

STATE LIABILITY: IMPLICATIONS OF DEFICIENT SUPERVISION BY THE NATIONAL BANKING AND SECURITIES COMMISSION

JANUARY 2025

Executive Summary:

- On January 10, 2025, the Twentieth Collegiate Court on Administrative Matters of the First Circuit published the thesis with digital registration number 2029799 under the heading: "STATE LIABILITY. IT MAY BE GENERATED BY THE DEFICIENT PREVENTION, MONITORING, AND SUPERVISION OF THE NATIONAL BANKING AND SECURITIES COMMISSION (CNBV) OF A FINANCIAL ENTITY."
- This thesis establishes a relevant criterion for determining the State's liability for omissions or deficiencies in the CNBV's supervisory functions over financial institutions.

On January 10, 2025, the thesis of the Twentieth Collegiate Court on Administrative Matters of the First Circuit was published in the Federal Judicial Weekly. It outlines the obligation of the National Banking and Securities Commission (CNBV or the Commission) to prevent, supervise, and monitor financial entities to ensure their stability and proper functioning, in protection of public order and social interest.

This criterion originates from a claim for damages filed by an individual against the State, arguing that the CNBV had engaged in deficient supervision of a credit institution. The CNBV denied such liability; therefore, the claimant filed an administrative lawsuit, where the Federal Court of Administrative Justice upheld the validity of the CNBV's resolution by applying the thesis 2a. XVIII/2020 of the Second Chamber of the Supreme Court of Justice of the Nation (SCJN). In said thesis 2a. XVIII/2020 (10th), titled "NATIONAL BANKING AND SECURITIES COMMISSION (CNBV). THE REFUSAL TO INTERVENE WITH POPULAR FINANCIAL SOCIETIES AT RISK DOES NOT CONSTITUTE A

CAUSE OF STATE LIABILITY NOR GENERATE A RIGHT TO COMPENSATION IN FAVOR OF THIRD PARTIES, AS IT IS A DISCRETIONARY POWER GRANTED BY LAW," the SCJN's Second Chamber established that:

1. The CNBV has discretionary powers to ensure the proper functioning of financial entities, as the law grants it broad discretion to decide whether to act or abstain, when and how to act, and even to freely determine the content of its potential actions.

2. To establish State liability for inaction, there must be a legal duty to act.

However, notwithstanding the SCJN's Second Chamber's criterion, the Twentieth Collegiate Court determined that the CNBV's omissions, particularly deficiencies in preventing, monitoring, and supervising regulated entities, could generate State liability. This is because the CNBV, as a decentralized body of the Ministry of Finance and Public Credit, regulated by the Credit Institutions Law, is obligated

o act diligently and promptly to protect the financial system's users' assets.

Furthermore, this new criterion underscores that the CNBV's discretion must not be interpreted as an absolute power that justifies omissions or arbitrary acts. Instead, such discretion must align with legal principles, ensuring that the Commission's actions do not expose savers to unnecessary or foreseeable risks.

Additionally, it highlights that irregular administrative actions by decentralized bodies can severely impact citizens' property rights, thereby creating a legal basis for State liability. This principle could be applied by analogy to various public administration entities exercising discretionary powers.

We consider the publication of this thesis to be a significant precedent in the context of administrative litigation and financial law. Moreover, it marks a meaningful shift in the perception of regulatory authorities' obligations, promoting greater diligence in their performance. Indirectly, it encourages regulatory authorities to review and, where necessary, strengthen their supervisory and oversight procedures.

Roberto Fernández del Valle
Partner
rfernandez@s-s.mx

Mariano Calderón
Partner
mcalderon@s-s.mx

Carlos Brehm
Partner
cbrehm@s-s.mx

Alexa Zuani
Associate
alexa.zuani@s-s.mx