competition establishes the fine for identical behaviour) by what is considering the theory of exception of this principle in the range of sanctions, same as explained in advance.

However, considered that he was well able to see opted for the another cause of exception, that is, the relative is possible the imposition of penalties of the same nature when conduct is violenten

[59] According with exchange rate $12.5 Dollars per Mexican peso.

diversity of principles as it would be the case, which is why you hold that you could well be fine for cases of collusion in the initiative in analysis.

As regards the application of the penalty consisting in the prohibition, implements a cumulative disqualification, as if an offender imposed prohibitions diversity at the same time, the period which was found to be unable to participate in public procurement will run concatenadamente which represents a greater impact this sanction.

The initiative sets may that in no case be granted the suspension of the prohibition, which puts an additional ingredient that paid to the effectiveness of the sanctions, and that is consistent with the approach that have argued the courts of Mexico.

In addition to the above, requires that the effects of the disqualification may occur in a very agile manner, that initiative discussed, article 10 last paragraph, provides for the implementation of the sanctions, it will take its effect from their publication in CompraNet.

The question that leads this regulation is: when must publish a penalty of disqualification in CompraNet? the answer to this is: once the decision has been notified to the individual in a personal way, as that of the administrative act theory suggests that this is the moment in which arises from the legal life,[60] this result has an effectiveness model in the sense that its application is almost immediate.

Individualization of punishment

Sanctions should be imposed through the study and graduation of the elements to enable the judge to issue a resolution proportional and consistent with the injury that caused the violator to legal well that guardianship the norm violated, for that purpose the initiative of the Act provides for the obligation of value elements see:

> **Article 11.** For the imposition of administrative sanctions provided for in this Act will be taken into account the elements listed below:
>
> I. the gravity of the offence incurred;

[60] This feature of the administrative act is also contained in articles 8 and 9 of the Federal law of administrative procedure.

II. the economic circumstances of the offender.

For the purposes of the provisions of this fraction, may consider information from contracts that the offender has concluded and are registered in CompraNet, either, if that information is does not have the amount of the contract, permission, concession, or commercial transaction which of origin to the administrative penalties procedure in question;

III. the history of the offender, including their behavior in federal procurement or, where appropriate, in international commercial transactions;

IV. the degree of involvement of the offender;

V. The means of implementation;

VI. the recidivism in the Commission of irregular behaviour, and

VII. the amount of the benefit, profit, or of the loss or damage arising from the irregular conduct, where they have caused.

For the purposes of this law, he considered recidivist the infringer having been declared responsible for the Commission of any of the irregular behaviour referred to in this law, once again incurred in one or more of them, within a period of five years from notification of the first sanction takes effect.

The individualization of the penalty is one of the most important exercises of the punitive function of the judge and has as a guiding axis the principle of legality and legal certainty that they allow the defendant know precisely the reasons and fundamentals that make up the considerations to arrive at the decision of the State to repress it with the conduct that were tried, and so is capable of exercising their defence.

One of the requirement in the Mexican legal order on sanctioning administrative law is that the standard should foresee sanctions within a minimum and a maximum, so that the judge used his discretion and can graduate the punishment considering the specific issues of each casegiven that such an exercise is located within the discretionary authority, taking the dam built by the guarantee of legality which will allow the punishable knowing with any accuracy the causes that led to the determination of the authority as a limit, the judiciary in this regard has been expressed in the thesis number: I.4o.A.604 A, visible in the Federation Judicial Weekly and its Gazette, XXVI, December 2007, page: 1812, same that the letter says.

