

## THE APPLICATION OF THE ANTITRUST LAW UNDER THE NEW RULES OF THE OIL AND GAS INDUSTRY IN MEXICO

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**Synopsis:** The Mexican Congress approved modifications and reforms to the oil and gas industry in 2013 and 2014, together with the promulgation of a new Federal Competition Law (Antitrust Law). The energy reform finally allows the participation of private economic agents in all phases of the oil and gas industry. The Antitrust Law's purpose is to provide better legal tools and venues to protect competition and free access to the Mexican market including the oil and gas industry by eliminating or regulating monopolies, absolute and relative monopolistic practices, concentrations, as well as other unfair trade activities that may affect the free flow of goods and services in the most important economic activity in Mexico. The oil and gas industry is transitioning from a *de jure* monopolistic market to a mix of open market practices, where the public sector will be participating through the so-called Productive State Entities while the private sector will act through individuals, corporations, associations, business chambers, groups of professionals, trusts, and other forms of participation.

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## I. INTRODUCTION

During the administration of President Enrique Peña Nieto, especially at the end of 2013 and 2014, several laws were modified, supplemented, incorporated, or abrogated with the purpose of allowing private investment (national or foreign) in the energy sector. These included: (1) changes to Articles 25, 27 and 28 of the Constitution;<sup>1</sup> (2) the promulgation of a new oil and gas law named the “Hydrocarbon Law;”<sup>2</sup> (3) the Hydrocarbons Revenue Law;<sup>3</sup> and (4) the new Petróleos Mexicanos Law (Pemex Law)<sup>4</sup> (together referred as the “2014 Energy Reform”). These various modifications and reforms effectively opened all sectors of the oil and gas industry to the participation of the private sector. Now, public, private, and social economic agents (either national or foreign) will be able to participate in: (1) upstream activities, through allotments or contracts granted to the so-called Productive State Entities such as Petróleos Mexicanos (Pemex); (2) mid-stream and downstream activities; and (3) alliances and partnerships with Pemex and any Productive State Entity.

In addition to the modifications to the energy legal system, a new Antitrust Law was promulgated in Mexico.<sup>5</sup> The need was clear: (1) the Mexican

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1. Decreto por el que se Reforman y Adicionan Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía [Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters], *as amended*, Diario Oficial de la Federación [DO], 20 de Diciembre de 2013 (Mex.).

2. Ley de Hidrocarburos [Hydrocarbon Law], art. 3, transitory 2, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

3. Ley de Ingresos sobre Hidrocarburos [Hydrocarbon Revenue Law], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

4. Ley de Petróleos Mexicanos [Petróleos Mexicanos Law], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.) [hereinafter Pemex Law].

5. Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], *as amended*, Diario Oficial de la Federación [DO], 23 de Mayo de 2014 (Mex). As part of Mexico’s international economic policy, based

government seeks to avoid passing on public legal or *de-jure* monopolistic practices to a regime of private *de facto* monopolistic practices, which historically have been more difficult to regulate; and (2) the government also seeks a redistribution of powers and faculties between the Federal Competition Commission (*Comisión Federal de Competencia*—the “Antitrust Commission” or the “Commission”) and the energy public entities as described below.

The impetus behind the decision to abandon the mistaken nationalist vision of placing all phases of the oil and gas industry in the controlling hands of the Mexican government for more than fifty-six years include: (1) the collapse of oil prices in the mid-eighties and the modern time since 2015; (2) recognition that existing legal restrictions were a disincentive for the participation of the private sector (national or foreign) with their desired experience, technology, and capital; (3) Pemex’s revenue going directly to the Mexican Treasury and leaving very few profits for re-investment in activities such as exploration, exploitation, refining, petrochemicals, and maintenance. In fact, Pemex has become the largest and most important taxpayer in Mexico.<sup>6</sup>

These modifications are important not only for the Mexican oil and gas industry, but also for the local and foreign private industry that wishes to participate in this sector. They will be analyzed in this article, with a focus on explaining: (1) the new regulatory scheme in Mexico; and (2) the array of legal protections to be provided to national and foreign concerns through several new competition provisions established in different legal ordinances, including various limitations on the general powers of the public entities involved in this sector.

## II. GENERAL LEGAL FRAMEWORK APPLICABLE TO THE OIL AND GAS INDUSTRY AND THE ANTITRUST LEGAL SYSTEM

In the past, most of the laws applicable to the Mexican oil and gas industry were related to public policy laws, since Mexico has a *de-jure* monopolistic energy industry. However, the new legal regime establishes Pemex as another competitor in the industry whereby private law is also applicable to Pemex. The Mexican oil and gas industry is now more transparent and fair since the modified antitrust legal system applies to all entities that participate in the oil and gas industry, notwithstanding a variety of existing laws and Constitutional provisions. The most im-

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in part on free trade and foreign investment, the Mexican Congress promulgated the former Federal Antitrust Law on December 24, 1992. However, the new Antitrust Law abrogates the former Law on May 23, 2014. *Id.*, transitory 4. For a better understanding of the application of the Antitrust Law before the 2014 Energy Reform, see Alejandro López-Velarde, *The Application of the New Antitrust Law in the Energy Industry in Mexico*, 15 LATIN AMERICAN LAW & BUSINESS REPORT 19 (2007).

