

Resolution of the Unconstitutionality Actions 82/2021 and 86/2021 filed by INAI and members of the Mexican Congress against the PANAUT

Mexico City, April 27, 2022

The Mexican Supreme Court of Justice ("SCJN"), in a plenary session held on April 25, 2022, discussed the unconstitutionality actions 82/2021 and its accumulated 86/2021 (the "Actions of Unconstitutionality"). Such actions were filed by the National Institute of Transparency, Access to Information and Personal Data Protection (the "INAI") and by some members of the Mexican Congress against the amendment to the Federal Telecommunications and Broadcasting Law, which created the National Registry of Mobile Telephony Users (the "PANAUT" or the "Decree"), published in the Official Gazette of the Federation on April 16, 2021. The following is an analysis of the most relevant issues of such discussion and its consequences.

Which topics were discussed by the SCJN?

The decree which created the PANAUT stipulated that the owners of mobile telephone lines — both individuals and legal entities— were compelled to provide the government the following information: **(i)** Mobile telephone number; **(ii)** Date and time of activation of the mobile telephone line; **(iii)** Full name of the user or name of the company which owns the line; **(iv)** Nationality; **(v)** Official identification number with photograph or Clave Única de Registro de Población of the holder of the line; **(vi)** Biometric data of the user and, if applicable, of the legal representative of the legal entity, in accordance with the general administrative provisions issued by the Institute; **(vii)** Address of the user; **(viii)** Data of the telecommunications operator; and **(ix)** Mobile telephone line contracting scheme, whether post or pre-paid.

The aforementioned, under the consideration that such data was needed in order to collaborate with the security authorities for the prosecution of crimes in which the use of a mobile device was involved.

In this regard, the Justices of the SCJN reviewed the constitutionality of the Decree by using a proportionality test.

What did the SCJN rule?

Firstly, the existence of a violation of the legislative process by the chambers of the Mexican Congress was analyzed by the SCJN. On such matter, the Justices concluded that there was no violation of the aspects of due legal justification and due motivation, nor with respect to the vote carried out by the United Commissions of Communications and Transportation and Legislative Studies.

This, since it was considered that the lawmakers acted within the powers granted to them by the Constitution (due legal justification) and that they regulated a social relationship that is legally relevant (due motivation). In addition, the SCJN considered that the votes taken by the United Commissions were in accordance with the law, since there is no rule requiring that the opinions resulting from joint commissions work must be approved in the same act by the majority of the members of such commissions.

Subsequently, the SCJN analyzed the constitutionality of the Decree and ruled their total voidness based on the result of the proportionality test, in accordance with the following:

Assessment of an affectation of Human Rights. The PANAUT does affect the human rights of privacy and personal data protection, since it conditions citizens to provide personal data in exchange for the possibility of obtaining access to or keeping their telephone lines.

1. Pursuit of a constitutionally valid end. The PANAUT pursues a constitutionally valid end, since it seeks to collaborate with security authorities in the prosecution of crimes in which the use of a mobile device was involved.
2. Suitability of the measure. Regarding this step of the examination, the Justices concluded that the PANAUT is suitable for the achievement of its purpose, given that there is a means-end relationship between the Decree and the fight against the crimes referred to in the previous paragraph.
3. Necessity of the measure. However, regarding the necessity of the measure, **the SCJN determined that there are alternative measures**—such as those contemplated in the Federal Telecommunications Law itself and in the National Code of Criminal Procedures—**that achieve the purpose intended by the PANAUT while also being less restrictive of the human rights of personal data and privacy protection.**

The above lies that such alternative measures do not grant unrestricted control to the State over the information of individuals, but are subject to judicial authorization that requires a link between the conduct investigated by the authority and the data of the person to be disclosed.

Moreover, the implementation of such alternative measures does not imply a generalized violation of rights, but is limited to those persons who are being investigated as a result of a court order.

On the other hand, in terms of temporality, the alternative measures are limited to a certain period, while the PANAUT does not provide for how long the information of individuals will remain in the hands of the State.

Finally, the SCJN explained that the existence of other governmental personal databases is motivated by the need to guarantee collective benefits or to allow access to other human rights, which is not the case in this particular scenario, given that the purpose of PANAUT is to monitor cell phone users.

Given the existence of alternative measures, which are more effective and less restrictive to the human rights of protection of personal data and privacy, it was concluded that the PANAUT does not pass the third step of the proportionality test and should therefore be declared unconstitutional by the Court.

What was the result of the vote?

In order to declare the unconstitutionality of any law, with the effect of invalidating it, **the vote of at least eight (8)** of the eleven (11) Justices that make up the plenary of the SCJN is required. If the eight votes are not obtained, the action of unconstitutionality is dismissed and the law in question remains in force.

In the case, by a majority of 9 to 2, the necessary votes to invalidate the entire Decree were achieved. The Justices who dissented from the project were: Ana Margarita Ríos Farjat and Alberto Pérez Dayán.

In the session of April 26, 2022, the Justices unanimously approved the effects and resolutions of the ruling on the unconstitutionality action, **which resulted in the total invalidity of the Decree.**

Regarding the constitutional controversy number 71/2021, filed by the Federal Telecommunications Institute, the Justices dismissed it, given that the invalidity of the PANAUT had already been determined in the preceding case.

As a result of the ruling issued by the SCJN, it is highly probable that the *amparo* actions filed against the PANAUT will be dismissed by the courts currently hearing them.

At Galicia Abogados we are prepared to assist you in relation to any proceedings related to the effects of the SCJN ruling discussed in this note.

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