Responsibilities of public servants. to consider is properly founded and justified the imposition of an administrative sanction, the authority must be FACTORED both elements objectives and SUBJECTIVE of the case specific. Both the technical garantistas developed by the criminal law and the principles are

> applicable to sanctioning administrative law, by virtue of which both are manifestations of jus puniendi of the State. Thus, by applying administrative sanctions should be considered the elements provided for by the criminal law for the individualization of punishment, their obligation to assess both objective aspects (circumstances of execution and gravity of the wrongful act) which brought to the judge as a subjective personal basis of the agent)(, dangerous, mobile, mitigating and aggravating, and so on), since otherwise, lack of sufficient reasons prevent sanctioned public server meet the key decision criteria, although it allows you to question her, which transcend in an improper motivation in the material aspect. In that context, to an administrative penalty is considered properly founded and reasoned, it is not enough that the authority cited the precept that forced to take into account certain aspects that this assessment must really justify the penalty imposedi.e., to actually get the degree of responsibility of the public servant in line and consistent way, it must be factored all objective factors (circumstances in which conduct was implemented) and subjective (background and conditions of the public servant and the extenuating that could promote it)in accordance with the specific case, taking care that it is not the result of a literal or dogmatic statement of what the law ordered, and thus the sanction is appropriate, fair, proportionate and not excessive. In this light, even if the authority has discretion to impose sanctions, is not unrestricted, since it must be found and motivate with sufficiency the reasons for its determination.

In this regard, the initiative of the Federal anti-corruption law on public procurement, establishes a flexible for the imposition of such sanctions, because refers to parameters, so that the authority to make use of penalties to value discretion the elements required by the law in this regard are made comments in respect of which merit a study in particular:

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- Severity

This element is directly related to the violation to the protected legal right, i.e., the legislator establishes a number of pronouncements in the regulation in order to preserve the rule of law, but it is specifically intended to safeguard certain collective interests, the form that is intended to protect it is establishing a punishment who so violent, so the judge must assess the consequences of the conduct that deployed the offender, unless the non-existence of a harmful outcome can be

considered as an exclusion of liability, that standards do not determine the production of the result for the imposition of sanctions.

- The offender's economic conditions

Traditionally the assessment of the conditions of the offender, have tabled a number of complications for the absence of sufficient information to enable the judge to pronounce on what the conditions of the offender and their relationship with the imposition of the sanction so that this is not excessive (constitutional requirement of sanctions)This problem has been that the challenge to the resolutions is kindness for the particular, for the only effect that the judge value again this circumstance.

In this connection, the formula established by the legislature ends with this problem because to do so provided that the judge may consider the information on the contracts that the offender has concluded and are registered in CompraNet or in his case must bear in mind the amount of the contractpermission, concession or commercial transaction which has given rise to the proceedings. Thus the legislator reflected in an innovative way the form in which should assess the economic conditions of the offender, which is linked with the contracts that had the offender or with the amount of which it was intended to celebrate, close this considering the relationship that it exists between the General characteristicstechnical, operational and financial capacity of a company, with the object, description and amount of the contracts which has been held or aspired to celebrate, this proportionality required in sanctioning administrative law is achieved.

- The background of the offender

The valuation of the background of the offender, is independent to the relative of recidivism, and is aimed to establish greater flexibility to the judge to be considered for the benefit of the individual a good historic behaviour in their contractual relations with the State.

- Recidivism

Implementation of recidivism requires that the individual, considered as such, has previously been convicted for violating the law, and after this incurs again breach within the period of 5 years, which

is consistent with the doctrine and the criteria of the judiciary have been made with regard to the updating of this figure.

Prescription

The figure of the prescription of faculties, constitute a limit on the authority so that decisions do not perpetuate over time and the particular left with uncertainty regarding the Act of the Administration, the novelty of this scheme is that the interruption of the limitation period has with the notification of the initiation of the proceeding which is more consistent with the nature and complexity of demonstration of conduct that makes the law as punishable.

f) Investigation procedure

Complaint

The new system of sanctions to the private sector, is designed ad hoc to control corrupt practices that have as much impact on public procurement, one of the main pillars of this system is the incentive of the complaint, (notitia cleverer). The law provides for various sources of information in respect of the possible acts constituting the offence, including the anonymous complaint.

The possibility of any person to denounce acts or acts contrary to the law, should have impact on the control of corruption, Susan Rose-Ackerman thereon[61] States: *The deterrence of criminal behavior depends on the probability of detection and punishment and on the penalties imposed both those imposed by legal systemand more subtle cost such as loss of reputation or shame (Becker 1968).*

The absence of limits to complaints, has to produce the effect that the sanctioning authority to obtain more information regarding corrupt practices, but can also have as result that the private sector, make frivolous allegations and unfounded or by remotely containing the presence of corruption, but that they obey a strategy for the environment of competition that exists in the market attempting to use their right to denounce in order to inconvenience its counterpart.