6. Elisabeth Malkin, *With Oil Revenue Dropping, Mexico Announces Budget Cuts*, N.Y. TIMES (Jan. 30 2015), [https://www.nytimes.com/2015/01/31/world/americas/with-oil-revenue-dropping-mexico-announces-budget-cuts.html?\\_r=0](https://www.nytimes.com/2015/01/31/world/americas/with-oil-revenue-dropping-mexico-announces-budget-cuts.html?_r=0).

portant of these applicable laws to this sector are the following: (1) the Constitution;<sup>7</sup> (2) the Hydrocarbons Law;<sup>8</sup> (3) the Pemex Law;<sup>9</sup> (4) the Hydrocarbons Revenue Law;<sup>10</sup> (5) the Foreign Investment Law (FIL);<sup>11</sup> (6) the Regulations of the Antitrust Law;<sup>12</sup> (7) the Law on the National Security Industrial Agency and the Environmental Protection in the Hydrocarbon Sector;<sup>13</sup> (8) the Mining Law;<sup>14</sup> (9) the Regulatory Bodies in Energy Matters Law;<sup>15</sup> (10) the Law of the Mexican Petroleum Fund for Stabilization and Development;<sup>16</sup> (11) Law on Public-Private Partnerships;<sup>17</sup> (12) Federal Budget and Fiscal Responsibility Law;<sup>18</sup> and (13) the General Law of Public Debt<sup>19</sup> among others.

### III. SCOPE AND APPLICATION OF THE ANTITRUST LAW

The Mexican Congress promulgated the new Antitrust Law in May 2014. Its purpose is to protect competition in the Mexican marketplace, including the oil and gas industry, by eliminating and regulating monopolies, monopolistic practices, concentrations and other acts that may affect the free-flow of goods and services. The general goal of the Antitrust Law is not only to guarantee that investors

7. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, at arts. 25, 27-28.

8. The Hydrocarbon Law abrogates the Regulatory Law to Article 27 of the Mexican Constitution in the Petroleum Sector (Petroleum Law) and amended the Foreign Investment Law, the Mining Law, and the Public and Private Association Laws. Hydrocarbon Law, *supra* note 2, at art. 3, transitory 2.

9. The Pemex Law abrogates its predecessor law published on November 28, 2008, and it also derogates the Federal Law of Paraestatal Entities [Ley Federal de las Entidades Paraestatales]; the Law of Acquisitions, Leasings, and Services of the Public Sector [Ley de Adquisiciones Arrendamientos y Servicios del Sector Público]; the Public Works and Related Services Law [Ley de Obras Públicas y Servicios Relacionados con las Mismas]; and any and all legal and administrative provisions contrary to this law. Pemex Law, *supra* note 4, art. 6, transitory 2.

10. This new legal ordinance abrogates and adds several provisions of the Federal Fiscal Rights Law [Ley Federal de Derechos] and the Fiscal Coordination Law [Ley de Coordinación Fiscal]. Hydrocarbon Revenue Law, *supra* note 3, transitories 3-5.

11. Ley de Inversión Extranjera [LIEIX] [Foreign Investment Law], *as amended*, art. 5(I)-(II), Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

12. Reglamento de la Ley Federal de Competencia Económica, [Regulations of the Antitrust Law], Diario Oficial de la Federación [DO], 12 de Octubre de 2007 (Mex.).

13. Ley de la Agencia Nacional de Seguridad Industrial y de Protección al Medio Ambiente del Sector Hidrocarburos [Law on the National Industrial Security Agency and Environmental Protection in the Hydrocarbon Sector], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

14. Ley Minera [Mining Law], *as amended*, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

15. Ley de los Órganos Reguladores Coordinados en Materia Energética [Regulatory Bodies in Energy Law], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

16. Ley del Fondo Mexicano del Petróleo para la Estabilización y el Desarrollo [Law of the Mexican Petroleum Fund for Stabilization and Development], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

17. Ley de Asociaciones Público Privadas [Law on Public-Private Partnerships], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

18. Ley Federal de Presupuesto y Responsabilidad Hacendaria [Federal Budget and Fiscal Responsibility Law], Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

19. Ley General de Deuda Pública [General Law of Public Debt], *as amended*, Diario Oficial de la Federación [DO], 11 de Agosto de 2014 (Mex.).

who wish to participate in the Mexican market will encounter a market free of monopolistic practices, but also that the Mexican government will now allow the participation of the private sector in the up, mid, and downstream areas of the industry through transparent legal rules which prohibit absolute and relative monopolistic practices and concentrations.<sup>20</sup>

The reach of the Antitrust Law is purposefully broad and it has been a matter of discussion and interpretation by establishing the meaning of economic agent in the following terms: “Economic agent: any individual or corporation, with or without profit aims, *public entities and agencies of the federal, state or municipal administration*, associations, business chambers, groups of professionals, trusts, or *any other form of participation in economic activity*; ....”<sup>21</sup>

As can be seen, the broad definition includes agencies and entities of the Mexican government in its three levels: federal, state and municipal. That is to say, a public agency such as Pemex and its subsidiaries shall observe the terms and conditions of the Antitrust Law since this legal ordinance is a stringent public policy-based law, which cannot be avoided by the public instrumentalities dealing with administrative contracts through public tender proceedings; authorizations; registrations; and further administrative proceedings which grant the possibility to participate in the oil and gas market according with the 2014 Energy Reform.<sup>22</sup>

For a better understanding, we provide an explanation below of the participation of Pemex and other public agencies such as the Ministry of Energy (SENER),<sup>23</sup> the National Hydrocarbons Commission (CNH),<sup>24</sup> and the Regulatory Energy Commission (CRE)<sup>25</sup> in the oil and gas industry including their powers related with antitrust issues as follows.

#### A. Pemex as Productive State Entity

Before the modifications and reforms to the industry, Pemex and its subsidiaries were considered decentralized public entities of the federal Mexican government. This legal status required Pemex to follow and observe the terms and conditions established in the Mexican Procurement Laws such as the Public Acquisitions, Leases and Service Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*) and the Public Works and Related Services Law (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*). Now, Pemex is considered a Productive State Entity (*Empresa Productiva del Estado*) and will be able to incorporate Productive Subsidiary Entities (jointly referred to as “Pemex”) and affiliate companies being the owner of Pemex the Mexican federal government without the need to follow the Procurement Laws above-mentioned.<sup>26</sup> Pemex is granted independent legal status created for the purpose of managing and developing industrial and commercial activities for all activities related to the

20. Federal Antitrust Law, *supra* note 5, arts. 1-2. See Alejandro López-Velarde, *supra* note 5, at 19.

21. *Id.* arts. 3(I), 4 (emphasis added).

