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E-COMMERCE COMPETITION ENFORCEMENT GUIDE

THIRD EDITION

Editor
Claire Jeffs

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E-COMMERCE COMPETITION ENFORCEMENT GUIDE

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Publisher's Note

E-commerce has changed our homes – replacing books, CDs, DVDs and satellite dishes with downloads and streaming; automobiles with app-hailed rides; shopping bags with postal delivery boxes. It is changing our language too, adding terms such as 'phygital' for blending online and offline business. Yet, as noted by Claire Jeffs, Nele Dhondt and Jack Dickie in their introduction, competition authorities are evolving their existing tools to address e-commerce, not revolutionising how they apply antitrust law. Practical guidance for both practitioners and enforcers in navigating this challenging environment is critical.

This third edition of the *E-Commerce Competition Enforcement Guide* – published by Global Competition Review – provides such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The Guide draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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PART II
AMERICAS

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08

Mexico

Carlos Mena Labarthe, Jorge Kargl Pavía and Aleine Obregón Natera[1]

E-commerce has transformed the way in which businesses work and think by creating new distribution and supply channels, but it has also revolutionised how people are made aware and acquire goods and services in practically all industries, as alternatives for consumers are virtually unlimited.

Digital markets have significantly altered traditional structures, which represent both opportunities for new businesses and business models, but also, challenges for competition authorities to adapt to this new and ever-changing reality in digital markets, which in some cases, may require challenging traditional doctrines to give in to new competition models and standards.

In the last years, there has been a shift into the digital world, which as a natural consequence has opened the opportunity for digital platforms to play a significant role in redefining traditional economic criteria. Given the fast-growing nature of the digital sector and constant changes in business models, traditional competition models have been insufficient to meet the digital markets' demands, which represents a challenge to adapt regulations and to strengthen competition authorities to balance innovation, fairness and freedom of choice among market participants.

To better determine how the digital competition law should address e-commerce, first it is imperative to fully understand the digital economy environment, seen as the economic activity driven by digital technologies that enable consumers to trade goods and services (including digital content) through e-commerce (known as e-commerce).[2] Additionally, the digital

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2 OECD Hearings, *The Digital Economy*, 2012, p.5 http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf (The OECD Hearings).

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economy also has effects on society and in the functioning of the markets that go beyond the development of digital technologies, creating more challenges to competition authorities when it comes to enforcement.

The key factor involved in the digital economy is the use of digital technologies that facilitate the exchange of goods, services and digital content, considerably increasing economic growth by eliminating geographical location barriers, reducing costs (such as distribution costs) and allowing the entry of new undertakings, which traditionally would be considerably more difficult.

Notwithstanding the foregoing, competition in the digital economy has very specific characteristics such as highly innovation, growth and dynamism, importance of network effects and critical mass requirements, a tendency towards 'winner takes all' competition, the fact that multisided markets as a generality rather than an exception, and platform-based models. These specific characteristics reshape the way in which competition authorities identify competitive concerns and poses a risk of incorrectly applying traditional economic models.

In the digital economy, the way in which offerors and customers interact involves certain particularities, since there is a direct link between them, allowing different forms or operation. For example, some e-businesses operate in the form of marketplaces, which involves digital multiple-sided platforms where various retailers operate, generating a continuous contact between buyers and sellers through a well-known site; likewise, advertising services may be offered by enhancing search rankings and facilitating access to a specific service.

Marketplaces can offer intermediary services as hybrid models, being the former only a hosting service for third party sellers and the latter not only a hosting service but also, the commercialisation of products and services through an owned platform, along with products offered by third parties.

A very important element of analysis which lately has been of special interest for competition authorities around the world in digital economy and e-commerce is the implications of consumer data collection, which enables a more effective and tailor-made search engine for consumers based on their apparent preferences. The potential antitrust issues that could arise from this data collection have not been determined. Many commentators and even authorities have commented on how they could represent a barrier to entry or create other competition problems.

According to eMarketer, in 2019, retail e-commerce sales worldwide reached US$3.535 trillion, approximately a 20.7 per cent increase over the previous year. Mobile was a key factor, as 'm-commerce' accounted for 58.9 per cent of digital sales.[3] Due to this continuous growth, in recent years, competition authorities around the world have focused their attention to the functioning of digital markets, as evidenced in the different investigations initiated in this sector.