In this regard, at the international level this phenomenon regulates it article 53 of the Statute of the International Criminal Court establishes that not every complaint should encourage the authority to initiate an investigation, but that the authority should evaluate the information and determine

[61] See: his work entitled Corruption and Government Casuses, Consequenses, and Reform, Cambridge Univesity Press, 2006.

through your studyIf it has a reasonable basis for drawing lines of research, i.e., if it follows an appearance of content to enable the authority to make credible an alleged infringement. For speedy reference cited the mentioned article:

> Article 53.
> Initiation of investigation
>
> 1. The Prosecutor, after evaluating the information available to it, start an investigation unless he determines **that there is no reasonable basis** to proceed to it pursuant to this Statute. (…)

For its part the initiative of the Federal anti-corruption law on public procurement, States that individuals who make a false complaint, that fact shall be penalised in terms of criminal law, which aims to discourage little serious non-anonymous complaints.

As regards the complaint of the contracting public institution, and be reminded of it, the current system prior to its most recent reforms, gave to the conveners of the monopoly of the complaint giving that obligation to each of the active agents of corruptionby who with the design could not expect that the authority had sufficient information to counter the effects of corruption.

The legislator now, not only puts the obligation on the contracting authorities (in which case aware of behaviours constituting infringement) but that provides expressly that the omission would constitute responsibility of public servants.

It is important to note that you established a complaints mechanism, which requires the authority to keep confidential the identity of the complainant, which seeks to strengthen the incentive so inform the authority of acts of corruption who have knowledge or that they are participating in them to attend.

International reporting and assistance mechanisms referred to in article 18 of the second paragraph of the initiative in study, gives the initiative of congruence with foreign instruments that Mexico has signed and reflected the compromise that the control of corruption must be an effort undertaken from all angles.

Measures of constraint

For its part, the authority in sanctioning administrative procedure, both the inquiry procedure will have powers to impose measures of constraint to be the leading acts for the good conduct of the proceedings, which provides a tool so far unprecedented in public procurement this can be seen in articles 18 and 28 of the initiative which is discussed and that for speedy reference cited:

> **Article 18.** In addition to the power indicated in the preceding article and in order to prove the Commission of irregular behavior and the likely responsibility of the offender, the competent authorities may:
>
> Require the contracting public institutions, the reports and documents that are linked to the acts constituting the alleged offence;
>
> Apply to persons subject to this Act, the data and information related to the complaint, and
>
> Carry out other inquiries to better provide you deem necessary.
>
> **Article 28.** For the effective performance of its functions, the competent authorities may in the sanctioning, administrative procedure or in the investigation stage imposing measures of constraint, for the purpose of enforcing its determinations.
>
> Any measure shall contain the grounds and reasons for their issuance, as well as the record of being notified via trade or staff, as appropriate.
>
> The measures of constraint, as follows:
>
> Warning, and
>
> Fine, of one hundred to two thousand days of existing general minimum wage in the Distrito Federal.

Bank secrecy

The initiative of the Federal anti-corruption law on public procurement, establishes a provision which is intended to strengthen the research of the competent authorities, see:

> **Article 17.** For the completion of the investigation the competent authorities will have access on their own or through the authorities empowered to do so, in terms of the provisions applicable to the information coming from any source or information bank, even that of a reserved, confidential nature or that should be kept secret, related the alleged offenders and the public servants involved in irregular behavior, still

required dependencies, entities, the Attorney-General and other public institutions, in accordance with the provisions applicable to provide such information. The information obtained under the terms of this article will have probative value in sanctioning procedure corresponding.

