

Challenges of Mexico's Public Policy on Minimum Storage of Petroleum Products

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Abstract: *This article discusses the challenges of the implementation of Mexico's Public Policy on Minimum Storage of Petroleum Products. Amid the COVID-19 pandemic, the Policy entered into force, and with it, marketers and distributors are mandated to maintain a minimum storage level of key products for unforeseen emergency situations.*

Compulsory Stock Obligations and Oil Storage Crisis

The shortage of storage infrastructure for petroleum products has been long acknowledged by the Mexican government as an energy security matter. After the 2013 energy reform, the general guidelines to address this issue were to carry on open seasons, set forth minimum storage obligations and incentivize the development of storage infrastructure.

So, on December 12, 2017, the Ministry of Energy ("SENER") published the Public Policy on Minimum Storage of Petroleum Products (the "Policy"). The purpose of the Policy was to guarantee the nation-wide supply of gasoline, diesel and jet fuel by setting regional and minimum storage obligations. The

Policy was amended on November 29, 2018, to remove the obligation to comply with storage obligations per regions and instead allow its compliance by securing storage anywhere within the Mexican territory. A second amendment to the Policy was published on December 6, 2019, mainly to extend the date on which it would come into effect to July 1, 2020, instead of January 1, 2020, and to reduce the number of days for the calculation of the compulsory stock obligations, among others.

The Policy entered into force in summer 2020 despite the fact that storage infrastructure in Mexico is mainly held by *Pemex Logística* ("PLOG") and was under an unprecedented stress caused by the COVID-19 pandemic. Just to give some context, as of 2018, PLOG controlled 89 percent of the storage capacity, 100 percent of the pipelines (the main transport for oil products) and it had operations in 15 ports (private investors only operate in three ports).¹ The effects of the pandemic were felt globally but in Mexico, they caused a fall of fuels demand to 400 Mbbbl/d in April 2020 from 850 Mbbbl/d in January 2020² and the usage by PLOG of 70 vessels as maritime storage facilities, implying a daily cost of approximately USD\$30,000.

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Despite the urgent need to develop additional infrastructure, private investors seeking permits to construct, own and operate fuel storage facilities have faced material setbacks on a number of fronts, including permitting delays, mostly related the Energy Regulatory Commission (“CRE”) not making any decisions due to the resignation of a number of commissioners and the resulting loss of quorum (between January 2019 and May 2019) and the discriminatory treatment of private investors vis à vis PLOG and *Pemex Transformación Industrial* (“PTRI,” collectively with PLOG “Pemex”) as a result of the government’s favoring Pemex. So, as of the publication of the Policy, only four private new terminals had started operations. Therefore, the Policy will be mainly implemented by Pemex, through the model of the agreement approved for the sale of tickets as described below.³

Implementation of the Policy

The Policy is applicable to holders of permits granted by CRE to trade and distribute gasoline, automotive diesel and jet fuel and which perform sales to service stations or end users (“Obligors”). Under the Policy, Obligors must report stock and sales and keep a minimum mandatory stock (“MMS”), so that in the event of an emergency declaration by the Coordination Council of the Energy Sector (“Council”), the MMS could be released. In general terms, the mechanics of the Policy are the following:

- The Obligors shall maintain from 2020 to 2025 an MMS equivalent to:
 - Gasoline and automotive diesel: 5 days
 - Jet fuel: 1.5 days
- The calculation of the MMS shall be made with the sales average during the immediate previous year.⁴
- The MMS may be fulfilled by contracting capacity from storage terminals or through the purchase of tickets. The tickets are financial rights to the marketer’s terminal inventories, granting its holders the right to make available the product in case of an emergency declared by the Council.
- Obligors that contracted storage capacity at terminals which commercial operation date is foreseen after July 1, 2020, must comply with the MMS through the purchase of tickets.