22. *Id.* arts. 1, 3(I). See Alejandro López-Velarde, *supra* note 5, at 19.

23. *Secretaría de Energía* (SENER).

24. *Comisión Nacional de Hidrocarburos* (CNH).

25. *Comisión Reguladora de Energía* (CRE).

26. Pemex Law, *supra* note 4, art. 2.

Mexican petroleum and gas industry, generating economic value and increasing the profits of the Nation in accordance with the terms of the Pemex Law and the Hydrocarbons Law.<sup>27</sup>

### B. Ministry of Energy (SENER)

SENER is granted broad and discretionary powers, not only in the oil and gas industry, but also on the decisions of application of sanctions by undue participation in the oil and gas by economic agents as follows.

#### 1. Upstream Activities

SENER with the technical assistance of the CNH, will award to Pemex or any other Productive State Entity, the allotments (*asignaciones*) for exploration and extraction established in Article 27, paragraph 7 of the Constitution.<sup>28</sup> Then, Pemex or any Productive State Entity will be able to request SENER to assign the allotments to the private sector<sup>29</sup> and the private sector will be able to participate in the development of such allotments through a bidding process with CNH for the granting of the administrative contracts. Further, SENER has the possibility to determine the applicable contract for upstream activities (i.e. services, utility, participation, license, or some combination of these contracts) and to assign the allotments to the private sector.<sup>30</sup>

#### 2. Midstream and Downstream Activities

In these activities SENER was given much discretion in the application of the Antitrust Law since it may revoke permits granted to economic agents if they have not abided the resolutions issued by the Antitrust Commission in activities such as the processing and refining of oil, processing of natural gas, and export and import of hydrocarbons and fuels.<sup>31</sup>

#### 3. Productive State Entities

SENER also has the power in the implementation of sanctions against Pemex and its subsidiaries to instruct, by itself or on a proposal from CRE or the Antitrust Commission, to carry out the necessary actions to ensure that Pemex's activities and operations do not hinder competition and the efficient development of the markets.<sup>32</sup>

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27. *Id.* arts. 4-5. For a better understanding of Pemex legal status and powers before the 2014 Energy Reform, see Alejandro López-Velarde, *The New Foreign Participation Rules in Each Sector of the Mexican Oil and Gas Industry: Are the Modifications Enough for Foreign Capitals?*, 3 J. WORLD ENERGY L. & BUS. 71, 74-76 (2010).

28. Hydrocarbon Law, *supra* note 2, arts. 6-7.

29. *Id.* art. 12.

30. *Id.*

31. *Id.* arts. 48(I), 56(IX), 80(I).

32. *Id.* arts. 80 (III), 81(IX).

### *C. Regulatory Bodies in the Oil and Gas Industry*

Pursuant to the Regulatory Bodies Law, the following commissions regulate the oil and gas industry.

#### 1. National Hydrocarbons Commission (CNH)

Upstream activities in Mexico were previously one of the major oil and gas markets in the world off limits to private participation. This changed with the 2014 Energy Reform. Pemex is no longer the public company granting upstream contracts. Now, the private sector can participate in the exploration and extraction activities through administrative contracts to be granted by the CNH. The CNH is the entity that regulates the upstream activities and participates in the granting of administrative contracts carrying out the public tender,<sup>33</sup> the technical administration of allotments and contracts, and the regulation of exploration and extraction of hydrocarbons.<sup>34</sup> Further, the CNH is the governmental body in charge of authorizing the alliances and partnerships between Pemex and the private sector through a bidding process and the CNH will execute a contract with the partnership or alliance to be incorporated between Pemex and the private sector.<sup>35</sup>

#### 2. Regulatory Energy Commission (CRE)

In general terms, CRE regulates the mid and downstream sectors through a permit regime. The powers granted to CRE related with the Antitrust Law are as follows.

##### a. Revocation of Permits

CRE may revoke the permits it issues in the: (a) transport, storage, distribution, compression, liquefaction, decompression, regasification, marketing and sale to the public of hydrocarbons, oil or petrochemical industries; and (b) management of integrated gas pipeline systems, when the economic agents do not abide by the resolutions issued by the Antitrust Commission.<sup>36</sup>

##### b. Prices and Rates

CRE can issue provisions related with the activities above-mentioned, including the terms and conditions applicable to services and remuneration, among others. These provisions will be applicable except when in the opinion of the Antitrust Commission there are conditions of effective competition in the corresponding activity, in which case prices or rates shall be determined by the conditions of the market.<sup>37</sup> Finally, it is important to mention that SENER, CRE,

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33. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, transitories 6, 10.

34. *Id.* transitory 10(b).

35. *Id.* transitory 6. *See also* Hydrocarbon Law, *supra* note 2, arts. 13-15.

36. Hydrocarbon Law, *supra* note 2, arts. 48(II), 56(IX), 81(VI).

37. Further, CRE also applies principles of asymmetric regulation to limit the dominant power of Pemex as to the first-hand sales of oil, petroleum or petrochemicals until a greater participation of other economic agents in the markets is achieved. In any case, Pemex, public entities and private economic agents must observe the non-discrimination obligations established in the Hydrocarbons Law. *Id.* art. 82(I), transitory 13.