Should be noted, that the nature of corrupt practices is that its means of implementation are carefully consumed in the shadows of illegality, its characteristic conspiratorially represents a major challenge for the areas responsible for controlling corruption, so the legislature is contemplating that specialized (in research and in the administrative procedure) authorities are which carry out the tasks of research and legal process, Gabor Peteri thereon[62] notes: *Investigations and sanctions might be initiated by agency responsible for procurement or any parties involved in the tender. In general, overregulated procedures might be counterproductive and we don't lower significally the level of corruption. However, independt investigations from other professional areas, international organizations, and strong domestic enforcement mechanisms will improve the impact of legal actions.*

One of the pillars underpinning all anti-corruption system is the opening to be of different authorities to help with the investigation, the difficulty of obtaining evidence make complex the task, the secret banking and fiscal to name a few are steeped in legal certainty and the rule of law for individuals, but those rights must not be absolute, especially when there is reasonable basis for the presence of alleged acts of corruption, in such a case should be considered the superiority and prevalecimiento of the general interest, on the subject.

In international law the Convention on combating bribery of foreign public officials in international business transactions, provides that no part may refuse to grant legal assistance arguing the existence of bank secrecy, this derogation has is binding for Mexico by what we consider which should be extended where the research is to the interior of our country and thus give the fortress to the initiative of the Federal anti-corruption law.

Article 9.

Mutual Legal assistance

3. A party may not refuse to grant mutual legal assistance in criminal matters within the scope of this Convention based on the grounds of bank secrecy.

In addition to the above, according to international experience has shown that one of the main sources of information in order to detect and punish acts of corruption is directly linked with the investigation of financial routes of the persons involved, on the subject William f. Wechsler author of the book "Follow the Money" points out: Corrupt government officials exploit banks to facilitate their own misdeeds, breeding to lawless business culture and undermining public confidence in

[62] Peteri, Gabor Finding the money., The Relationship between the public and private sectors.

national financial systems. And the underregulated banking systems that facilitate these abuses have sparked financial meltdowns around the world.

In this context, suffice to Alphonse Gabriel Capone, could not be stopped by the countless crimes he committed as killings, bribery, property damage, but derived from the laws enacted in 1927 which allowed the Government of United States of America, scrutinize the accounts of Al Capone, to found tax evasion that finally deprived it of his freedom.

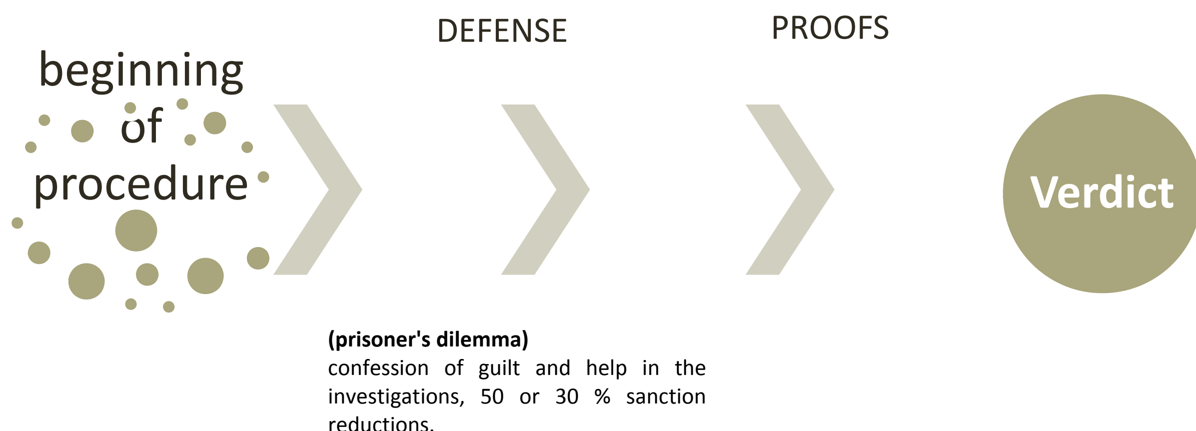
Some other cases have related to the banking information document, which have taken place to be found corrupt practices, the work "Follow the Money" previously cited their copyright concerns: *Financial abuses are also affecting regime changes around the world. Corruption has always been unpopular among voters. But recently, revelations of secret accounts held in banks have helped topple governments underregulated. In the Philippines, for instance, President Joseph Estrada was impeached and driven from office this past January after it was revealed that he had opened to $10 million trust account under the assumed name of "jose Velarde". In Peru, President Alberto Fujimori tried to remain in office even as his intelligence chief and adviser, Vladimiro Montesinos, was caught bribing political officials before becoming a fugitive from justice. Fujimori even led to search team through the Peruvian jungle for the benefit of television cameras. It was only after Swiss authorities announced last November that they had found and frozen $70 million linked to Montesinos that Fujimori had to flee. In Europe, too, financial abuses are undermining politicians. Revelations of secret political slush funds in Liechtenstein ruined former German Chancellor Helmut Kohl's reputation; It seems almost everyone associated with the late French President Francois Mitterrand is now reeling from investigations into slush funds involving the formerly state-owned oil company Elf Aquitaine.*

