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The Mexican Supreme Court ruled against the Federal Executive and SENER in the constitutional control procedure filed by COFECE.

On February 3, 2021, the Second Chamber of the Mexican Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*) resolved the constitutional control proceeding filed by the Mexican Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*; “COFECE”) against the “Administrative order issuing the Policy for the Reliability, Safety, Continuity and Quality of the National Electric System” (the “Policy Order”), published in the Federal Official Gazette on May 15, 2020 by the Ministry of Energy (*Secretaría de Energía*; “SENER”).

COFECE submitted a constitutional challenge before Mexico’s highest court alleging that certain provisions contained in the Policy Order (i) were contrary to the principle of legality set forth in Article 16 of the Mexican federal constitution since the need for the policy contained in the Policy Order was not sufficiently justified, in particular considering best international competition; (ii) infringed the principles of economic competition and free access set forth in Article 28 of the constitution, including the rights of consumers to have access to goods and services on competitive conditions; (iii) affected the autonomy and jurisdiction of COFECE in the exercise of its constitutional mandate and authority, in violation of the principle of separation of powers set forth in Article 49 of the constitution; and (iv) contravened the principles of non-contradiction of norms and constitutional supremacy set forth in Article 133 of the constitution and in the laws that regulate the energy sector.

The contested Policy Order, as alleged by COFECE and as recognized by the court, would prevent the existence of an efficient market for generation and supply of electricity where industry participants may compete with the Federal Electricity Commission (“CFE”), as the Policy Order would implement provisions that would become clear obstacles, *ex ante*, to the effective exercise of COFECE’s legal authority under Article 28 of the constitution. Furthermore, COFECE emphasized in its legal challenge against the Policy Order that the Federal Executive lacks the legal right to issue orders that infringe upon COFECE’s jurisdiction and sphere of authority as an independent constitutional body. It is precisely to avoid interference from other governmental branches that COFECE was granted constitutional autonomy and entrusted with ample authority on competition matters. COFECE also argued that, by infringing the aforementioned constitutional principles, the Policy Order sought to void or limit such authority, in breach of the principle of separation of powers.

In the context of the constitutional challenge filed by COFECE, the following competition concerns raised by the Policy Order were brought forward before the court by COFECE:

- (i) The Policy Order affects the fundamental principle of open and non-discriminatory access to transmission and distribution networks, affecting competition in the electric generation and supply market.

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(ii) The Policy Order changes the economic dispatch principle, by privileging the “reliability” of the National Electric System (“SEN”) over economic efficiency, thus affecting competition.

(iii) The Policy Order affords unfair advantages to CFE by privileging less efficient and more polluting power plants, thus reducing incentives for more efficient and green generation of electricity.

(iv) The Policy Order would compromise the technical autonomy and unbiased role of the National Energy Control Center (*Centro Nacional de Control de Energía*) as operator of the SEN by affording unfair advantages to CFE.

It is to be highlighted that the court, by ruling on the constitutionality challenge brought by COFECE against the provisions contained in the Policy Order, stated the following:

(i) Regarding the provisions contained in the Policy Order aimed at strengthening CFE (provisions 1.2.4, 3.8 (3.8.4 and 3.8.5) 5.4 and 5.23 of the Policy Order; of which provisions 3.8.4, 5.4 and 5.23 were declared invalid): the provisions contained in the Policy Order aimed at strengthening of the strategic planning of CFE (its state productive companies and subsidiaries), to promote the integral planning of the SEN and to guarantee electricity supply as a public and reliable service, , do not violate the constitution nor do they affect competition. On the other hand, the fact that CFE may propose strategic projects to develop power plants and expand and modernize the national grid, grants an undue advantage to CFE, which affects competition and creates legal uncertainty. The court also noted that open and non-discriminatory access to the grid would be affected by the priority established in the Policy Order with respect to the interconnection of strategic projects so defined by SENER.

(ii) Regarding the provisions contained in the Policy Order requiring a Feasibility Report (*Dictamen de Viabilidad*) for the Incorporation of Intermittent Clean Energies (*Incorporación de Energías Limpias Intermitentes*) (provisions 5.7, 5.12, 5.12.1, 5.12.2, 5.12.3, 5.12.5, 5.12.6, 5.12.8, 5.12.11, 5.13 and 5.15 and 10.2 of the Policy Order; resulting in a declaration of illegality as to provisions 5. 7, 5.12, 5.12.1, 5.12.2, 5.12.3, 5.12.4, 5.12.5, 5.12.6, 5.12.7, 5.12.8, 5.12.9, 5.12.10, 5.12.11, 5.12.12, 5.13, 5.15 section “and the interconnection feasibility opinion issued by CENACE” and 10.2): the provisions granting authority to CENACE to evaluate the feasibility of interconnection applications and reject such applications on the basis of unreliability (and granting CRE the authority to require a favorable opinion from CENACE as to the relevant interconnection as a pre-condition for the granting of a power generation permit), were declared illegal as the court held that CENACE does not have such ample authority. The court also established in its ruling the importance of eliminating undue discriminatory conditions and entry barriers aimed at renewable energies.

(iii) Regarding the provisions contained in the Policy Order targeting economic dispatch (provisions 7.1 and 8.4 of the Policy Order, which were declared invalid): the court decided to invalidate the intended change to dispatch rules aimed at favouring dispatch security over economic efficiency, and to also invalidate the provisions affording CENACE authority to require “out-of-merit” order dispatch, as this would affect more efficient power plants.

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Moreover, as mentioned above, the court recognized in its ruling the validity of the provisions contained in the Policy Order aimed at strengthening CFE and its group companies to promote the planning of the SEN, as well as the validity of the provisions related to new services in connection with the operation of the SEN and renewable energy power balancing (provisions 4.17, 8.10 and 10.8), as the court found them not to be unduly discriminatory.

Once the ruling of the court is notified to the parties involved in the constitutional challenge, it will have general effects (*erga omnes*) and only those specific provisions of the Policy Order that were not declared unconstitutional by the SC will have effects.

The constitutional control procedure filed by COFECE against certain provisions of the Policy Order highlights the importance in Mexico of COFECE's role as technical authority and independent constitutional body, and as a sponsor and advocate of market competition. Also, the ruling of Mexico's Supreme Court in this important matter once again proves the relevance in Mexico of the court's in defending the constitutional order and the rule of law, by ruling on matters of significant relevance for the people.

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