Pemex, and the private economic agents will be able to request to the Antitrust Commission to determine the existence of conditions of effective competition and, in its case, issue the declaration for the release of prices and rates instead of having CRE determining prices and rates.<sup>38</sup>

### c. Vertical and Horizontal Integration

With the purpose to prevent the hoarding of various phases of each sector of the industry in one or a few economic agents, the Hydrocarbons Law dictates that the CRE, with the opinion of the Antitrust Commission, shall establish the terms and conditions under which economic agents will be able to carry out vertical and horizontal processes in activities such as production, transportation, distribution, storage, and commercialization of hydrocarbons, petroleum, and petrochemicals. The foregoing, should include: (1) the legal separation, functional, operational and accounting between the activities permitted by the government; (2) the issue of codes of conduct; (3) the limits to participation in the capital stock, as well as the maximum participation that may have economic agents in the commercialization of products; and, if applicable, (4) in the pipeline capacity for transportation distribution and storage facilities. All cross-participation must be authorized by CRE, which must have the preliminary opinion of the Antitrust Commission. Likewise, corporations or individuals who directly or indirectly hold capital stock from companies related with end users, producers, or dealers of hydrocarbons, petroleum, gas, and petrochemicals that use the services of transport by pipeline or storage, will be able to participate directly or indirectly in the capital stock of economic agents who have obtained the corresponding permit from CRE and provide these services as long as such cross participation does not affect competition.<sup>39</sup>

Finally, Mexican law allows the Antitrust Commission to have personal jurisdiction over any economic agent regardless of its nationality, location, principal place of business or nature. Therefore, the nationality of the parties and the place where the transaction was/is carried out do not necessarily matter. What does matter are the economic effects that such a transaction has on the Mexican market. Accordingly, the Antitrust Law could have extraterritorial application to acts occurring abroad but having a substantial effect on the Mexican market.<sup>40</sup>

## IV. MATERIAL SCOPE AND TERRITORIAL APPLICATION OF THE ANTITRUST LAW

The Antitrust Law is applicable to any economic sector in Mexico including energy.<sup>41</sup> Nevertheless, there are some *de jure*-monopolies which are not within the reach and scope of the Antitrust Law, such as the so-called “strategic areas”

38. *Id.* art. 82.

39. *Id.* arts. 83, 84(X).

40. Alejandro López-Velarde, *El Derecho Competencial en la Industria Petrolera [Antitrust Law in the Petroleum Industry]*, REVISTA MEXICANA DE DERECHO PÚBLICO [MEXICAN JOURNAL ON PUBLIC LAW], Feb. 2001, at 34. For a better understanding on the international application of the Antitrust Law see Rogelio López-Velarde, *La Ley Federal de Competencia Económica y Algunas Consideraciones Desde la Perspectiva del Derecho Internacional Privado [The Federal Law of Economic Competition and Some Considerations from the Perspective of Private International Law]*, 24 JURÍDICA 281 (1995). See also Alejandro López-Velarde, *supra* note 5, at 19.

41. Federal Antitrust Law, *supra* note 5, arts. 1-2.



established in the Mexican Constitution, which include the upstream activities of the oil and gas industry.<sup>42</sup> Thus, article 6 of the Antitrust Law expressly dictates that:

Not constitute monopolies functions that the State exercises exclusively on the strategic areas determined in the Political Constitution of the United Mexican States. However, Economic Agents who are responsible for such activities are subject to the scrutiny of the [Antitrust] Law with respect to acts which are not expressly included as strategic areas.<sup>43</sup>

At the same time, Article 28, paragraph 4 of the Constitution, includes the so-called *strategic areas*, among which exploration and extraction of oil and other hydrocarbons, in terms of the sixth and seventh paragraphs of Article 27 of this Constitution are deemed to be strategic activities. Therefore, the Mexican State will carry out these activities through allotments granted to Pemex or other Productive State Entities; or through the execution of exploration and extraction contracts with the private sector. In any event, the hydrocarbons in the subsurface are the property of the Nation and this constitutional restriction must be established in the allotments or contracts.<sup>44</sup>

Without question, the strategic areas that are exclusively still reserved to the Mexican State represent the most resistant areas to a complete free market liberalization. However, neither the Constitution nor the FIL establishes the scope of the oil and gas industry (exploration, extraction, refining, petrochemicals, transportation, distribution, storage, commercialization and importation and exportation of petroleum and its by-products). Consequently, it is necessary to review the implementing legislation with the purpose to find out what the oil and gas industry means. Thus, the Hydrocarbons Law dictates that it regulates the following activities in national territory:

- The surface studies and exploration, and the exploration and extraction of hydrocarbons;
- The treatment, refining, conveyance, marketing, transportation, and storage of petroleum;
- The processing, compression, liquefaction, decompression, and re-gasification, in addition to the transportation, storage, distribution, marketing and retailing to the public of natural gas;
- The transportation, storage, distribution, marketing and retailing to the public of petroleum products, and
- The transportation by pipeline, and the storage linked to pipelines for petrochemicals.<sup>45</sup>

42. *Id.* art. 6. *See also* Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, art. 28. For a better understanding of the application of the Antitrust Law before the 2014 Energy Reform *see* Alejandro López-Velarde, *supra* note 5, at 20.

43. Federal Antitrust Law, *supra* note 5, art. 6.

44. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, arts. 27, 28. *See also* Hydrocarbon Law, *supra* note 2, arts. 2(I), 5.

45. Hydrocarbon Law, *supra* note 2, art. 2.

Thus, all aspects of the oil and gas industry have been opened for private participation except for upstream activities whereby the private sector will be able to participate under the administrative contract regime as explained in Section III 1 above.

