

Unclassified**English - Or. English****27 September 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM –Session
III: Practical approaches to assessing digital platform markets for competition
law enforcement****- Contribution from Mexico -****24-25 September 2019, San Pedro Sula, Honduras**

The attached document from Mexico (COFECE and IFT) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 24-25 September 2019 in Honduras.

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JT03451728

Session III: Practical approaches to assessing digital platform markets for competition law enforcement

- Contribution from Mexico -

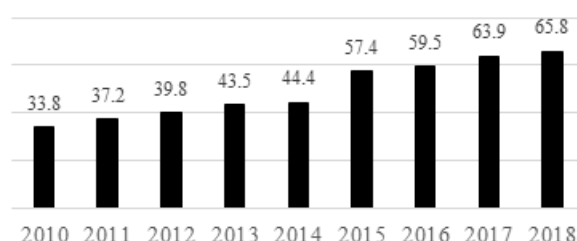
Federal Economic Competition Commission

1. Introduction

1. Mexico is undergoing a process of digital transformation in response to the increasing use of digital technologies, such as Internet access and the mobile communication devices. This transformation has increased the demand for goods and services offered through digital markets. The number of Internet users has grown steadily in the country (see Figure 1), which means greater opportunities to develop digital markets as the size of the market increases.¹

**Figure 1. Internet users in Mexico
(% of total population)**

**Gráfica 1. Usuarios de Internet en México
(% del total de la población)**



2. According to the National Institute of Statistics and Geography (INEGI), the main uses of the Internet are finding information, communication and entertainment (see Figure 2). Banking and online shopping are the least common uses, which could mean that they are the main activities with growth potential in the country.

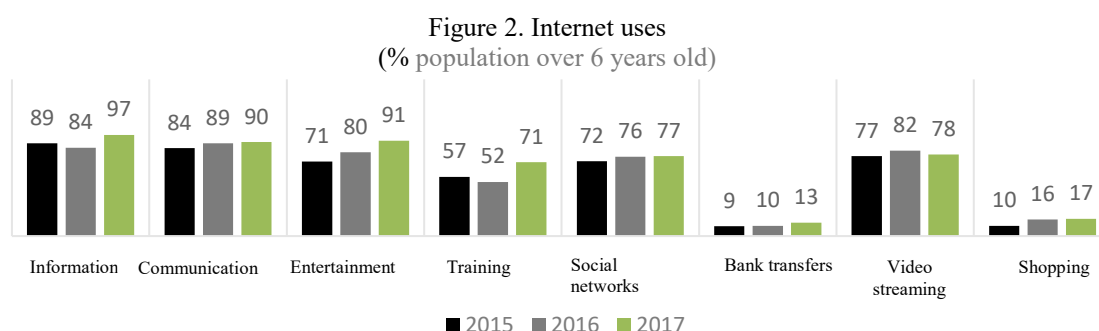
3. In Mexico, 64 per cent of the population uses the Internet, 58 per cent uses mobile devices with Internet access and 45 per cent uses a computer.² The number of mobile devices with Internet access has therefore increased rapidly in recent years, with 64.7

¹ Users aged 6 years and above, Government of Mexico, 2018. In Mexico there are 74.3 million Internet users and 18.3 million households with an Internet connection: ENDUTIH 2018. Available at: <https://bit.ly/2TXNQro>.

² Uso de las TIC y actividades por Internet en México: Impacto de las características sociodemográficas de la población [ICT adoption and Internet activities in Mexico: Impact of socio-demographic characteristics], 2018. Available at: <https://bit.ly/31dcB7I>.

million users in 2018.³ As a result, online sales have experienced a steady growth rate of 26 per cent in recent years, with greater participation of the retail sector. This trend is consistent with increased consumer access to the Internet and greater consumer confidence in online transactions.⁴ Furthermore, when comparing the number of purchases per week from 2017 to 2018, the figure increased by more than 400 per cent, with the highest expenditure on fashion and clothing.⁵

Figure 2. Internet uses
(% population over 6 years old)



Note. Internet users, by main use: 2017 – 71 million; 2016 – 65 million; 2015 – 62 million.

