

Critical Decision: COFECE and the Future of E-commerce Competition in Mexico

By Mariana Camacho Ordonez | The George Washington University



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Mexico's Federal Commission of Economic Competition ("COFECE") faces a critical moment regarding the ratification of its Investigating Authority's findings on potential barriers to competition in the "retail e-commerce market." The Investigating Authority recently released its Preliminary Report² ("Report") after conducting an inquiry into competitive dynamics within the retail e-commerce sector. The Investigating Authority suggested the imposition of structural remedies on "two leading economic players of the retail e-commerce market": Amazon and Mercado Libre.

This investigation is supported by Article 94 of the Mexican Federal Economic Competition Law ("LFCE"), under which it is considered a "hybrid tool" or a "quasi-regulatory procedure" since it allows the imposition of regulatory-type remedies that are not aimed at imposing economic sanctions for anticompetitive conduct against economic agents. Instead, the procedure is designed to identify structural problems and impose different types of remedies and/or regulations through orders that the economic agents are asked to implement.³

In this case, according to the Investigating Authority's preliminary findings, the three potential barriers to competition are (i) "Artificiality" in some components of the marketplaces' loyalty programs; (ii) "Buy Box opacity" affecting sellers' access to information on product selection, and (iii) "Logistics solutions foreclosure" due to restricted access

to logistics Application Programming Interfaces (APIs) by major platforms.

Mexican competition law allows the economic agents "to present their arguments and evidence, which are analyzed by the Commission's Board before a final decision is made."⁴ Although Amazon and Mercado Libre's formal response has not been published yet, both companies have made public statements confirming their awareness of the Report and their willingness to collaborate with the Authority and continue promoting competition and innovation in the industry.⁵ From an antitrust perspective, these are some of the key points that the Commission's Board will need to analyze while studying the initial findings to make a final decision.

I. Problematic Market Definition

The Report's narrow market definition misses important competitive dynamics and consumer behaviors. The Report highlights a major oversight in considering the wide range of substitutes and competition by distinguishing between the Seller's Relevant Market and the Buyer's Relevant Market and emphasizing network effects. According to the Investigative Authority, Amazon and Mercado Libre's market shares and high entry barriers suggest insufficient competition. However, this conclusion is problematic since the Report does not fully consider the role of physical stores, social media platforms, and other retail channels that may compete with or complement

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² Federal Commission of Economic Competition ("COFECE"), Preliminary Report. Reference: IEBC-001-2022.

³ Alejandra Palacios, CPI Columns Latin America, Competition Tools for Digital Markets in Mexico: Section 94 of the Economic Competition Federal Act (2021). <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/06/LatAm-Column-June-2021-2-Full.pdf>.

⁴ *Id.* at 5.

⁵ Rodrigo Riquelme, El Economista, Amazon y Mercado Libre responden a Cofece: promovemos la competencia (2024). <https://www.eleconomista.com.mx/empresas/Amazon-y-Mercado-Libre-responden-a-Cofece-promovemos-la-competencia-20240213-0096.html>.

marketplace services. This narrow definition ignores the nuanced ways consumers interact with and move between online and offline shopping environments, as well as the changing nature of retail as technology and consumer preferences change. A more comprehensive market definition is needed to accurately assess competitive dynamics and ensure regulatory actions match market conditions.

Indeed, in its Report, the Investigating Authority concludes that there are two different relevant markets under study: (i) the Seller Relevant Market which consists of the marketplace service for sellers with a national geographic dimension,⁶ and (ii) the Buyer Relevant Market which consists of the market of marketplace services and online stores of multiple categories to buyers within the national territory.⁷ According to the Authority, given the high network effects produced in a marketplace, both markets interact with each other since having more users on one side (buyers) increases the number of users on the other (sellers).⁸

After analyzing market shares in both Relevant Markets, the Report reaches a preliminary conclusion that there are “no conditions for effective competition in those markets” considering (i) Amazon and Mercado Libre hold the largest market share, jointly representing over 85 percent of sales and transactions in the Sellers Relevant Market; (ii) the top three participants of the Buyers Relevant Market hold 61 percent of the market share, with the remaining participants having a highly fragmented share, and Amazon and Mercado Libre leading the market, (iii) the strong network effects among user groups, as well as within the same user group, and (iv) the barriers to entry related to high investment requirements.