For this reason, argues that the exception to bank secrecy contained one of the pillars on which the success of the purpose of the law, according to the nature of punishable conduct, one of the ways to gather useful information is supported It will be the use of the technical follow the money that has been described, and makes the use of front men in the consummation of the behaviors necessary to obtain such information.

f) Administrative sanctioning procedure

Integrated file with leading evidence, will begin the sanctioning administrative proceedings against the individual, with all due respect to the guarantee of hearing for individuals.

The procedure is accusatory in nature, stages short so that once (to notify the Office containing the charges to the individual) of the same resolution materializes in a very short time, which may vary depending on the degree of complexity or the evidencefor illustrative purposes the procedure



g) Reduction of sanctions

Reducing sanctions is one of the fundamental pillars of the initiative of the Federal law against corruption that formula in public procurement, they have no precedent in the sanctions in the area of procurement, the innovation this supported the idea that we should create the necessary incentives for people involved in acts of corruption to have the possibility to decide to collaborate with the authority in the investigation in exchange for preferential treatment in the sanctioning administrative procedure and its consequences course.

As he has been said that the complexity to demonstrate behaviors that are typified in the initiative, requires mechanisms to enable the authority to have a wider range of options to gather the necessary information, thus establishing a series of requirements so that individuals can auto announce with the aim to cooperate fully and continuously in investigations and obtain benefits in the sanctions.

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autodenunciarse with the aim to cooperate fully and continuously in investigations and obtain benefits in the sanctions.

Stresses that the initiative, only provides for the reduction of penalties, but does not provide the possibility of immunity, which could be a topic to explore with later and after taking the maturity that the case studies will give the legislation proposed.

The project establishes incentives so that individuals cooperate with the Secretary of the public service, according to the following:

- If those who participate in conduct with other individuals, is reduced the sanction which corresponds in a **50% reported that** their partners and provide elements to punish them.
- The penalty by **30% to the defendants** who confess to having committed the infringement which are attributed will reduce. This will give greater efficiency to the sanctions, because removed the dispute them elsewhere.

h) Prevention

The initiative of law study sets in his last chapter concerning the prevention of corruption-related behaviors, see:

Seventh chapter

Prevention

Article 32. The Secretariat may conclude cooperation agreements with the people physical or moral, to participate in public procurement of federal character and in international commercial transactions, as well as with the Chambers of Commerce or industry organizations or of trade, in order to guide them in the establishment of mechanisms for self-regulation involving the implementation of internal controls and program integrity allowing them to ensure the development of an ethical culture in your organization.

In the design and monitoring of the mechanisms referred to in the preceding paragraph, shall be considered as international best practices on controls, ethics and integrity in business, as well as include measures to suppress the practice of irregular behaviour and to guide partnersmanagers and employees

of the company on the implementation of the programme's integrity and containing tools of complaint and protection to complainants.

The system of sanctions which it is proposed, it contains an additional component consisting of the prevention of the Commission of corrupt practices which have the penalties, presence in public procurement, the mechanisms of prevention which are regulated by the initiative of the Federal law of anti-corruption in public procurement essentially focus on the conclusion of agreement with the public sector, individuals or individuals and organizations such as chambers of Commerce and industry.