4. Average annual online spending in Mexico is similar to that of consumers in other countries with more mature digital markets, such as Brazil,⁶ the first online consumer in Latin America, which has an annual revenue from e-commerce of more than US\$19 billion, almost double the figure for Mexico in 2018.⁷

5. However, a constraint on Mexican e-commerce markets reaching maturity relates to the low levels of financial services and banking penetration, given that only 68 per cent of the adult population has at least one financial product (mainly debit accounts), and barely one third has access to credit.⁸

³ According to a survey conducted in 2018, 94 per cent of those who bought something online did so at least once using their smartphone. Estudio Sobre Venta Online, 2019 [Online Sales Study]. Available at: <https://bit.ly/2Gyh3H5>.

⁴ 2016: The Tipping point for e-commerce in Mexico, 2017. Available at: <https://bit.ly/2mGPbpP>.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Revenue from online retail sales in Mexico was US\$8.72 billion in 2018, according to Statista figures. Growth rate of e-commerce sales in selected Latin American countries in 2017 and 2018. Available at: <https://bit.ly/2mjO5lq>.

⁸ Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros [National Commission for the Protection and Defence of Financial Services Users – CONDUSEF], 2018. Educación e inclusión financiera en México [Financial education and inclusion in Mexico]. Available at: <https://bit.ly/2NkU036>.

2. Digital platforms in Mexico

6. Increased use of mobile devices, growing access to Internet services and the emergence of online services that offer a range of payment methods have allowed digital platforms to become a tool for providing services and products by connecting at least two different types of users (providers and consumers). However, digital platforms are not only a means for consumers to access a wider range of goods and services, but they also serve as a means of connecting producers and potential customers. As such, these platforms act as intermediaries connecting two or more user groups that need one another and that depend on the platform to facilitate interactions between them.

7. It is difficult to define digital platforms, though they can be understood as providing “services or content from different suppliers to consumers in a same space”.⁹ The platforms mediate between users and suppliers via the Internet, allowing for a greater amount of consumer information to be gathered. They operate through various commercial models, such as subscriptions, by presenting advertisements to consumers and open access models.

8. In Mexico, bank accounts and debit or credit cards are very important when it comes to completing online purchases. The fact that a large segment of the adult population does not have one is a barrier to the development of e-commerce platforms. This trend is also reflected in the commercial strategies of the main platforms operating in Mexico, given that they are working to create tools such as those that enable consumers to shop online and collect in store or pay on delivery, in order to skip the online payment step. However, these actions can only act as a temporary solution, as a high level of financial inclusion is necessary to harness the potential of the digital economy. It has been estimated that around 20 per cent of online purchases in Mexico were paid for using a barcode or reference number in a physical store.¹⁰

9. On the other hand, in Mexico, consumers tend to spend as much as those in more mature digital economies, as is the case for Brazil, whose online retail sales in 2018 totalled 19.7 billion dollars with 71 per cent Internet penetration, while Mexico achieved 17.6 billion in the same period with an Internet penetration six percentage points lower.¹¹ With respect to the Latin American region, e-commerce sales grew by 29.8 per cent in 2018,¹² and Mexico was recorded as just below that figure with 28.3 per cent growth.¹³

10. The rapid growth in e-commerce is having a positive indirect effect, as demonstrated by the gross value added (GVA) of 4.6 per cent in the e-commerce sector (in

⁹ Definition provided by COFECE in Rethinking Competition in the Digital Economy, 2018. Competition Advocacy Studies: COFECE. Available at: https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_ENG_letter.pdf.

¹⁰ Digital Platforms and Competition in Mexico 2018. OECD. Available at: <https://www.oecd.org/daf/competition/digital-platforms-and-competition-in-mexico-2018.htm>.

¹¹ Linio. (2018). Índice Mundial de Comercio Electrónico [Global E-commerce Index]. Available at: <https://bit.ly/2lY7TdZ>.

¹² Compared with the previous year.

¹³ *Ibid.*

2017).¹⁴ However, as the potential for profit increases, so too does the potential for anti-competitive practices.

11. Digital markets are primarily based on data, the manipulation of which using price-setting algorithms has been identified as one of the main threats to these markets. Pricing algorithms are programmed algorithms that are used to improve business pricing models, customise services and predict market trends. Their use facilitates product placement, which benefits both sellers and consumers. However, some of these algorithms may pose a risk to competition as they are programmed to monitor and predict decisions through information gathering (big data) and the constant improvement of the algorithm (artificial intelligence). Algorithms may therefore introduce the risk of collusion or even price discrimination based on demand on the platform.