Given that this conclusion certainly responds to the narrow market definition described above, one of the main points that needs to be analyzed by the Commission’s Board is the proposed market definition as a critical component of this case. It is important to consider that market definition not only “narrows consideration to a limited range of relevant products or services”⁹ but also “specifies a domain of competition at issue in an antitrust case—that is, the nature of the competition between certain firms that might (or might not) be harmed by the conduct of the defendant.”¹⁰ Therefore, it is crucial for the Commission’s Board to carefully define to what extent the marketplace service is itself a relevant market (as proposed by the Investigative Authority) or whether it competes with other online retailers and/or traditional brick-and-mortar sellers of the same product.

For example, the Investigative Authority found that, regarding the Buyer Relevant Market, physical stores do not substitute online marketplaces since the latter offer a comprehensive value proposition, including access to a wide range of products, 24/7 availability, easy comparisons, and nationwide logistics, while physical stores primarily offer personal product experiences but lack the convenience, variety, and logistical support of online marketplaces.¹¹ This hypothesis has been supported by experts who consider that “the ‘one-stop shop’ offered by large digital platforms may have no equivalent within the brick-and-mortar world.”¹²

However, it should be noted that “consumers buy *products*, not store types.”¹³ In that sense, determining how substitutable offline and online retail channels are involves examining each case individually, considering factors such as “consumer preferences, product features, and

⁶ COFECE, *supra* note 2, at 58.

⁷ COFECE, *supra* note 2 at 81.

⁸ *Id.* at 176.

⁹ Geoffrey A. Manne, International Center for Law and Economics (ICLE), *Gerrymandered Market Definitions in FTC v Amazon* (2024). <https://laweconcenter.org/resources/gerrymandered-market-definitions-in-ftc-v-amazon/>.

¹⁰ *Id.*

¹¹ COFECE, *supra* note 2, at 68.

¹² Florence Thepot, *Market power in online search and social-networking: a matter of two-sided markets*, 36 *World Competition* 195. (2013).

¹³ Manne, *supra* note 9.

advancements in technology and business practices.”¹⁴ In the words of the Organisation for Economic Co-operation and Development’s (“OECD”): “does it make sense to argue that the same product, being sold by the same retailer, generally at the same price, sits in a different product market depending upon whether the customer opts to complete the transaction online or instore?”¹⁵

Similarly, the Investigative Authority concludes that from the buyers’ side, sales through social media platforms, such as Facebook Marketplace, cannot match the comprehensive value proposition provided by marketplaces, as they lack the range of products, convenience, and integrated services like secure payment processing and logistics coordination, making them complementary rather than direct substitutes of Amazon and Mercado Libre’s marketplaces, ultimately offering buyers a more complicated and less convenient purchasing process compared to these marketplaces. From the sellers’ side, the Report reaches a similar conclusion given that sales through social media lack logistics and payment systems and do not allow transactions to take place within the platform.

However, the analysis ignores that from the buyers’ side “Mexican buyers are highly influenced by social networks when making purchases. Forty-three percent of e-commerce buyers have bought via Conversational Commerce or c-commerce (selling via Facebook or WhatsApp), and 29 percent through ‘lives’ or live streams.”¹⁶ Now, from the sellers’ side, it should also be considered that Amazon and Mercado Libre are not the only places available for sellers to reach consumers. Even if logistics and payment systems may vary, statistics show that social media is, much like online marketplaces, an attractive and easy option for sellers to offer their products.