#### V. MONOPOLISTIC PRACTICES

Like pro-competition laws in various other jurisdictions such as in the United States, Canada, Spain and France,<sup>46</sup> the Antitrust Law prohibits so-called “absolute monopolistic practices.” In general terms, absolute monopolistic practices involve agreements among competitors to join forces to: (1) fix prices; (2) restrict production and distribution of goods and services; (3) divide markets; (4) rig bids on contracts; or (5) exchange information with the purpose or effect of fixing prices; (6) restrict production and services.<sup>47</sup>

On the other hand, the Antitrust Law allows most vertical agreements among non-competitors, except those made by a dominant firm which unfairly drives its competitors from the market. However, to determine the existence of a relative monopolistic practice, it is necessary to prove the substantial power that the economic agents involved have in the relevant market or in a related market. It is also necessary to show that the purpose or effect of the acts, contracts, agreements, or cartels executed by those parties is or could be to wrongfully displace other agents from the market, substantially impede their access thereto, or to establish exclusive advantages in favor of one or several entities, in the following cases:<sup>48</sup> (1) vertical allocation of markets; (2) restrictions on sale and price maintenance; (3) tying agreements; (4) exclusive dealings; (5) unilateral refusal to deal; (6) boycott; (7) predatory pricing; (8) exclusive discounts; (9) cross subsidies; (10) discrimination on price and sale conditions; (11) increase of the costs and the possibility to impede the production process or reduction of demand to competitors; (12) discriminatory denial or access restriction to essential inputs; and (13) narrowing margins consisting of reducing the margin between the price of access to an essential input provided by one or more economic agents and the price of the good or service offered to the final consumer by the same economic agents.<sup>49</sup>

The provisions established by the Antitrust Law are applicable in the new oil and gas industry as follows.

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46. Rogelio López-Velarde, *supra* note 40, at 282-83.

47. Federal Antitrust Law, *supra* note 5, art. 53. For a better understanding of the application of absolute monopolistic practices dictated by the Antitrust Law before the 2014 Energy Reform see Alejandro López-Velarde, *supra* note 5, at 21.

48. *Id.* art. 54.

49. *Id.* art. 56. To determine whether a relative monopolistic practice is in violation of the Federal Antitrust Law, it is necessary to analyze whether the economic agents participating in the transaction might demonstrate that the transaction generates efficiency gains and favorable impact on the process of economic competition and free market resulting in a benefit of consumers or end users. *Id.* art. 55. Further, it must be proven that the economic agents involved in the transaction will exert “substantial power” in the relevant market. *Id.* arts. 58-59. For a better understanding of the application of relative monopolistic practices established by the Antitrust Law before the 2014 Energy Reform see Alejandro López-Velarde, *supra* note 5, at 21.

### A. Upstream Activities

Before the modifications to the Constitution in December 2013, the upstream activities of the oil and gas industry were considered a *de jure*-monopoly.<sup>50</sup> The 2014 Energy Reform did not modify the direct dominion over the subsoil as well as the right of exploitation and development of petroleum and gas in favor of the Nation since the Constitution still prohibits the private ownership of hydrocarbons and reserves ownership of petroleum and all solid, liquid, and gaseous hydrocarbons to the State.<sup>51</sup> The State ownership of such natural resources is still a Constitutional power of the State that is inalienable and imprescriptible for the State.<sup>52</sup>

Despite these prohibitions, private parties either national or foreign might be able to participate in the upstream activities under the terms and conditions of the Hydrocarbons Law and the Hydrocarbons Revenue Law<sup>53</sup> through bidding proceedings and the awarding of administrative contracts with the CNH.<sup>54</sup> In this participation any Productive State Entity such as Pemex and the economic agents might be subject to the application to the Antitrust Law if the corresponding administrative contract, license, authorization, permit, or registration is not granted in accordance with the terms and conditions established in the Constitution, Hydrocarbons Law, Hydrocarbons Revenue Law, Antitrust Law, offer and sale rules of the market, and any other technical, economic, and market consideration which was not observed during the bidding process, or during the implementation of the awarded contract. Stated differently, potential suppliers that participate in bidding proceedings cannot fix prices or coordinate proposals between competitors or with CNH, SENER, or Pemex. By the same token, CNH, SENER, and Pemex cannot guide public tenders in favor of one economic agent or limit the participation of other potential parties who have the requested materials, equipment, products, or services.<sup>55</sup>

This regulation is extremely important because many economic agents in Mexico depend on one bidder, CNH, and Pemex when CNH has already granted it an allotment or a contract, for their participation in the upstream sector supplying services, equipment, works, leasings, and further materials.

### B. Refining

Before the 2014 Energy Reform, the development and marketing of the refining industry was entrusted to the State through Pemex-Refining (*Pemex-Refinación*) for the processing of hydrocarbons in the following basic generic

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50. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, arts. 27-28.

51. *Id.* art. 27. *See also* Hydrocarbon Law, *supra* note 2, arts. 1, 3.

52. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, arts. 27, 28.

53. Hydrocarbon Revenue Law, *supra* note 3, art. 1.

54. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, transitories 6, 10.

55. *Id.* art. 134; Federal Antitrust Law, *supra* note 5, art. 53(IV)-(V).

products: liquid or gaseous fuels, lubricants, paraffins, asphalts and solvents, and by-products generated by such processes.<sup>56</sup>

Today, the public and private sectors can participate in all phases of the refining process as follows:

- Manufacturing of petroleum products, and by-products which can be used as industrial basic raw materials through a permit granted by SENER.<sup>57</sup>
- Transportation, distribution and storage through a permit granted by CRE.<sup>58</sup>
- Retail trade of gasoline and liquefied petroleum gas through a permit obtained by CRE. The retailing of fuels through Mexicans or Mexican Corporations with Foreigners' Exclusion Clauses established in the FIL was deleted. Now, foreign investors can participate directly in the retail trade of gasoline and liquefied petroleum gas through a permit obtained by CRE. Further, the franchised agreement imposed on the private sector by Pemex-Refining will no longer be required for the retail and supply of fuels.<sup>59</sup>

### C. Importation and Exportation

Importation and exportation of hydrocarbons were previously granted to Pemex through Petroleos Mexicanos International (*Petroleos Mexicanos Internacional*, or PMI). However, the Hydrocarbon Law opens the possibility to participate in the importation and exportation of fuels by the private sector.<sup>60</sup> On February 23, 2016, the Mexican government published in the Official Gazette of the Federation the possibility of obtaining a permit from SENER and beginning activities on April 1, 2016.<sup>61</sup>

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56. Based on the consideration that Pemex was acting as another player in the oil and gas market, the Antitrust Commission has subjected Pemex-Refining to investigation and sanctions for: (1) the franchising agreements executed with the private sector for the retail sale of gasoline; (2) the sale of oils and lubricants in the gas stations different to the Pemex's trademark named "Mexlub;" (3) the division and distribution of markets in the transportation of hydrocarbons; (4) the tying agreements executed with Pemex's Union in the transportation of fuels to gas stations; and (5) public tenders. COMISIÓN FEDERAL DE COMPETENCIA DE MEXICO, INFORME DE COMPETENCIA ECONOMICA 1995-1996 [1995-1996 ANTITRUST REPORT] at 68 (1996).

57. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, transitory 10. *See also* Hydrocarbon Law, *supra* note 2, arts. 48(I), 80(I)(a).

58. Hydrocarbon Law, *supra* note 2, art. 48(II).

59. *Id.* transitory 14(III); Foreign Investment Law, *supra* note 11, arts. 6(II), transitory 6. For a better understanding as to the regulation of foreign investment in Mexico, *see* Alejandro López-Velarde, *Some Considerations as to the New Foreign Investment Law*, 10 NEWSLETTER OF THE INT'L. SEC. OF THE STATE BAR OF TEX. 27 (1994).

60. Hydrocarbon Law, *supra* note 2, transitory 14(II).

61. Aviso por el que se Informa que a Partir del 1 de Abril de 2016, la Secretaría de Energía Podrá Otorgar Permisos de Importación de Gasolinas y Diésel a Cualquier Interesado que Cumpla con las Disposiciones Jurídicas Aplicables [Notice Informing that as of April 1, 2016, the Ministry of Energy May Grant Importation Permits for Gasoline and Diesel to any Interested Party that Complies with Applicable Legal Provisions], Diario Oficial de la Federación [DO], 23 de Febrero de 2016 (Mex.).

#### D. Governmental Price

The Hydrocarbon Law dictates that the government price will be eliminated in the year 2018, and the price for gasoline and diesel will be established according to the market price.<sup>62</sup> On December 26, 2016, the Mexican Congress approved the elimination of the governmental price beginning on January 1, 2017.<sup>63</sup>

#### E. Supply of Fuels and Lubricants

Now, foreign economic agents can participate up to 100% in the supply of fuel and lubricants for ships, airplanes, and railroad equipment.<sup>64</sup>

#### F. The Petrochemical Industry

Petrochemicals represent one of the pillars of the Mexican industrial structure as an economic supplier of widely diffused raw material. However, this sector was subject to some of the worst regulations established in Mexico since the Constitution and the Petroleum Law divided this industry in two sectors (as explained below). In fact, one of the fundamental characteristics of the petrochemical industry is its integration into long productive chains, which supply other fields of economic activity, the first link of which are the primary and the secondary petrochemical products. In fact, primary and secondary products are sometimes produced at the same time. However, the Mexican government used to divide this industry with the purpose of keeping the exclusive production and commercialization of certain petrochemical products in the hands of the State. Thus, the industry was divided as follows.<sup>65</sup>

##### 1. The Basic Petrochemical Industry (BPI)

Development in this sector was exclusively reserved to the State through Pemex-Gas and Basic Petrochemical (*Pemex-Gas y Petroquímica Básica*). The BPI is based on the following products: (1) ethane; (2) propane; (3) butane; (4) pentane; (5) hexane; (6) heptane; (7) naphtha; (8) the raw material for smoke lamp-black; and (9) methane when such product comes from Mexican source hydrocarbons and is used as a basic industrial material in petrochemical industrial processes.

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62. Hydrocarbon Law, *supra* note 2, transitory 14(I).

63. Acuerdo que Establece el Cronograma de Flexibilización de Precios de Gasolinas y Diésel Previsto en el Artículo Transitorio Décimo Segundo de la Ley de Ingresos de la Federación para el Ejercicio Fiscal de 2017 [Resolution Establishing the Gasoline and Diesel Price Flexibility Schedule Provided for in the Twelfth Transitory article of the Federation Revenue Law for Fiscal Year 2017], Diario Oficial de la Federación [DO], 26 de Diciembre de 2016 (Mex.).

64. Foreign Investment Law, *supra* note 11, art. 7(IV)(w).

65. Alejandro López-Velarde, *Historic Break with the Past: The New Foreign Investment Possibilities in Mexican Oil and Gas Industry*, 55 NAT. RESOURCES J. 153, 171 (2015).

## 2. The Secondary Petrochemical Industry (SPI)

This industry was developed by the Mexican State through Pemex-Petrochemical (*Pemex-Petroquímica*) and the private sector.<sup>66</sup>

In general terms, before the 2014 Energy Reform, the Antitrust Law did not apply to *de-jure* monopoly of the BPI. Today, the Hydrocarbons Law does not distinguish between or place different regulations on BPI and SPI. Thus, there is no two-part division in the petrochemical industry, and the private sector will be able to: (1) participate in the production of BPI (and SPI) since the BPI is no longer considered a strategic activity reserved to the State;<sup>67</sup> and (2) participate in the commercialization of petrochemical products as long as a permit is obtained with CRE and statistical information requested by CRE is provided.<sup>68</sup> When petrochemical products need to be in storage and/or transported by pipeline due to their high volume, a permit from CRE will be needed. Petrochemicals that do not need to be transported by pipelines do not need any kind of authorization permits.<sup>69</sup>

### G. The Gas Industry

Before the 2014 Energy Reform, the Mexican legal system has regulated the products of the gas industry in different ways, establishing restrictions and legal barriers to the free market participation of economic agents (national or foreign) as follows.

