

Competition and antitrust in the digital age

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While the digital economy offers abundant opportunities to customers and retailers alike, it also raises a number of competition concerns, including the impact on bricks-and-mortar businesses, the potential for abuse of market power by major digital platforms and the challenge of fostering online competition while preventing free riding. Competition authorities must evolve and adapt traditional antitrust principles and approaches to meet the challenges of the rapidly changing digital market.

What impact has the rapidly changing digital market had on competition in your jurisdiction, and how have legislators and competition authorities responded?

The digital market is expanding worldwide and Mexico is no exception. A recent study showed a 59% growth in e-commerce in Mexico from 2014 to 2015, amounting to approximately \$17.6 million worth of transactions. Further, the number of e-commerce transactions grew by approximately 949% from 2009 to 2015.⁽¹⁾

However, in comparison with other countries, this growth is somewhat negligible and has been inconsistent across the country. According to recent studies, 41% of Mexican e-commerce is concentrated in only three of its 31 states, including Mexico City.⁽²⁾ This may be due to the fact that Mexico's internet coverage is not as developed as in other countries and, as such, few people can access e-commerce.

Despite this, the effect that e-commerce has had on the Mexican economy is not insignificant. It is therefore necessary to monitor the effect that it has and will have on competition.

Since 2000, e-commerce has been regulated by the Commercial Code with respect to:

- parties' compliance with their obligations in e-commerce agreements;
- the principles governing e-commerce;
- security in transactions; and
- the rules for determining when an e-commerce agreement is created (ie, the time and date).

In addition, the Procuracy for Consumer Protection is in charge of protecting consumers' rights in both traditional and e-commerce transactions.

However, legislators have taken no action towards regulating the effects of e-commerce on economic competition in the digital market.

Conversely, in recognition of the importance of e-commerce and the development of new technologies that can improve peoples' day-to-day lives, but also give rise to competition concerns, the Federal Economic Competition Commission (FECC) stated in its Annual Working Plan for 2017 that it will focus its efforts on competition issues arising from disruptive technologies, which include apps and internet platforms.⁽³⁾

Mexico has two competition authorities:

- the FECC; and

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- the Federal Telecommunications Institute (FTI), which is the competition authority for the telecommunications and broadcasting sectors.

In general terms, the FECC regulates all digital platforms that affect traditional businesses; however, there are some grey areas concerning digital platforms that compete with traditional broadcasting or telecommunications services, such as over-the-top services and music platforms. In such cases, even though the platform could compete with an FTI-regulated market, some related elements, such as licences, may be under the FECC's jurisdiction. When such jurisdictional problems arise, the federal courts specialised in competition matters must determine which authority is entitled to review the market.

In terms of market definition, are online services considered to be in the same market as traditional services in your jurisdiction? What impact has this had on competition?

There is only one publicly available opinion in which the FECC has assessed competition concerns regarding online services or digital markets in the context of new transportation apps such as Uber, Cabify or Easy Taxi.⁽⁴⁾ In this opinion, the FECC did not define specifically the relevant market in which these transportation apps operate, but recognised that they compete with traditional taxi services in certain circumstances and can therefore be considered to be in the same market. However, the FECC stated that these new platforms have certain characteristics that enable them to fulfil consumer needs which, at present, traditional services cannot.

Further, the FECC recognised that these new apps provide certain efficiency gains that enhance consumer surplus, such as:

- solving information asymmetries and coordination problems; and
- offering convenient conditions, including security, cleanliness, transparency and efficient route selection.

In light of the above, the FECC recommended that the legislative and regulatory agencies not issue regulations that could create barriers against or decrease innovation or impede the growth of disruptive technologies.

What types of conduct constitute abuse of dominance in the online space and what practices are most likely to catch out unwary online players?

New technologies are continuously emerging and changing. Considering the lack of knowledge regarding these new technologies, a number of competition matters are pending before the FECC, which will be thoroughly analysed and decided on a case-by-case basis. Given the diverse nature of each player in the market – such as bricks-and-mortar establishments and retailers and allegedly neutral and vertically integrated platforms – the determination of whether an economic agent has abused its dominance will not be a straightforward matter.

Digital platforms, such as online retailers and mobile apps, are two-sided markets as they are created to connect services and product providers, including advertisers, with consumers looking to have their needs fulfilled.

In the case of online services, many bricks-and-mortar establishments and retailers offer their products and services through a platform expecting it to reflect the principles of neutrality. However, a situation where a platform competes with service and product providers and advertisers may arise. For instance, the platform may be incentivised to give preferential treatment to the advertising of its own products, in prejudice of those of its competitors. In the case of such information asymmetry, conduct constituting an abuse of dominance, such as a margin squeezing or discriminatory treatment, can flourish.

In this respect, the FECC should promote transparency rules, including full disclosure of advertisement policies to both bricks-and-mortar businesses and consumers.

What steps are competition authorities in your jurisdiction taking to prevent online retailers and services providers from free riding on the investments of bricks-and-

mortar retailers and services providers?

A free-riding problem may arise between traditional establishments – both bricks-and-mortar retailers and manufacturers – and online retailers. Online businesses may benefit from pre-sale services offered by traditional establishments (eg, face-to-face customer service and fitting rooms) which may create incentives for online platform retailers to offer lower prices than traditional establishments and therefore attract more demand.

This may affect the business of traditional establishments, encouraging them to eliminate pre-sale services in order to reduce costs and compete with online retailers, all of which may reduce consumer surplus. In this context, the FECC may encounter some vertical restraints which can be justified as solving free riding or other similar problems.

Nonetheless, neither the FECC nor the FTI have taken steps to prevent online retailers and service providers from free riding on the investments of bricks-and-mortar retailers and service providers. However, as mentioned above, the FECC will focus its Annual Working Plan for 2017 efforts on studying disruptive technologies and will hopefully address the above issues.

How can competition authorities best ensure that these steps do not hinder innovation or consumer choice and promote the continued evolution of online services?

The digital market will likely continue to expand rapidly. At present, new technologies are having a significant impact on bricks-and-mortar businesses, which has given rise to new competition concerns.

While assessing new technologies and their impact on competition matters, the FECC should consider the fact that digital markets are evolving faster than traditional markets; hence, a digital market could be vastly different by the time the FECC decides a case or issues a determination. This has happened in other jurisdictions, such as the United States and the European Union.

Based on the only publicly available FECC precedent on transport platforms, it is likely that it will avoid intervening in digital markets with regard to disruptive technologies that enhance the consumer experience. Nonetheless, it may be important for the FECC to issue general principles of transparency and neutrality in order to prevent an abuse of dominance that may ultimately harm consumers.

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Endnotes

(1) Mexican Association of Internet, [Ecommerce Study Mexico 2016](#).

(2) *Ibid.*

(3) FECC, [Annual Working Plan for 2017](#).

(4) FECC, [Resolution to File OPN-008-2015](#).

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