For example, the Mexican Federal Economic Competition Commission (COFECE) has initiated several ex-officio investigations and market probes, including (1) an investigation for potential relative monopolistic practices (abuse of dominance) in the market of e-commerce platform services in Mexico[4] (COFECE informed that this was the first time an investigation

3 eMarketer, Global Ecommerce 2019, 27 June 2019, https://www.emarketer.com/content/global-ecommerce-2019.

4 Comisión Federal de Competencia Económica, *COFECE probes the market of e-commerce platform services in Mexico*, file number IO-002-2017, 1 February 2018, https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-06-2018-COFECE.pdf.

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on digital markets was opened in Mexico); (2) a market probe to determine if there are competition barriers or essential facilities causing anticompetitive effects in the market of payment services which involve compensation of payments through debit and credit cards[5]; and (3) a market study related to the retail of food and beverages. Similarly, the Federal Institute of Telecommunications (IFT)[6] has also initiated a probe into potential abuse of dominance in the market of production, distribution and commercialisation of content transmitted over the internet, as well as in the distribution and commercialisation of streaming devices. All these investigations and probes involve e-commerce businesses to different extents.[7]

In these efforts by competition authorities to better understand the functioning of the digital economy and to develop regulations in line with this new environment, several questions have been raised on which the appropriate way is, or which tools should be used by competition authorities to achieve these goals and protect the dynamic nature of these digital markets.

Moreover, it is important to consider that most distributors or suppliers are active in both online and offline markets. In this regard, developing specific rules to attend only online markets could be challenging for competition authorities and represent a risk of inappropriate decisions and enforcement by indivertibly assessing only a part of the market because of wrongful segmentation.

Another important challenge for the competition analysis of e-commerce is the recognition of retail multisided platforms. On e-commerce, marketplaces are an example of multisided platforms, since they unite retailers who seek to sell their products and services, customers that are willing to buy, and advertising seeking to draw attention to a given objective. The variation in retail multisided platforms online is the interaction of different groups of customers, each one with specific demands and preferences, but closely interlinked, since conduct by one group will necessarily impact the others. Multisided platforms normally also involve different pricing implications for each different group (i.e., customers and sellers or advertisers), since the platform may, for example, impose certain fees to sellers whereas consumers may be subject to a significantly lower fee or no fee at all.

From a competition law perspective, determining that any of these players has a dominant position is a difficult task, or at least, it is likely to represent a challenge for the conventional monopolistic test, which would be less effective than in other markets. A platform may, for example, offer free services to its customers while costs are absorbed by sellers, implying a close interdependency between different types of users.[8]

5 Comisión Federal de Competencia Económica, COFECE investigates possible barriers to competition and/or essential inputs in card payment systems, file number IEBC-005-2018, 26 October 2018, https://www.cofece.mx/wp-content/uploads/2018/11/COFECE-047-2018-English-.pdf.

6 Antitrust authority in Mexico with exclusive jurisdiction over the telecommunications and broadcasting sectors.

7 Comisión Federal de Competencia Económica, *COFECE initiates market study in retail food and beverage sector,* file number REC-001-2019, 20 May 2019, https://www.cofece.mx/wp-content/uploads/2019/05/COFECE-031-2019-English.pdf.

8 OECD Directorate For Financial and Enterprise Affairs Competition Committee, *Implications of E-commerce for Competition Policy-Background Note*, 2018, p.14 http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf (The OECD Implications of E-commerce).

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In multisided platforms there are different issues which must be assessed to determine the existence of market power. First, the existence of different customer groups with individual demands, who constantly interact through a platform represents a problem, as although the different groups can easily be identified, their different demands are highly interdependent, as price increases or quality decreases directly affecting one group will necessarily impact the other, deriving in a reduction of the general demand on the platform.[9] This symbiosis and common goal to increase demand (which benefits both sellers and consumers) drives the e-commerce environment. Second, cross-subsidies between participants in a platform may also occur, as one group can access the platform without incurring in any costs, whereas the other group is charged to access the platform to offer products.

These complex payment structures make the traditional small but significant non-transitory increase in price test (SSNIP test) or hypothetical monopolistic test less effective.