12. Platforms have two main uses for pricing algorithms. The first instance involves platforms that bring together several sellers. In this case, the algorithms can be used to compare the prices of similar products and change the prices accordingly. Moreover, if several sellers implement similar algorithms, it can lead to collusive outcomes. The second instance involves platforms imposing price-fixing conditions on their suppliers or sellers, for which algorithms can be used as a mechanism to ensure that clauses are respected by those who join them (e.g. most-favoured-nation clauses).¹⁵ Although this is not anti-competitive by nature, under certain conditions the imposition of such mechanisms could have negative effects on competition conditions, which is one of the reasons why an authority might consider intervening in the markets.

13. Some of the challenges arising from price-setting algorithms include: (1) the possibility that the algorithms are programmed to maximise profits in response to market conditions (likely through an ‘agreement’ with at least one other algorithm); (2) the potentially oligopolistic structure of a highly interdependent market, which could lead to tacit collusion; and (3) the interaction and speed of changes of digital media, which facilitate coordination and make detection difficult (due to constant price adjustment). Finally, the above makes it difficult for an authority to obtain evidence of the existence of a cartel.¹⁶

14. As can be seen, the development of e-commerce in Mexico could result in competition issues that do not exist in traditional markets. However, the application of competition law remains the same and, as is the case in traditional markets, the Comisión Federal de Competencia Económica [Federal Economic Competition Commission – COFECE] must assess whether intervening will promote innovation and competition, or whether it will limit dynamic efficiency and market competitiveness. However, analysing digital markets in terms of competition raises new and complex questions. As such, there is always the option to analyse whether the Commission’s powers are appropriate or adaptable to the context of the digital economy.

¹⁴ GVA 2017. Preliminary official values from the National Institute of Statistics and Geography (INEGI). Comercio Electrónico [E-commerce]. Available at: <https://bit.ly/2knyfph>.

¹⁵ United Kingdom, Competition and Markets Authority. (2018). Economic working paper on the use of algorithms to facilitate collusion and personalised pricing. Available at: <https://bit.ly/2y8iyG4>.

¹⁶ Algorithms and Collusion: Competition Policy in the Digital Age. OECD, 2017. Available at: <https://bit.ly/2h67Mur>.

3. COFECE's intervention in digital markets

15. Considering the size and growth of e-commerce in Mexico, before any intervention, the Commission actively seeks out potential anti-competitive conduct, assessing the existence of barriers to competition as well as essential inputs, and observing the emergence of new players or regulations in digital markets. This is in order to gain an in-depth knowledge of the market.

16. In Mexico, the Federal Economic Competition Law (LFCE) establishes the standard of proof for launching investigations (objective cause), which is different for each type of conduct:

- Cartels are punishable *per se* under the LFCE, so the objective cause is any indication that a cartel may exist on the basis of indirect evidence (sudden price increase of a given service or product).¹⁷
- In cases of relative monopolistic practices, three conditions must be met in order to launch an investigation: (1) the existence of significant market power (individual or joint); (2) the commission of one of the 13 conducts provided for by law; and (3) anti-competitive effects.¹⁸

17. In 2017, COFECE launched its first investigation into digital markets, more specifically, into an e-commerce platform also offering other related services, which is still under way.

18. Finally, the LFCE stipulates that the Commission's interventions, as regards investigations, must focus on the competitive process rather than on consumer welfare. However, the LFCE allows for the identification of the best mechanisms for intervening in favour of market conditions without generating negative costs and conducting a case-by-case analysis with the aim of avoiding artificial market distortions. In this way, competition creates a virtuous cycle which benefits consumers in particular by providing them with access to higher quality products and services at different prices.

4. Capacity to investigate digital platforms

19. The Investigative Authority within COFECE is a unit with technical and administrative autonomy to decide on its operation and resolutions that is also responsible for conducting the investigation procedure. The Investigative Authority has the tools and technical expertise to investigate digital markets.

20. In digital platforms analyses, the aspects that receive the most attention are:

- financial services, whether in relation to bank, cash or credit-based payment methods;
- price comparison tools;
- advertising on the digital platform;

¹⁷Article 53 of the LFCE.