#### 1. Natural Gas

This industry was opened for private participation in the areas of transportation, distribution and storage for the first time on May 11, 1995. But the modifications were not enough since the exploration and production of natural gas were reserved to Pemex. Now, private economic agents can participate in upstream activities of natural gas through contracts granted by CNH. Further, activities of compression, liquefaction, decompression, regasification, and sale to the public of natural gas are also open to any economic agent through a permit to be obtained with the CRE.<sup>70</sup>

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66. The above-mentioned division was imposed by the Mexican government back in 1986. Resolución que Clasifica los Productos Petroquímicos en Básicos o Secundarios [Resolution Which Classifies Petrochemical Products as Basic or Secondary Petrochemicals], Diario Oficial de la Federación [DO], 13 de Octubre de 1986 (Mex.). See also Alejandro López-Velarde, *Algunas Consideraciones Legales Sobre la Industria Petroquímica en México* [Some Legal Considerations as to the Petrochemical Industry in Mexico], 26 JURÍDICA 427, 427-29 (1996); Alejandro López-Velarde, *supra* note 5, at 22.

67. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, art. 28; Foreign Investment Law, *supra* note 11, art. 5(II).

68. Hydrocarbon Law, *supra* note 2, art. 49.

69. *Id.* For a better understanding of the petrochemical industry in Mexico, see Alejandro López-Velarde, *supra* note 66, at 427-29.

70. Hydrocarbon Law, *supra* note 2, arts. 2, 48-49.

## 2. Liquefied Petroleum Gas (LPG)

Before the 2014 Energy Reform, LPG production was kept in the hands of Pemex while the distribution and sale of this fuel was exclusively reserved to Mexican individuals or corporations with exclusion of foreigners clauses.<sup>71</sup> Today, any economic agent regardless of its nationality can participate in production of LPG through a permit granted by SENER<sup>72</sup> and in the transportation, distribution, and storage of LPG through a permit granted by CRE.<sup>73</sup>

## 3. Associated Natural Gas

This sector was not developed in Mexico due to poor regulation. However, the Hydrocarbons Law and the Mining Law now dictates that the mining concessionaries with mineral deposits of coal will be able to explore and exploit associated natural gas without having to bid with the CNH as long as such concessionaries timely request the corresponding contract from the CNH,<sup>74</sup> otherwise concessionaries or any other economic agent will be able to participate through a bidding process for the granting of contracts with the CNH.<sup>75</sup>

## 4. Shale Gas

Horizontal drilling was not developed in the past by Pemex due to the lack of expertise and expensive technology. However, this sector is regulated in the 2014 Energy Reform, whereby any economic agent might participate through a bidding process for the exploration and extraction of shale gas in Mexico.<sup>76</sup>

### *H. Transportation, Storage, Distribution, Compression, Liquefaction, Decompression, Regasification and Sale to the Public of Oil Products*

Finally, the Mexican Congress understood the need of opening these sectors to more economic agents regardless of their nationality since one of the biggest deficiencies in the oil and gas industry is the transportation of oil and gas products throughout the Mexican Republic.<sup>77</sup> Now, the private sector is able to participate in activities such as storage, transportation, distribution and sale of hydrocarbons, oil, and petrochemicals through a permit, to be granted by CRE.<sup>78</sup> In fact, foreign capital will be able to participate on a 100% basis in shipping companies engaged in the operation of vessels that provide services for the exploration and extraction of oil and other hydrocarbons.<sup>79</sup>

71. Foreign Investment Law, *supra* note 11, art. 6(II).

72. Hydrocarbon Law, *supra* note 2, arts. 4(XVI), (XXVIII), 48(I).

73. *Id.* art. 48(II), transitory 27.

74. *Id.* transitory 7.

75. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, art. 27, transitory 8; Hydrocarbon Law, *supra* note 2.

76. Hydrocarbon Law, *supra* note 2, arts. 15, 23.

77. *Id.*, Statement of Purpose at 3-4, 9-11.

78. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, transitory 10; Hydrocarbon Law, *supra* note 2, art. 48(II).

79. Foreign Investment Law, *supra* note 11, arts. 7(III) v), 8(II).

## VI. ALLIANCES AND PARTNERSHIPS IN THE OIL AND GAS INDUSTRY

The 2014 Energy Reform now allows Pemex to be able to joint venture with the private sector in upstream activities.<sup>80</sup> This will be carried out through a bidding process before the CNH, and the CNH will execute a contract with the partnership or alliance to be incorporated between Pemex and the private sector.<sup>81</sup> On the other hand, in the midstream and downstream sectors alliances and partnerships can be carried out through the Law on Public-Private Partnerships.<sup>82</sup> Therefore, it is expected that Pemex will execute several merger, joint venture and other similar agreements (called “concentrations” under the Antitrust Law) in sectors such as refining, natural gas processing, transportation, distribution, and storage of hydrocarbons, LPG, among others.<sup>83</sup>

The Antitrust Law regulates alliances, partnerships, mergers, and acquisitions under the term of “concentrations.” Mexico’s Antitrust Law establishes a notification requirement for any concentration that reaches the monetary thresholds established in its article 86. However, once those thresholds apply, only those concentrations which have market effect in the Mexican Republic must be reported to the Antitrust Commission for their authorization prior to their consummation.<sup>84</sup> Thus, article 61 of the Antitrust Law dictates that a “concentration” is a “merger, acquisition of control or any act whereby companies, partnerships, shares, equity, trusts or assets in general are concentrated among competitors, suppliers, customers or any other economic agents....”<sup>85</sup>

In the event that foreign or national economic agents want to participate, directly or indirectly, in an existing energy company in Mexico including Pemex, it must obtain a favorable resolution from the Antitrust Commission in the event of three different scenarios established by the Antitrust Law:

- When an act or succession of acts related with the transaction independently in the place where it is executed, directly or indirectly reaches an amount in the Mexican territory over the equivalent of 18 million times the Minimum General Wage (MGW) prevailing in Mexico City (approximately US \$71,065,945 where the daily minimum wage is \$73.04 and applying an exchange rate of \$18.50/US \$1);<sup>86</sup>

80. Pemex Law, *supra* note 4, art. 6.

81. Decree Amending and Supplementing Various Provisions of the Political Constitution of the United Mexican States on Energy Matters, *supra* note 1, transitory 6; Hydrocarbon Law, *supra* note 2, arts. 13-15.