A third particularity refers to innovation. Multisided platforms are continuously subject to incremental innovation, seeking to improve their offerings to attract more users to the different channels of the platform, be it as a consumer or as a seller. A disruptive innovation by alternative business models may quickly displace a leading platform. The interconnectedness of the digital ecosystem means that dynamic considerations which drive innovation are also present in e-commerce and should be considered. [10]

These particularities were recently analysed by COFECE when reviewing Walmart's intent to acquire Cornershop -a grocery delivery platform which offers end-consumers the possibility to access and order groceries from a variety of supermarkets and retailers-, which COFECE ultimately blocked. This is the first e-commerce platform-related merger ever blocked by COFECE. Although COFECE raised several concerns, most were dissipated through the evidence submitted by the parties', as well as through certain remedies; however, one concern remained which in COFECE's view, could not be dissipated by any remedies: that the transaction could induce Walmart's competitors to abandon the platform because of the strategic information to which Walmart would have access to.

With the continuous growth of e-commerce, competition concerns of vertical restraints have become increasingly relevant by competition law in several jurisdictions and has driven discussions as to the approach that competition authorities should follow when analyzing such vertical restraints.

For the vertically integrated manufactures that chose to operate their own online sites to have more control over distribution, competition laws are usually not required to be applied. Nonetheless, in those cases where the manufacturer is not vertically integrated and tries to limit or control the online resale of its products or impose contractual limitations (such as exclusivities or most favored nation provisions) may potentially raise concerns and therefore, must be analysed in detail to determine whether any they pose an actual risk.

In general, there are two distribution models used by manufacturers for online sales, which should be analysed on a case-by-case basis to determine whether they have significant anti-competitive effects to consider them illegal. The first is the exclusive distribution model, which refers to vertical arrangements by which a supplier agrees to sell its products to one single distributor in one specific territory, which limits competition between different manufacturers

9 ibid.

10 ibid.

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by limiting the online retailer to only sell one specific brand.[11] The second is the selective distribution model, which refers to vertical arrangements by which a supplier establishes minimum standards for admitting a manufacturer in its distribution network. One of the practices that have been implemented in e-commerce is the inclusion of so called 'internet addendums' which includes more restrictions for online sales.[12] This issue of course can be considered from the other side of the argument in that it offers a market where there was none.

Another important practice in the selective distribution model that has been analysed and deemed anticompetitive in Europe is the absolute ban of online sales,[13] in which a clause that limits the scope in which the products can be commercialised (although the agreement does not contain a specific prohibition to have online sales) without having objective justifications has been found anticompetitive as it restricts competition in markets where there is not a physical store– i.e., online. The European ruling in this case has been highly controversial and some commentators believe that not all the relevant facts of the products and the specific industry were considered.

Additionally, vertical price-based restraints and their effects in digital markets have become an important topic of study, as they are often used in online platforms. Retail price maintenance is a restraint imposed usually by the manufacturer to the distributor or retailer, where the manufacturer sets a maximum, minimum or fixed resale price to end consumers.

Dual pricing, where a manufacturer imposes different prices depending on whether they are sold online or offline is also an important practice and may constitute a harmful vertical restraint. In fact, the European Commission has determined that these restraints constitute a hard-core restriction which has been considered in different enforcement actions against manufacturers.

Moreover, there are non-price related vertical restraints in which the manufacturer can impose certain rules to the distributor or supplier such as: exclusive distribution to a specific distributor; select the specific distributors that can commercialise a product; acquire a product from one supplier (also called single branding); exclusive supply; and tying and bundling.

According to the OECD, although not all vertical restraints are harmful to competition, these practices can have negative effects in competition when they imply a market foreclosure, when they facilitate collusion or when they soften competition. Market foreclosure may particularly be harmful in concentrated markets and when the main participants implement activities (in any part of the distribution chain) to prevent other players from entering the market. Collusion may be facilitated either in the upstream or downstream markets by the dynamics followed by suppliers or manufacturers when price arrangements allow other suppliers to the prices in each level of the chain, making coordination easier to increase profitability. Softening competition can be caused by the imposition of price restrains which reduce incentives to compete fiercely among suppliers or distributors (for example, allocating specific areas to distributors for the sale of the manufacturer's products), which could grant certain market power to distributors in their exclusive territory.

11 OECD Implications of E-commerce, op cit, p.16.

12 ibid, p.17.