- At least 50 percent of the MMS obligation shall be covered with capacity from terminals that supply through virtual pipelines (i.e., trucks).
- Besides the weekly reporting obligations in place since April 2018 regarding purchase and sale transactions, as of July 1, 2020, all ticket transactions must also be reported by the parties to the CRE as part of their permit obligations.
- In cases of an emergency declared by the Council, the Obligors must address the emergency situation through the use of their MMS.
- In order to facilitate the enforcement of the Policy, the latest amendment included the mandate for CRE to include the Policy’s obligations in the permits granted to Obligors, so the breach of such obligations could result in the revocation of the relevant permits.
- As for distribution Obligors, even if their infrastructure considers the storage/guard of the distributed products,⁵ there is no clarity if the capacity of such storage could be considered in the MMS calculations.

For purposes of implementing the Policy, PTRI has approved a model agreement which allows for the sale of tickets (“Agreement”). However, the Agreement⁶ includes some controversial provisions, which may suggest a bundle sale of capacity and tickets. The Agreement also forbids the assignment of tickets, which limits the existence of a secondary market and grants PTRI with a supervision right to oversee the ethics and anti-corruption compliance of the Obligor. As in all the new contracts released by Pemex (and its affiliates) the anticorruption provisions play a crucial role, however, the definition of anticorruption practices and the events that may trigger an early termination are loosely defined, generating uncertainty in the purchase of tickets and strengthening even further the Pemex’s position.

Legal Claims

A number of Obligors challenged the Policy before federal courts, requesting an injunction relief. However, in this case and different to other *amparo* proceedings filed against public policies (i.e., power sector), injunction relief was not granted. Therefore, the Policy is effective and the tickets market implemented by Pemex is fully operational and is currently

creating a new revenue stream for the Mexican government.

The *amparo* proceedings filed by the Obligors were based on different grounds; however, the general arguments consist of (i) antitrust arguments, stating that the Policy promotes anticompetitive practices, creates new entry barriers, strengthens Pemex's monopoly within an industry already open for private investment and (ii) the lack of secondary regulation required for the implementation of the Policy.

Future Developments

Although the pandemic has caused several delays, it is expected that 10 new storage terminals owned by private investors would begin operations during 2020. The processing times of CRE may continue delaying or preventing the development of storage by private investors; however, Mexican conglomerates have declared interest in developing additional

capacity, and the draft of the National Infrastructure Program released on August 27, 2020, has included a number of storage projects, including the Terminal System Sirius Tuxpan-Hidalgo, the Maritime Terminal Sirius Lazaro Cardenas and the Escolin project. It is expected that these projects will receive additional support from the Mexican government, but it is still unclear how many of them will begin operations.

The Obligors who filed claims against the Policy may continue the *amparo* proceedings until their conclusion, and in the meantime, they shall comply with the Policy obligations. The implementation of the tickets system by Pemex may result in new claims and potential investigations from the antitrust authority.

Despite the challenges, it seems that new privately owned storage facilities will be constructed. The key is whether the government's position with respect to Pemex's quasi-monopoly situation will significantly slow down investment in storage infrastructure.

Endnotes

- ¹ <https://www.gob.mx/sener/documentos/diagnostico-de-la-industria-de-petroliferos?idiom=es>.
- ² With respect to regular gasoline. See more at: <https://estadisticashidrocarburos.energia.gob.mx/gas.aspx>.
- ³ Pemex Transformación Industrial is a permit holder, among others, for the activity of petroleum products marketing; on the other hand, Pemex Logística is a permit holder for storage activities. Taking the above into consideration, Pemex Logística is to negotiate the storage capacity agreements, and Pemex Transformación Industrial has the option to trade the tickets as financial rights to their available storage contractual capacity as marketers.
- ⁴ As an exception, the first calculation of the MMS obligation was based on the sales of oil products for the first semester of 2020.
- ⁵ See: http://dof.gob.mx/nota_detalle.php?codigo=5471620&fecha=13/02/2017.
- ⁶ The comments included in this article are based on one of the versions released by PTRI; however, such version may be amended.

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