

Proposed Constitutional Reforms: the Judiciary overhaul and the elimination of the Independent Agencies

Mexico City, September 3, 2024

As discussed in prior memoranda, on February 5, 2024, the Federal Executive submitted to Congress 19 Bills of Amendment to the Mexican Constitution including a proposal to overhaul the Judiciary and the eradication of several autonomous agencies. Back in February, the incumbent party (Morena) and its allies in Congress (Partido Verde Ecologista and Partido del Trabajo) lacked the majority required to pass these amendments. Following a landslide victory in the past July election which gave them the constitutional majority to amend the Constitution, they have re-engaged in their efforts to pass these amendments, prioritizing the formalization of the militarization of the National Guard (currently mandated by the Constitution to be under civil command), the disappearance of independent regulators and the overhaul of the Judiciary. In this note we only touch on the proposals around the independent agencies and the Judiciary.

I. Current status and next steps

On August 23, 2024, the Constitutional Matters Committee of the Chamber of Representatives (*Cámara de Diputados*), approved the bill submitted by the Executive in connection with the disappearance of independent regulators, without making any changes thereto. On the 26th of the same month, such Committee approved the Bill submitted by the Executive proposing an overhaul of the Judiciary with a number of changes, none of which alters the substance of the proposal (both Bills are summarized below).

According to applicable law and regulations of Congress, the immediate next step is that the reports of the Committee approving the Bills proposed by the Executive be scheduled for discussion at the plenary of the Chamber of Representatives now that the new Legislature has commenced its legislative term. The reform relative to the reorganization of the Judicial branch is being discussed at the plenary of the Lower Chamber and is expected to be voted in the coming days. As noted above, the Executive and his allies in Congress now have a qualified majority in the new legislature and it is thus expected that both Bills would get the necessary votes to be approved.



After approved by the Lower Chamber, these Bills will be remitted to the Senate where the Constitutional Matters Committee will have to either approve or amend such Bills (as remitted by the Lower Chamber). With any proposed modifications, the Bills will then be turned to the plenary of the Senate to be voted. If approved on the same terms as proposed by the Lower Chamber, which is expected, as Morena and allies will likely reach a qualified majority in the Senate (they are only one vote short), the Bills will be turned to the State Legislatures (32) for their approval (first in the relevant committees and then at their respective plenaries). Once a majority of the State Legislatures so approve (which is also expected as Morena and allies have congressional control in the majority of the States), the Bills will become effective and part of the Federal Constitution.

If the Senate makes changes to any of the Bills as approved by the Lower Chamber, the relevant Bill with such changes would need to be remanded to the Lower Chamber for discussion of such changes.

In the past, this process has taken several months to be completed but this time around it seems that things are moving extremely fast and given that Morena and allies have or will have qualified majority in both chambers of Congress and in an important number of the local congresses, this could all be wrapped up and become law within the next few months.

Below is a summary of the Bills and the proposed mandates to Congress to make legislative changes that conform federal legislation to the constitutional amendments being discussed.

II. The Judiciary

Organization of the Supreme Court

The Bills propose that seats on the Supreme Court be reduced from 11 to 9 and that tenure of the justices also be reduced to 12 years instead of 15. With respect to its actual judicial work, it is proposed that going forward the Court only hears cases en banc (thus eliminating the ability to decide cases in Chambers) and that qualified majority to set binding precedent decreases to 6 votes (currently 8).

Also, the Bills propose to eliminate the power of the Court to grant injunctive relief in the case of constitutional controversies and challenges brought by government bodies against laws and regulations, as well as the power to grant relief with general effects (*erga omnes*) against laws and regulations in amparo cases. While the Supreme Court would retain the ability to make general declarations of unconstitutionality of laws and regulations, qualified majority would

remain at 8 votes (out of 9). Binding precedent, on the other hand, will require at least 6 affirmative votes.