13 Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi.*

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Although competition authorities are working to ensure competition in digital markets, based on the technical knowledge required and the constant evolution of the digital economy, it is difficult to apply traditional competition laws and economic principles to this sector. This represents a continuous challenge as competition authorities will not only face technical difficulties, but also geographical problems due to the global scope of digital economies which requires cross-border cooperation between different competition authorities.

Likewise, the continuous evolution of the digital economy brings two main challenges to competition authorities when it comes to enforcement of competition law in this market: being able to conduct an analysis in a dynamic environment where current circumstances can change rapidly, and being able to determine when the dynamics of the digital economy become a competition problem and in which cases enforcement of competition laws is (more) effective.[14]

A clear example of this is the digital economy in an increasing tendency to mobility: platforms can encourage innovation by opening their platforms to enable third parties innovate through 'follow-on' technologies, but this can also raise concerns if the platforms seeks to exclude third-party applications to protect its own vertically integrated applications or if it first seeks to capture investment by third-party developers only to copy their applications.[15]

Based on the above, when it comes to the application of competition laws in the digital economy, there are many elements that must be analysed to determine if the traditional principles reflected in competition laws reflect the reality of digital markets and their dynamics, or whether such concepts require adjustments.

In general terms, there is a consensus among scholars, commentators and professionals in the sense that current competition laws are sufficiently flexible to adjust to the specific characteristics of digital markets and therefore, specific regulations are not necessary and on the contrary, may be inappropriate due to a risk of eliminating the possibility of adjusting the rules to new business models and dynamics. Moreover, as most distributors participate in both brick & mortar and online stores, any assessment should consider the interrelation of the relevant players in both channels (online and offline). Disregarding this reality can lead to inaccurate decisions by competition authorities.

Other options discussed by the OECD relate to the creation of specific regulations for certain practices in the e-commerce sector, which have been implemented by some jurisdictions such as the European Union with the creation of the Geo-Blocking Regulation, which prohibits certain business-to-consumer practices for cross-border sale of goods and services through e-commerce, or the Macron Law in France, which prohibits the use of most favored nation clauses in the hotel sector. Some competition authorities have also made the argument that specific regulations could eliminate uncertainties in the application of competition laws in the digital sector, but as previously mentioned, specific regulations may also derive in disadvantages preventing flexibility of the regulations to adapt to unforeseen cases.

A different alternative analysed by the OECD has been the modification of consumer and data protection laws, aiming to regulate -to the extent possible- all aspects of e-commerce transactions. This may also prove short of being sufficiently effective, as different rules among jurisdictions may constitute a barrier for cross-border online sales.

14 Ezrachi, Ariel, *EU Competition Law Goals and The Digital Economy*, University of Oxford, 2018, p.1.

15 OECD Hearings, op.cit, p.10.

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A key element that also needs to be considered when discussing competition implications of the digital economy and e-commerce is data collection, as it allows (among other things) to acquire consumer preferences. This has further lead to discussions as to whether personal data may constitute an essential facility, raising the question as to whether a policy for limiting data collection is necessary and even convenient. An important factor to consider when addressing this discussion, is that data collection is not, on its own account, contrary to competition, as it does enhance innovation and benefits both suppliers and consumers by clearly identifying different market segments.

That said, data collection can also constitute a strong tool for algorithmic competition mechanisms which could potentially facilitate collusion or unilateral conduct. This has also become relevant for competition authorities to analyse at what point data collection may constitute an illegal conduct and how competition laws address some of the associated concerns. Consensus has not reached on this topic and hence, it is likely that competition authorities will continue paying close attention. A good example of an illegal practice committed through the collection of data was analysed and fined by the European Union, whereby it imposed a fine of €2.42 billion to Google for its abuse of a dominant position as search engine. According to the European Commission, Google provided an illegal advantage to its own products in detriment of its competitors.[16]

Advertising is also a key feature which plays an important role in e-commerce and the digital economy. It has become an essential component and is highly integrated in almost all e-businesses and other digital platforms such as social networks. Together with data collection, users can easily be targeted with tailor-made advertising, impacting the competitive environment in the digital economy.