The purpose of the conventions which may carry out the Secretary for the civil service, with such people is supporting the private sector in the following topics:

I **Implementation of internal controls.** With the experience of the Secretary of the civil service, can be advisors to the private sector develop an internal control based on the detection of areas of risk and possible solutions.

II. **Covenants on integrity.** The private sector can develop within your organisation covenants of integrity including codes of ethics, innovative and aimed at sensitizing the people that make up the organization.

The prevention of corrupt practices has had great importance for the systems of sanctions at the international level, we should remember that in the case of the United Kingdom the Bribery Act 2010, the lack of prevention by persons working in a company, is planned as an social felony.

In addition to this, the Bribery Act 2010, points out that the system of prevention of corrupt practices established by the private sector, can produce effects of innocence if it is shown that within your organization has implemented the conducive actions at their disposal to prevent briberyi.e., they can avoid being sentenced.

Even at the initiative of the Federal Act anti-corruption in public procurement, although expressly does not contains a provision that includes exclusive or extenuating of responsibility, moral persons that have an appropriate mechanism for prevention of offences, this element if it cannot be for the benefit of the offender (only as mitigation), in the light of the scheme of individualization of the

penalty referred to in article 11, in particular its sections III, IV and V that stipulates that the authority should assess the background of the offender, its behavior in public procurement and their degree of participation respectively by what it can be an incentive to ensure that the private sector to be involved directly with the control of corruption and active mechanisms internal to that not only prevent the infringement but that consummate, her detected and approach with the authority to denounce.

In this regard, emphasizes that the Secretary for the civil service, has shown interest to be added to the private sector to counteract the effects of corruption, with the signing of the agreement with the International Chamber of Commerce (ICC) which essentially stipulates:

- The Secretary for the civil service is committed to give publicity to the legal framework governing the performance of public servants and to promote a culture of complaint, among businessmen that while it can be noted that it is related to responsibilities of public servants, this could be extended to the irregular behavior of the own private sector in the scope of the initiative of the Federal anti-corruption law in public procurements.

- Will for its part, the International Chamber of Commerce promoted among its partners such complaints mechanism so that, in coordination with the Secretary of public administration, take steps to go to the competent authorities.

- The International Chamber of commerce must of promote ethics in the development of its activity in order to prevent corrupt practices to deter the phenomenon of corruption and disseminate international anti-corruption treaties signed by Mexico, with that in the event that approves the initiative of the Federal anti-corruption law on public procurementbecause of its intimate relationship with the international instruments should be part of this effort.

Conclusions

The current system of sanctions to the private sector in public procurement of Mexico is limited by its scope and magnitude of the penalties which may be imposed both its purpose. This system is designed to punish conducts that do not have a nature that obey mainly to corrupt practices, generating impunity.

The amount of the sanctions that may be imposed today is not proportional with the amount of the contracts, so in any case the sanctions do not represent a high cost for offenders, which is why there are necessary incentives so that they infringe the rules with the aim of obtaining contracts, of fruit, it is possible to cover the fines imposed.

In most of the corrupt practices that occur in public procurement participating subjects in the corrupt practice are public servants in co-responsibility with people from the private sector, which are equally responsible for what if the legal system imposes no equality of consequences there is no doubt a punitive imbalance.

The current sanction system, has no legal provisions which provide the authority of all the tools necessary to stop the simulation of events caused by the use of third parties (namely or figureheads), which prevents the State to get the best conditions available on the market of the goods or services contracts.

The legal tools to cope with the forms and methods in which corrupt practices in public procurement, are consumed are insufficient to tackle them vigorously, by which the private sector does not run any risk to providing bribes or make coalitions with companies in its sector to affect prices in government procurement, or to influence them to lead a bid on his behalf, to cite some cases, i.e., there is a systematic risk of the Commission of such behaviors which originate in diversity of causes, but that without doubts the lack of regulation that punished them in an exemplary mannerIt plays an important role in this.

The initiative of the Federal anti-corruption law on public procurement, attends to the need to establish a mechanism to fight corruption in the system of public procurement, which has the following main pillars:

- The long range that already has the material aspect of the law is determined by the concept of public procurement of federal character in a sense which includes pre and derivative acts as well as grant concessions.

