

Supreme Court allows additional types of challenges against Energy Regulators

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Supreme Court's decision opens the door to various defense mechanisms to challenge resolutions issued by energy regulators

On August 14, 2020, the Second Chamber of Mexico's Supreme Court of Justice (the "Supreme Court") published in the Judicial Weekly Gazette (*Semanario Judicial de la Federación*) a case law summary under the heading: "Article 27 of the Law of Energy Regulatory Agencies violates the Principle of Constitutional Supremacy by establishing an additional exception to the Principle of Definitiveness that governs the *amparo* proceeding" (the "Decision").

By way of introduction, it should be noted that according to Article 27 of the Law of Energy Regulatory Agencies (the "Regulators' Law"), the only means to challenge general rules, actions or omissions issued of the Energy Regulatory Commission and the National Hydrocarbons Commission (the "Regulators") is the *amparo* proceeding (constitutional review), which prevents private parties from accessing ordinary defense mechanisms prior to the filing an *amparo* proceeding, such as the administrative lawsuit before the Federal Court of Administrative Justice ("FCAJ"), which is foreseen in the Federal Law of Contentious Administrative Proceedings, or the administrative appeal provided in the Federal Law of Administrative Procedure.

In this regard, the Supreme Court determined that Article 27 of the Regulators' Law violates the principle of constitutional supremacy, since the *amparo* proceeding is governed by the principle of definitiveness, and the exceptions to such principle can only be established in accordance with the Mexican Constitution.

The principle of definitiveness of the *amparo* proceeding sets forth that, as a general rule, since the *amparo* proceeding is an extraordinary defense mechanism of a constitutional nature, in order to have access to this defense mechanism, the ordinary defense mechanisms against the governmental action being challenged must have been previously exhausted. In this regard, the Supreme Court considered that, in accordance with

the principle of hierarchy of laws, the exceptions to the principle of definitiveness can only be established in the Mexican Constitution and in the Amparo Law, as this is the law that regulates articles 103 and 107 of the Mexican Constitution that govern *amparo* proceedings. Thus, since the Mexican Constitution is the supreme law of the land, a law of lesser hierarchy, as is the Regulators' Law, cannot provide additional exceptions to that governing principle.

It should be noted that the court precedents that paved the way for this Decision consisted of administrative lawsuits brought before the TFJA. In these proceedings, general rules issued by the Energy Regulatory Commission or that should have been issued by such Commission were challenged, and they were dismissed by the TFJA based on Article 27 of the Regulators' Law.

Considering the above, it may be interpreted that the Decision opens the door for general rules or even actions or resolutions issued by the Regulators to be challenged by private parties through an ordinary defense mechanism, as is the administrative lawsuit before the TFJA, prior to the filing of an *amparo* proceeding. However, it is advisable to carry out a detailed analysis of each rule, action or resolution of the Regulators to be challenged, in order to determine what defense mechanism would be appropriate in the case in question.

In this regard, the ordinary defense mechanism consisting of the administrative lawsuit extends the scope of protection of private parties: while the *amparo* proceeding may only be commenced when a fundamental right provided for in the Mexican Constitution is transgressed, the administrative lawsuit may be commenced against any legal irregularity in the governmental action that is being challenged, and the decision issued in such administrative lawsuit may be appealed, for constitutional review, through an *amparo* proceeding.

Finally, it is important to mention that, in principle, the Decision is only binding for the judiciary, i.e. the courts of the Federal Judiciary and the TFJA. This implies the possibility that the Regulators may not abide by its contents in the event that an administrative appeal is filed with them.

For ease of reference, you may consult the Spanish version of the Decision [here](#).

For any additional information, do not hesitate to contact our expert team on energy issues and administrative litigation, that can be of assistance:

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