In general, the Commission must be careful not to base its decision on a misconstrued market definition that assumes that Amazon and Mercado Libre compete exclusively with other “leading economic players of the retail e-commerce market” following the example of the Federal Trade Commission’s (“FTC”) case against Amazon. As experts in the US have underscored “the alleged ‘online superstore’ and ‘online marketplace markets services’ [in the FTC case] are excessively narrow, excluding manifest competitors and alternatives.”¹⁷

Finally, regardless of the market definition, it is also important to remember that to determine the dominant or leading position of an economic agent in a specific market its position needs to be considered individually, and not through combined market shares as suggested by the Report. All these points are essential to correctly define the relevant market.

II. Exaggerated Barriers to Competition?

Restrictive logistical solutions, loyalty programs, and the Buy Box system’s opacity are alleged barriers to competition. According to the Report, loyalty programs influence buyer behavior through streaming services but also create an entry barrier for competitors. This ignores sellers’ ability to innovate and offer unique value propositions outside of such programs. As for the Buy Box’s opacity, transparency and sharing operational details could alleviate these concerns, suggesting that the barrier is more about information asymmetry than an insurmountable obstacle. Additionally, logistical solutions, which were previously a barrier due to exclusive arrangements with Amazon and Mercado Libre, are addressed by proposing performance-based logistics provider integration. In other words, the barriers may not be as high as initially thought and the Report’s

¹⁴ Organisation for Economic Co-operation and Development (“OECD”), Implications of E-commerce for Competition Policy - Background Note (2018) at 28. [https://one.oecd.org/document/DAF/COMP\(2018\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)3/en/pdf).

¹⁵ *Id.*

¹⁶ International Trade Organization, Mexico - Country Commercial Guide, (2023). <https://www.trade.gov/country-commercial-guides/mexico-ecommerce>.

¹⁷ *Id.*

recommendations may overestimate their impact on competition and market access.

Indeed, the LFCE defines Barriers to Competition and Free Market Access as “[a]ny structural market characteristic, act or deed performed by Economic Agents with the purpose or effect of impeding access to competitors or limit their ability to compete in the markets; which impedes or distorts the process of competition and free market access, as well as any legal provision issued by any level of government that unduly impedes or distorts the process of competition and free market access.”¹⁸ The Report reaches the conclusion that, in this case, there are three barriers to competition:

First, the Investigating Authority establishes that there is artificiality in some components of the marketplaces’ loyalty programs. The Report states that loyalty programs in marketplaces like Amazon and Mercado Libre influence buyer behavior, creating a barrier to competition. According to the Authority, “these programs include services such as streaming, which are not directly related to transactions between buyers and sellers but attract and retain buyers, thereby reducing the likelihood of them using alternative marketplaces. This particularly affects the seller market and increases entry costs for competitors in the buyer market.”¹⁹

As a corrective measure, the Investigating Authority has ordered Amazon and Mercado Libre to dissociate streaming services and other unrelated services from their loyalty programs. Additionally, both economic agents are ordered to cease promoting these services on their marketplaces. In other words, streaming services and similar offerings must be provided and charged for independently and separately from any loyalty program or subscription service.²⁰

Second, the Investigative Authority concludes that there is opacity in the operation rules of the

Buy Box within Amazon and Mercado Libre. The Buy Box is a system within the marketplace that, through a series of algorithms, selects and highlights a particular offer as the best offer for buyers. For sellers offering products through Amazon and Mercado Libre, winning the featured offer slot is crucial as it provides greater visibility and increases the probability of sales. However, according to the Authority, there is limited and inefficient information available to sellers regarding the operation of the Buy Box and the variables it considers when choosing the featured offer. The limited information provided by the marketplaces to sellers could lead them to erroneous strategies as they seek to win the featured offer slot, making it difficult for them to compete effectively.²¹

As a result, to eliminate these restrictions the Investigative Authority has ordered Amazon and Mercado Libre to share the necessary information related to the Buy Box with all users. Specifically, the Authority ordered both companies to create a section on its seller portal informing users of all variables considered by the Buy Box to select the featured offer and announce all corrective measures on their respective seller portals, providing also COFECE’s contact details for users to report any non-compliance with the imposed measures.²²

