

The Federal Competition Commission (*Comisión Federal de Competencia Económica*) ("COFECE" or the "Commission") issued a **non-binding** opinion by means of which it declared that the competition process in gasoline and diesel markets is currently affected by different governmental authorities of the Mexican State, mainly for the benefit of the Economic Agent with substantial market power, namely *Petróleos Mexicanos* ("PEMEX"). To substantiate the foregoing, the Commission describes the inadequate, and potentially discriminatory application of regulation by the Ministry of Energy (*Secretaría de Energía*) ("SENER"), the Ministry of Economy (*Secretaría de Economía*) ("SE"), the Energy Regulatory Commission (*Comisión Reguladora de Energía*) ("CRE"), and the National Commission of Regulatory Enhancement (*Comisión Nacional de Mejora Regulatoria*) ("CONAMER"), against the participants, or potential participants, of such markets. Consequently, COFECE recommends such authorities to modify their application of relevant regulation for purposes of protecting the competition process and avoid harming consumers in the referred relevant markets.

I. Analysis and executive summary of the opinion.

The Federal Competition Act (*Ley Federal de Competencia Económica*) ("FCA" or the "Law") defines different faculties of the Commission, including, amongst others, issuing opinions, either unilaterally or by prior request of any party. Even though these opinions are not binding, such tool allows the autonomous constitutional organism to interact with other authorities and Economic Agents to try to resolve competition issues by alternative mechanisms, signaling different problems to the competition process and issuing recommendations on how to address them. Likewise, it is a tool available to the public, which binds the Commission in order to formally acknowledge its position in such matters and issue a substantiated analysis regarding commercial conducts and different actions that may result in anti-competitive objectives or consequences.

In view of the foregoing and the content of opinion OPN-007-2020 (the "Opinion"), it seems like it was issued for two main reasons. First, the interest of certain market participants in relevant markets of the gasolines and diesel to restore competition conditions in order to try to compete against PEMEX, through a – non-dispute– strategy, based in Mexican competition and antitrust legislation. Second, the interest of COFECE to formally reiterate its position with regard to the inefficient operation and the possible anti-competitive conducts that have been performed and materialized in the different hydrocarbons sector markets, but focusing on public retail of petrol. In this regard, it appears that the Opinion may be based on the various *amparo* claims that have been made in the electricity sector, in which the Commission has been called as responsible authority for not acting against anti-competitive conducts probably performed, unilaterally or coordinated at least by SENER, SE, CRE, CONAMER, PEMEX, the National Energy Control Center (*Centro Nacional de Control de Energía*) ("CENACE") and the Federal Electricity Commission (*Comisión Federal de Electricidad*) ("CFE"). In this regard, the Opinion states that many conducts over which it issues recommendations may favor the use of PEMEX's hydrocarbons and oil products over those held or provided by other Economic Agents, and which, incidentally, in the absence of such conducts, PEMEX may not be able to commercialize as they currently do so.

By virtue of the previous analysis, the most relevant elements of the Opinion are described in the following paragraphs, from a commercial and legal perspective. First and foremost, the Commission explained that it considers that there are sufficient elements to consider that PEMEX has substantial power in the Mexican hydrocarbons, gasoline and diesel markets, in the segments of i) exploration and production; ii) importation; iii) refining; iv) wholesale; v) storage; vi) transport and viii) retail. To substantiate the foregoing, COFECE establishes that PEMEX has market shares of almost 90% in several of the above-mentioned segments, while the remaining 10% is scattered and held amongst many private parties. Therefore, the Commission considers that such markets are still extremely concentrated and final users have been paying higher prices to those that they would pay in markets where there were more participants with higher market shares.

Furthermore, the Commission suggests that it is possible that SENER, SE, CRE, CONAMER, and PEMEX, either unilaterally or in coordination, are performing anti-competitive conducts with the object or effects of displacing competitors that are intending to enter, or participate, in the hydrocarbons, gasoline and diesel markets. Moreover, the Commission seems to suggest that, since the loss of its quorum, CRE has lost its independence. Amongst the possible anti-competitive conducts identified by COFECE, the following are the most relevant, even though they are not named as such in the referred document:

- i. *Establishing entry barriers against the investment to develop storage and transportation infrastructure, as well as to the effective participation in the import, wholesale, and retail segments.* According to the Commission, this is based on the fact that the SE, SENER and CRE deny or delay the granting or assignment of the necessary permits to allow, or at least encourage these activities to be carried out by players other than PEMEX¹, and revoke or terminate them without any basis (either formally or on a *de facto* basis). Pursuant to the Opinion, this is not justifiable and it is disproportionate and discriminatory, by virtue of such discrimination being done over inconsequential elements such as the nationality and brand of participants.
- ii. *Refusal to deal or discriminatory access to essential facilities.* This is based on three reasons. First, PEMEX controls almost 80% of the storage and transportation infrastructure in Mexico and has a presence considered being five times larger than any other participant in existing Mexican ports. Second, even though the open season concepts exists in applicable legislation, CRE has not implemented it since 2018². Third, SENER has reduced even more the minimum inventory requirement for petrol and eliminated incentives for purposes of increasing strategic inventory goals, which are still established in the regulation in order to encourage the construction of infrastructure. This against (and

¹ The Opinion states that: "there are at least 229 requests related to brands different to PEMEX in petroleum derivate products, [...] that have not been resolved. These requests refer to, amongst others, (i) assignment modifications; (ii) updates to permits for changes in brand or product; and (iii) new retail permits.

² Although the Opinion mentions that the CRE is the relevant entity in charge of open seasons, Pemex Logística is the entity which in fact convened and carried out the same, while the CRE is authority that regulates and supervises them.

far below from) international standards to ensure an adequate supply of hydrocarbons, situation that also creates a concern in national security matters.

- iii. *Boycott or establishment of exclusive, discriminatory or undue advantages in favor of PEMEX.* This is based on the fact that the actions of the previously mentioned Economic Agents have been exempted from the Regulatory Impact Analysis (*Análisis de Impacto Regulatorio*) that should have been performed before CONAMER. Furthermore, and unlike PEMEX, individuals are bound to complying with disproportionate bureaucratic procedures, and sometimes duplicated in local regulations, in which there seems to be evidence that priority is given to those performed by PEMEX, even under equal circumstances. The Commission also seems to have sufficient grounds to refer that since the loss of its quorum, the CRE analyzes (and prefers) permit applicants that have commercial relations and contracts with PEMEX from those that are requested from other market participants.

Finally, the Commission states that it considers that the aforementioned activities have encouraged the structure of the pertaining markets to remain concentrated, and even maintaining the monopoly structure that the energy reform intended to eliminate. According to the Commission, the small number of participants and the dominance of PEMEX has caused consumers in Mexicans markets to pay overprices and in turn, for providers to increase their profit margins, since they do not have any incentives to drive prices down, even though international prices of petrol have decreased significantly. In this regard, it should not go unnoticed that COFECE estimates that of the average price of regular gasoline paid by consumers, 47% is actually to pay for the cost of gasoline (considering raw materials and refining), and the rest is used to pay for transportation costs and profit margins of service stations. In other words, the added cost of the entire market chain is greater than the price of the materials. If we add to this the fact that the Economic Agent with substantial power, namely PEMEX, dominates the existing infrastructure, it is clear that said Economic Agent is the main beneficiary of said actions, which are not allowing the benefits of price fluctuation to reach the Mexican final consumers in the form of lower prices.

Furthermore, the Commission states that the sector's business models have not evolved, nor are differentiating, to increase the welfare of consumers in Mexico. This since such regulation establishes unjustified requirements, which lack rationality or are duplicated, such as the establishment of minimum distances between service stations and the duplication of the request for an Environmental Impact Statement. In addition, the erroneous application of the established regulation and its execution by the aforementioned entities as well as local authorities has furthered complicated improvement possibilities in such markets. COFECE concludes that this translates into a loss of well-being, which mainly affects consumers who could benefit from innovative business models, such as smaller and cheaper gas stations that could be economically viable in remote areas.

Hence, the Commission recommended to SENER, SE, CRE and CONAMER to: i) eliminate the barriers for the granting and transmission of permits to participate in the sector; ii) eliminate the barriers to retain the permits, and prior recognized rights; iii) avoid discriminating against or favoring certain Economic Agents; iv)

accelerate the bureaucratic procedures required to participate in the relevant markets; v) guarantee transparency and legal certainty to the economic agents with which they interact, and vi) encourage local authorities to eliminate the regulatory barriers and obstacles that distort the relevant markets in their territory.

As mentioned above, the opinions issued by COFECE under the aforementioned articles are not binding to the Economic Agents to whom they are addressed. Nevertheless, it is important to keep in mind that its recommendations, and mainly, the reasons found to issue them, can be used by the affected participants who wish to formally denounce anticompetitive practices before COFECE, as well as the filing of diverse claims for damages in their legal sphere.

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