In conclusion, we believe the Mexican authorities are well equipped to analyse e-commerce with the tools and laws already in place. However, it is important that they understand that e-commerce has created new ways of doing business and modified the traditional interaction between economic agents and customers and authorities will need to adjust their traditional models. Within the changes caused between the market participants, platform owners, suppliers and distributors could be deemed as participating in different markets and therefore, not as competitors. This conclusion however, if reached without an in-depth analysis of the close interrelation of traditional and non-traditional activities, could also cause unintended consequences, special care is needed.

In these efforts to analyse the new models of digital business, COFECE has approached the new business models in digital markets in some specific sectors, most notably in the financial sector, which have been recently regulated by the Congress in Mexico through the approval of the Law to Regulate the Technological Financial Institutions (the Fintech Law).

The Fintech Law pursues to regulate the financial institutions to provide them guidance on the development and use of technology and infrastructure to provide to the consumers certainty on the use of digital platforms and promote at the same time investments in the development of the digital financial platforms. COFECE analysed the Fintech Law from the competition perspective and submitted some suggestions to promote competition and innovation in the services

16 European Commission, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 2017, <http://europa.eu/rapid/press-release_IP-17-1784_en.htm>

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offered by financial technology companies (fintechs) to Congress. In this regard, COFECE suggested that fintechs be allowed to access the information of the users of the platform that is currently in possession of the financial institutions. This information is seen by COFECE as an essential facility for fintechs to be able to effectively compete with the financial institutions and the Mexican authority considered that granting fintechs access to the information of the users without charging additional fees or imposing additional conditions other than those imposed on traditional financial institutions was essential to promote competition in the digital financial market.

The Mexican authority has indicated that the study of the development of the new technologies and its impact in competition in different markets is very important and, in an effort to establish a clear path in the study and analysis of competition in the digital markets, it issued a position paper called 'Rethinking Competition in the Digital Economy', in which an in-depth analysis is made of the differences between the traditional and digital business models. We believe that in the near future we will continue to see the Mexican authority actively participating in all industry or sectorial regulations in which new digital business models are regulated or analysed, as COFECE has stated its commitment to collaborate in the implementation of regulations that help to promote and enhance competition in the markets in which digital economy is playing an important and disruptive role.

A balance between innovation and competition regulation needs to be safeguarded to keep innovation and investment going while at the same time protecting markets from potential harm. The role of Mexican competition authorities in the following years will be key to this purpose and may require adapting traditional concepts to the specific characteristics of the digital economy or by creating new regulations if needed in the future.

Another interesting feature of the Mexican institutional setting is the division of powers between COFECE as the competition regulator in all markets except for the telecommunications and broadcasting markets, where the sectoral regulator, the Federal Telecommunications Institute is also the competition authority with exclusive jurisdiction. Although there have been several cases in which the authorities have fought for jurisdiction in some markets and these battles have ended up before the judiciary, there has only been one precedent involving e-platforms, in the proposed acquisition of Cornershop by Uber (Uber, a ride-sharing app and Cornershop, a grocery shopping app). In this case, the Federal Court ruled that COFECE had jurisdiction to review the case, as the Court argued that the relevant question from a competition perspective was which markets may be affected by a transaction, rather than whether the means used by the companies are electronic or not. This is an important precedent, as it is a clear interpretation by the Federal Court that even if an activity falls under e-commerce, a comprehensive assessment must be made to identify the competitive dynamics with traditional businesses.

There is no clear path to follow, but competition authorities will have to weigh the potential harm of a specific practice against the potential detriment to innovation in their decisions.

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Appendix 1

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Mr Mena is a partner in the competition law practice of the firm where he advises and represents clients in competition-related matters, including compliance and litigation. He was the first chief prosecutor (head of the investigative authority) at the Federal Economic Competition Commission of Mexico and was involved in the negotiations on the current competition laws.

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Increasingly, competition enforcement in digital markets is moving on from a discussion of whether established competition tools and laws are sufficient for the new challenges of the online world, to specific and targeted enforcement against tech companies. This fully updated *E-commerce Competition Enforcement Guide*, edited by Claire Jeffs, looks at this evolution and discusses its impact on companies, consumers and indeed competition itself. Drawing on the collective wisdom and expertise of distinguished experts from around the world, the Guide provides insight on the differing approaches adopted by enforcement agencies and whether a balance is being struck between maintaining a vigilant approach to the digital economy and allowing competition to flourish.

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