Finally, the Investigative Authority has identified that the current configuration of logistic solutions within marketplace services for sellers constitutes a third barrier to competition and free market access. According to the Authority, this anti-competitive effect impacts both the relevant seller and buyer markets since, (i) Amazon and Mercado Libre do not allow the interconnection of their APIs with all logistics companies, and (ii) there is a link between product positioning, through the Buy Box and/or distinctive labels,

¹⁸Article 3 IV of the Mexican Federal Economic Competition Law. https://www.cofece.mx/wp-content/uploads/2018/03/Federal_Economic_Competition_Law.pdf.

¹⁹ COFECE, *supra* note 2, at 505.

²⁰ *Id.*

²¹ COFECE, *supra* note 2, at 506.

²² *Id.*

and the adoption of fulfillment programs offered by the same platforms.²³

To address these issues, the Investigative Authority proposes the following corrective measures: (i) modify the criteria of the Buy Box so that the contract of logistics solutions with a specific economic agent is not considered as a variable. Instead, logistics contracts should be determined by efficiency and performance criteria; (ii) allow interested logistics companies to integrate into the platform through their respective APIs to facilitate the offering of logistic services properly, and (iii) modify the criteria for assigning the "Prime" or "Fulfillment" label so that these labels are not exclusively assigned to sellers who contract logistical services from Amazon and Mercado Libre, respectively. Instead, criteria for assigning such distinctions should be based on efficiency and performance, regardless of the logistic service provider.²⁴

Regarding these three findings, it is critical to clearly determine how Amazon's and Mercado Libre's infrastructure, know-how, scale, and goodwill constitute barriers to competition. Although the Investigative Authority makes references to scenarios in which those companies naturally have an advantage over other competitors, it is not clear how this

impedes access to competitors or distorts the process of competition and free market access in practice.²⁵ Also, it is fundamental to consider that the alleged barriers to competition are only possible in a scenario in which Amazon and Mercado Libre have a dominant position based on the problematic market definition that are excessively narrow as explained above. Finally, it should be carefully analyzed if the implementation of the proposed corrective measures achieves its objectives in the least burdensome or restrictive manner and considers the best interest of consumers and the Mexican economy.

More generally, it cannot be ignored that Mexico is the second-largest e-commerce market in Latin America, demonstrating a thriving e-commerce industry.²⁶ Why regulate something that isn't broken, but instead thriving? In addition, regarding the excessively narrow market definition mentioned in the Report, it is important to question why the investigation fails to consider Alibaba and Walmart, which are respectively the third and fourth-largest e-commerce platforms in Mexico.²⁷ These omissions indicate that the Preliminary Report should address these significant oversights before the issuance of any Final Report, let alone contemplating additional measures.

²³ *Id.* at 510.

²⁴ *Id.*

²⁵ Mario Zúñiga & Geoffrey A. Manne, Truth on the Market, *Mi Mercado Es Su Mercado: The Flawed Competition Analysis of Mexico's COFECE*, (2024). <https://truthonthemarket.com/author/mzuniga/>.

²⁶ Stephanie Chevalier, "E-commerce market share in Latin American and the Caribbean 2023, by country," Statista, March 25, 2024, <https://www.statista.com/statistics/434042/mexico-most-visited-retail-websites/> ("Over the last few years, online buying and selling have gained considerable ground in Mexico, so much so that the country has positioned itself as the second largest e-commerce market in Latin America. With a rapidly increasing online buying population, it was forecast that nearly 70 million Mexicans would be shopping on the internet in 2023, a figure that would grow by over 26 percent by 2027.")

²⁷ *Id.* The ten e-commerce and retail websites in Mexico with over 15 million monthly visits are Amazon, MercadoLibre, AliExpress, Walmart, Liverpool, Coppel, Promodescuentos, HomeDepot, Samsung, and eBay. Arguably, a comprehensive and accurate market investigation should include all these e-commerce platforms.