Appointment of judges

It is proposed that Justices of the Supreme Court, Circuit Court magistrates and District Court judges be elected by direct popular vote in general elections pursuant to ballots prepared with proposals from Congress, the Executive and the Judiciary. The proposal does not allow the possibility that political parties nor independent candidates participate in this election and no public funding is proposed for such purposes, though it is proposed that candidates in the ballots be allowed to campaign (it is largely left to secondary legislation the regulation of these elections). Along the same lines, it is proposed that justices of the Supreme Court be elected for a 12-year term whereas magistrates and judges be elected for a 9 year term (except for Magistrates of the Elections Court, who would only be elected for a 6 year term).

Constitutional review powers

As with the Supreme Court, the Bill introduces a prohibition for Circuit Courts and District Judges to declare the general unconstitutionality of laws and regulations when adjudicating amparo claims and to grant injunctive relief against such laws and regulations while considering amparo claims brought before them.

Salary and benefits

A proposal is made to the effect that the salary of no jurisdictional officer can be above that of the President and that the Judiciary cannot create funds or trusts other than those approved by Congress.

Replacement of current judges

The Bills propose that all justices, magistrates and judges currently in office be dismissed on the date that replacements are elected as per the method described above. Such election would take place within the calendar year following the enactment of the proposed amendments. Transitory provisions in the proposed constitutional amendment state that Congress must legislate conforming changes to federal law within 90 days following the amendment becoming effective, while State Legislatures would have 180 days to so do. As to the actual election of judges, it is proposed that in 2025 the totality of the Supreme Court Justices be elected together with half of federal judges and magistrates, with the remaining half being replaced by elected

judges and magistrates in 2027 as stated above. The amendment states that the first election will be held on June 1, 2025.

Administration of the judiciary /creation of Disciplinary Court

The Bills propose to disappear the Judiciary Council and split its powers between an administrative office within the judiciary branch and newly-created Judiciary Disciplinary Court, which would be in charge of adjudicating disciplinary matters within the judiciary and whose members would be elected by popular vote.

Tax controversies and criminal proceedings

The Bills propose that major (threshold to be determined by Congress) tax controversies before administrative courts or the judiciary branch be adjudicated within 6 months and that failure to observe such term would be reported to the Disciplinary Court (or the applicable disciplinary board, in the case of administrative courts). It also mandates that, when criminal proceedings are not adjudicated within the timeframes set forth in the Constitution, such circumstance must be reported to the Disciplinary Court.

Implementation

The constitutional amendment would need to be reflected in actual legislation that accommodates these changes, but also policy changes that the new administration and Congress wish to introduce in terms of judicial organization and proceedings, provided these changes are consistent with the approved Bill.

III. Independent Agencies

Antitrust enforcers and telecoms regulator

The Bills propose the disappearance of the Federal Economic Competition Commission ("COFECE") and the Federal Telecommunications Institute ("IFT"), and that thereafter the power to enforce antitrust laws across all industries and markets be transferred to an office within the Executive (presumably the Ministry of Economy) in charge of the general industry, commerce (domestic and foreign), supply and prices policies, whereas the powers to regulate the telecommunications and broadcasting industries and apply antitrust laws in such spaces would be transferred to the office within the Executive (presumably the Ministry of Infrastructure, Communications and Transport) in charge of defining the general policies for such industries.

Judicial relief against new regulators

The Bills propose that to the extent that the relevant offices of the Executive carry out the powers that currently vest on COFECE and IFT, their actions and regulation would only be subject to judicial review pursuant to amparo petitions, which would in turn would only be admissible against definitive decisions and would not grant injunctive relief.

Energy regulators

The Bill proposes the disappearance of the National Hydrocarbons Commission ("CNH") and the Energy Regulatory Commission ("CRE"), which regulate the different activities in the hydrocarbons and electricity sectors. Their respective powers would be transferred to an office within the Ministry of Energy of the Executive, which would thereafter be responsible for the technical and economic regulation in the energy and hydrocarbons industries and the enforcement of applicable laws within such industries and their respective markets.

Transparency and data protection

The Bills propose the disappearance of the National Transparency and Data Protection Institute ("INAI"), whose powers over access to public information and transparency would be distributed among comptrollers and similar offices within the Executive Branch, Congress, the Judiciary and autonomous bodies, respectively; the Elections Board with respect to political parties and labor authorities with respect to unions. The powers currently vested on INAI with respect to data protection would be transferred to the Executive, which would in turn be responsible for enforcing data protection laws and the rights afforded to data subjects thereunder.