- The promotion of the complaint, with the possibility that this is anonymous or derived from international sources, for the purpose of encouraging society to make knowledge about alleged acts of corruption.

- The construction of disciplinary administrative types which regulate specific acts of corruption which currently have high rate of occurrence and that generate all kinds of harmful effects (expensive shopping, low participation) in the procedures, and detrimental to the competitiveness of the country(, uneven economic growth potential of country among others).

- The administrative types regulated not only provide for cases of public corruption, understood this as one in which a public servant (bribery, extortion, influence peddling) is involved but also cases of private corruption (collusion and simulation relative and absolute).

- More stringent, effective and dissuasive sanctions which represent a high cost to those who decide to walk the path of corrupt practices.

- Reduction of sanctions, as an innovative mechanism that of flexibility so that the authority has the collaboration of individuals involved in acts of corruption and who will find it attractive not resist to the research and confess their guilt in exchange for a lesser penalty.

The aim of the initiative is strengthening the national legal order, and provide it with an innovative tool that allows to counter the devastating effects that has corruption in our country, and will contribute significantly to raise competitiveness Mexico.

The initiative was officially launched by the President of the Republic on March 2, 2011, being approved by the Senate of the Republic on 5 April; It is currently in the hands of the federal deputies.

It is important that society and the Government work together to control corruption, expected that the initiative will contribute significantly to make the system of public procurement in Mexico and will receive the benefits.

Sources

Agullar Lopez, Miguel Angel, The presumption of innocence available at: http://www.reformapenal.inacipe.gob.MX/PDF/Numero8(3aepoca)/01AguilarLopezSP.PDF

Bribery In Public Procurement: Metods, actors and counter-measures, OECD 2007, Chapter 4 pag 45

Ferrara Francisco, Simulation of Legal Business, Edi Revista de Derecho Privado, Madrid, 1960, Capitulo VII

Fritz heimann and Gillian, Progress report 2010, enforcement of the OECD convention on combating bribery of foreign public officials in international business transactions, 28 july 2010

Handbook for Curbing Corruption in Public Procurement Published by Transparency International

INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT, Edit by Khi V. Thai, International Public Procurement: Concepts and practices, pag 21

Lomelí Cerezo Margarita, Right Prosecutor Represivo, Porrúa, Mexico, 1998, page 8

Maljar Daniel e., Sanctioning Administrative Law, ed. Ad Hoc, Buenos Aires, 2004, pp 245-246

Magide Herrero Mariano, Constitutional limits of Independent Administrations, pag 337

Martínez Yánez Nora Maria, Problems JURÍDICO-PRÁCTICOS of the figure of the complainant on the procedure administrative sanctioning, where refers to this concept is essentially understood as the right to communicate to the Administration the facts allegedly constitute visible infringement in https://www.rexurga.es/pdf/COL131.pdf

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are the most comprehensive instrument in existence today for corporate responsibility multilaterally agreed by governments.

www.oecd.org/daf/investment/guidelines

Peteri, Gabor Finding the money., The Relationship between the public and private sectors.

Posner A, Richard, Exclusionary Practices and the Antitrust Laws, University of Chicago Law Review, Vol. 41, no. 3 (Spring, 1974), pp. 506-535, Published by: The University of Chicago Law Review.

Posner Richard A., Corporation Theories of Economic Regulation, The Bell Journal of Economics and Management Science, Vol. 5, no. 2 (Autumn, 1974), pp. 335-358

Porter, Robert H., Detecting Collusion, Review of Industrial Organization (2005) 26:147–167 © Springer 2005 Department of Economics, Northwestern University, Evanston, Illinois 60208, U.S.A.

Rose Ackerman Susan, Corruption and Government Casuses, Consequenses, and Reform, Cambridge Univesity Press, 2006

Rose-Ackerman, Susan (1997). "The Political Economy of Corruption," in Kimberly Ann Elliot (ed), Corruption and the Global Economy, Washington DC: Institute for International Economics

Valls Hernández Sergio, criminal administrative law.

William f. Wechsler, "Follow the Money" Foreing Affairs , Vol 80 No 4 (jul aug, 2001)