¹⁸ Algorithms and Collusion: Competition Policy in the Digital Age. OECD, 2017. Available at: <https://bit.ly/2h67Mur>.

- terms of use for users;
- digital space;
- commercial strategies;
- other platform-related goods and services;
- dynamic efficiencies; and
- network effects.

21. As previously explained, the platforms serve as intermediaries between sellers and buyers. However, when there is a digital market, the market could be larger as it can, geographically-speaking, reach more sellers and buyers, unlike a local market, which may only receive a few visitors and those from the area. Markets that operate as platforms could therefore be of a significant size, hosting thousands of different products and involving a wide range of producers. Given these particularities, a differentiated approach to investigating platforms could be taken.

22. In view of the dynamic aspect of digital platforms, it is essential to identify all the sides of the market that converge on the platform. Furthermore, several challenges may arise when defining a relevant market, such as: (1) the definition of one or more relevant markets; (2) the definition of significant market power (especially when there are subsidies in at least one side of the market); (3) the measurement of a small but significant non-transitory increase in price (SSNIP test), especially when the price is zero; and (4) the use of additional tools such as the SSNDQ test (small but significant non-transitory decline in quality) and the calculation of proxy prices, among others.

23. Likewise, measuring market effects could also be a challenge due to: (1) the multiplicity of the markets; (2) consumer data, which are a crucial element of the market's competition dynamics; (3) constant changes in the market structure and commercial strategies; (4) network effects; and (5) other aspects such as innovation, growth and market dynamics.¹⁹

24. To address the above-mentioned challenges, it is useful to draw on international experience, using documents published by international organisations (e.g. the International Competition Network or the Organisation for Economic Co-operation and Development), to share experiences with authorities in other jurisdictions, as well as to seek expert advice.

25. On the other hand, considering the large amount of data that must be analysed to properly assess market conditions, the Investigative Authority has a dedicated data management team, the General Directorate of Market Intelligence. The General Directorate provides support in three areas: (1) verification visits; (2) information gathering for ex officio investigations; and (3) data processing and analysis during investigations. The General Directorate has a dedicated data science team to develop techniques and tools to digitise the information gathered during investigations in order to filter, systematise or consult the data. Due to the dynamism of digital markets, the expertise developed by the case teams and the information technology specialists at the General Directorate is

¹⁹ Öbrerg, U. Cyber competition: new challenges for antitrust enforcers? (Conference). Concurrences Antitrust Publications and Events, September 2017. Available at: <https://bit.ly/2ykVZhX>.

constantly expanding to improve their techniques for investigating traditional and digital markets.

26. Together, these tools and expertise empower the Commission to investigate digital platforms when its intervention is considered appropriate. However, investigations are not the only way in which market competition issues can be addressed. Some cases may require other strategies, such as ex ante analyses of market concentration or tools for protecting and promoting competition.

5. Analysis of concentration in digital markets

27. Article 61 of the LFCE establishes that concentration involves the merger, acquisition of control or any act through which companies, associations, shares, stocks, trusts or assets in general are united between competitors, suppliers, customers or any other economic agents.

28. In this regard, COFECE has the power to review any concentration of economic agents. However, the LFCE only requires economic agents to notify those concentrations that, due to their economic value, are most significant. Article 86 of the LFCE establishes the thresholds for the notification of such concentrations.

29. Usually, companies merge with the aim of expanding their markets and increasing their efficiency, bringing benefits to consumers. However, some concentrations can have anti-competitive effects. COFECE therefore has the power to decline to authorise concentrations that have the purpose or effect of hindering, diminishing, damaging or preventing economic competition or free market access or to subject them to compliance with certain conditions. The following is an example of a concentration in a digital market that was blocked.

5.1. Walmart/Cornershop

30. Walmart is a company that operates self-service shops, membership-only price clubs, pharmacies and online shops. Cornershop MX, a subsidiary of Cornershop, is a Mexican company that provides the logistics services for the display, purchase and immediate delivery of products offered by shops through websites and mobile apps to end users.

31. In the transaction notified on 5 November 2018, Walmart intended to acquire shares representing the entire share capital of Cornershop MX.