82. Hydrocarbons Law, *supra* note 2, art. 122; Law on Public-Private Partnerships, *supra* note 17, arts. 1-2, 10.

83. Law on Public-Private Partnerships, *supra* note 17, art. 10.

84. Although, economic agents are the ones that should evaluate their own transactions under the terms and conditions of the Antitrust Law regarding the meaning of “concentrations,” “market effects in Mexico,” “monetary thresholds,” and “annual sales” for reporting purposes prior to their consummation, it is recommended that economic agents request, at least to the Antitrust Commission, a confirmation of the need to report the transaction; otherwise, the sanctions established in Sections VII(i), (ii), (vi), and (vii) below may be applied by the Antitrust Commission.

85. Federal Antitrust Law, *supra* note 5.

86. The monetary threshold might be increased or decreased depending upon the MGW and the exchange rate applicable at the time of notification.



- When an act or succession of acts related with the transaction reaches the accumulation of 35% or more of the assets or shares of an economic agent, whose annual assets in the Republic or annual sales originated in the Republic are more than the equivalent of 18 million times the MGW prevailing in Mexico City (approximately US \$71,065,945); or
- When an act or succession of acts related with the transaction reaches the accumulation of assets or capital stock in the Mexican Republic in excess of 8.4 million times the GMW prevailing in Mexico City (approximately US \$33,164,108); and if the concentration involves the participation of two or more economic agents whose assets or annual volume of sales in the Mexican Republic, jointly or separately, total more than 48 million times the MGW prevailing in Mexico City (approximately US \$3,505,920.00).<sup>87</sup>

#### VII. MONETARY AND ADMINISTRATIVE SANCTIONS

With the purpose to discourage the participation in anticompetitive acts, the Antitrust Law establishes various monetary and administrative sanctions, such as:

- Ordering the correction or suppression of the monopolistic practice or illicit concentration in question.
- Ordering the partial or total deconcentration of an illegal concentration in terms of the Antitrust Law and the termination of control or the suppression of acts, without prejudice to the economic fine that may be applicable.
- Fines of up to 175,000 times the MGW prevailing in Mexico City for false statements or submitting false information to the Commission independently of the criminal action that the economic agent might incur.
- Fines of up to 10% of the income of the economic agent for having engaged in an *absolute* monopolistic practice independently of the civil or criminal action that the economic agent may incur.
- Fines of up to 8% of the income of the economic agent for having engaged in any *relative* monopolistic practice independently of the civil action that the economic agent may incur.
- Fines of 5,000 times and up to 5% of the income of the economic agent for failing to notify a concentration to the Commission, when required by the Law.
- Fines of up to 8% of the income of the economic agent for participating in a concentration prohibited by the Antitrust Law independently of the civil action that the economic agent might incur.
- Fines of up to 180,000 times the MGW to individuals who engage directly in monopolistic practices or prohibited concentrations, on behalf or through representation and mandate of corporations.

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87. Federal Antitrust Law, *supra* note 5, art. 86.

- Fines of up to 10% of the income of the economic agent for not having observed the conditions established by the Commission in a concentration previously reviewed by the Commission regardless of the possibility of requesting the divestiture of the concentration by the Commission.<sup>88</sup>

### VIII. CONCLUSION

One of the largest present day state-controlled monopolies in the oil and gas industry was finally opened for participation of private economic agents. This monopolistic stronghold was in place in Mexico for more than fifty-six years covering all areas of the industry from exploration and production through sale of the hydrocarbons, refining and petrochemical productions. Pemex has historically been subject to the application to the Antitrust Law when this entity has gone beyond the express *de jure* monopoly granted by the Constitution. But the *application of the Antitrust Law* through the definition of “economic agent” which includes Pemex as public entity has been questioned not only by the Antitrust Commission, but also in Mexican Courts.<sup>89</sup>

Today, Mexico has opened each of the phases of the oil and gas industry (exploration, production, refining, transportation, distribution, storage and first hand sale of national petroleum and hydrocarbons) to the private sector and has published a new Antitrust Law for the protection of the new private economic agents who wish to participate in this important economic sector. In so doing, the Mexican government is trying to avoid passing from a public monopolistic regime to a private one through the application of the new Antitrust Law and the 2014 Energy Reform regulating the process of free competition, including eliminating monopolies, monopolistic practices, and forbidden concentrations.

There are now broad discretionary powers granted to SENER and CRE in the application of sanctions to Pemex and private economic agents for not complying with the resolutions ordered by the Antitrust Commission in addition to the administrative and monetary sanctions established by the Antitrust Law.

As previously described in Section III above, SENER as the Ministry in charge of the national policy for the oil and gas industry will be able to: (1) forbid the participation of economic agents in public tenders published by CNH and assign or reject the allotments to the private sector in the upstream activities; (2) revoke permits granted to economic agents by CRE in the mid and downstream sectors if they have not abided the resolutions issued by the Antitrust Commission; and (3) apply sanctions or instructions against Pemex to ensure that their activities and operations do not hinder competition and the efficient development of the markets. At the same time, CRE will be able to revoke permits when economic agents do not abide by the resolutions issued by the Antitrust Commission; issue general price and rates provisions for services and remunerations as long as the Antitrust Commission has not determined conditions of effective competition; and establish the terms and conditions under which economic agents will be able to

88. *Id.* art. 127.

89. *Id.* arts. 3(I), 4.

carry out vertical and horizontal processes trying to avoid cross-participation in related activities.

Before the 2014 Energy Reform, these sanctions and activities were dictated by the Antitrust Commission exclusively. Without case law due to the recent reforms, the application of the powers and faculties granted to the Antitrust Commission, SENER, and CRE may lead to confusion in the application of the Federal Antitrust Law and the 2014 Energy Reform and could be subject to appeal process and constitutional challenge for possible violation of constitutional principles such as due process and legality.

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