Evaluation of social and education policies

The Bills also propose the disappearance of the National System for the Continuous Improvement of Education, which is currently accountable for measuring the level of achievement of educational goals, and that going forward it be the Ministry of Education (which is in charge of achieving such goals) the agency that evaluates itself.

Likewise, the Bills propose the disappearance of the National Council for the Evaluation of the Social Development Policies, which measures poverty and evaluates the governmental programs, objectives, goals and actions in the field of social development, in order to transfer these responsibilities to the National Geography and Statistics Bureau.

Pending proceedings and succeeding agencies

All agencies will continue to exist and function until their replacements are appointed and take office. This, and other features of the constitutional amendment would need to be reflected in actual legislation that accommodates the new institutional design mandated therein and the changes that the new administration proposes to enforce telecommunications, competition, energy, data protection and transparency laws. Currently these are autonomous bodies with a Board and staff but, as their powers will be absorbed by ministries within the administration, it is unclear if the succeeding authorities will be commissions or agencies within such ministries (i.e., collegiate bodies) or mere departments. Transitory provisions in the proposed Bill state that a new law must be enacted within 90 days following the amendment becoming effective, but it is unclear if that would even be achievable.

As far as pending proceedings goes, the transitory provisions of the proposed Bill only state that action taken by the disappearing agencies prior to their abolishment shall remain in full force and effect. This is somehow ambiguous and would certainly need to be clarified in the final Bill (assuming Congress wishes to so do at this time) or when secondary legislation is enacted. In terms of precedent, back in 2013 when COFEC replaced COFECO and IFT replaced the Federal Telecommunications Commission, both the constitutional amendment and the decree that enacted secondary legislation contained a specific provision to the effect that proceedings pending at the date of entry into force of the relevant decree, were to be conducted in accordance with the provisions in force at the time when they were brought. This is something that is currently not in the proposed Bill but can (and should) be addressed in the transitory provisions of implementing legislation.

IV. How can we help?

It is critical to bear in mind that the overhaul of the Judiciary and the new institutional design of competition, telecommunications, energy and transparency regulators (among others) will bring significant changes to the way in which companies and individuals go about the legal affairs of their businesses, and will likely require adaptation and focus not only on litigation and regulatory aspects, but also on related matters such as compliance, jurisdiction and arbitration clauses in contracts, and treaty protection decisions when setting up investment structures. All these challenges must be approached holistically.

At the same times, these changes will likely face important challenges in their implementation, due to the number of judges, magistrates, justices, commissioners and other federal employees that will have to be appointed or replaced. At the same time, these changes will likely have long-term consequences, the full extent of which will not be possible to assess for several years. All

these will, in turn, likely result in increased noise and inflammatory discourse that may disrupt the business ecosystem.

However, as a Firm, we believe of utmost importance to be prepared to face the new challenges and understand that the Judiciary will not disappear, but will be different; and that regulation will not go away, but regulatory processes will change and the technocratic approach that already faded away in this administration, will likely be significantly reduced with the next government.

While some proceedings and resources will likely become more cumbersome, others, such as alternative dispute resolution mechanisms, may become a suitable alternative to litigation. Along the same lines, it will now more than ever be of great importance to maintain a proactive and effective approach with authorities and to increase compliance efforts as it is clear that the main driver behind these amendments is to strengthen the powers of the Executive and its agencies.

We believe we are uniquely positioned to assist our clients in this transition and to partner with them in facing the challenges that these amendments and the new political landscape will bring. Over the past few years, we have been in the frontline, side-by-side with our clients, helping them successfully navigate through complex controversies and proceedings; we know what is coming, because we have seen it firsthand. In Galicia, our 35 practices come together to provide our clients with a comprehensive service, bringing to the table extensive and sophisticated public sector knowledge, unrivaled business-oriented approach and expertise, and our unrelenting commitment to better agreements and better understandings.

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