32. Analysis of the transaction showed that it would have vertical effects and would enable the acquiring party to unduly displace its competitors in the market for logistics services for the display, purchase and immediate delivery of products offered by self-service shops and price clubs on websites and apps to end users.

33. Furthermore, considering the aspects analysed by COFECE, it was determined that the following risks could arise if the acquisition was carried out under the terms originally proposed:

- Cornershop could refuse to provide its services to Walmart's competitors.
- Walmart could refuse to market its products through other platforms in competition with Cornershop.

- The economic agent resulting from the transaction could prompt Walmart's competitors to leave the Cornershop platform through strategically using the information they provide to and produce on the platform to sell their products.

34. The LFCE allows economic agents to propose conditions to eliminate the risks to the competition identified as arising from the transaction. In this case, the commitments proposed by Walmart and Cornershop proved insufficient to avoid the possible negative effects of the concentration.

35. Therefore, on 27 May 2019, the COFECE Plenary decided not to authorise the concentration, since it would have the effect of hindering, diminishing, damaging or preventing competition in the market for logistics services for the display, purchase and immediate delivery of products offered by self-service shops and price clubs through websites and apps to end users.²⁰

6. Actions to promote competition

36. As previously mentioned, the characteristics of digital markets could pose a risk to competition and free market access. For example, the emergence of entry barriers for new competitors resulting from network effects, the accumulation of big data or new regulatory restrictions preventing new companies from accessing and competing against traditional suppliers.

37. In response to these challenges, COFECE not only investigates and sanctions anti-competitive practices in these markets and analyses concentrations, but also fosters a regulatory environment that promotes competition in different productive activities in which companies offering goods and services using digital technology compete in one way or another with companies with traditional business models.

38. With regard to the latter point, pursuant to article 12, sections XII to XV and XVIII of the LFCE, COFECE has the power to express opinions on: (1) legal initiatives and draft regulations and decrees; (2) draft regulations, rules, agreements, circulars and other administrative acts of a general nature; (3) laws, regulations, agreements, circulars and administrative acts of a general nature; (4) adjustments to programmes and policies made by authorities; and (5) international treaties. Article 18 of the LFCE establishes that it is for the COFECE Plenary to express these views. The following are two examples of these views.

6.1. Transportation network companies

39. Between 2014 and 2015, Mexico extensively debated the prohibition and regulation of disruptive technologies based on the case of transportation network companies (TNCs), such as Uber and Cabify. TNCs began operating in Mexico in 2013 and experienced rapid growth, in part, due to the positive externalities of network effects, i.e. the use of a platform that grows in value as its registered users increase (in this case, drivers and passengers). The Commission issued an opinion on the matter, according to which, TNCs correct market

²⁰ Public version of the decision on file CNT-161-2018. Available at: <https://bit.ly/2lF4qAK>. The COFECE-032-2019 press release is available at: <https://bit.ly/2ljBzd3>.

failures and are involved in an innovative process, contributing to consumer welfare by offering additional services to those that already exist and meet previously unmet needs.²¹

40. In June 2015, the Commission issued an opinion on TNCs, in which it recommended that state governments, in particular, recognise the service that these companies provide as a new mode of transport, i.e. that they do not prohibit it. This is because this new service benefits consumers by offering new modes of transport, allowing them to know the identity of the driver who will provide the service and the journey times and fares, for example. The Commission also suggested that regulations for such services should be limited to protecting public objectives, such as the safety and security of the user, prioritising competition and free market access. Finally, it recommended that governments ensure that such regulations enable users to benefit from the improvements and returns resulting from the new business model offered by these platforms.²²

41. Thirteen bodies have amended their regulations or issued new regulations to recognise the business models under which TNCs operate, which gives them legal certainty, as recommended by COFECE. For example, Guanajuato, Querétaro, Coahuila, Yucatán, San Luis Potosí, Colima, Sonora and Tijuana established minimum safety requirements for users, such as anti-lock brakes, seatbelts and airbags. The State of Mexico, for its part, requires valid liability insurance. Some laws, such as in the State of Mexico and Mexico City, also provide for the collection of a contribution. In the case of Mexico City, the contribution will go to the Taxi, Mobility and Pedestrian Fund that will seek to improve mobility in the city.²³

6.2. Financial technology institutions

42. In October 2017, the Federal Executive submitted the financial technology institutions regulatory bill to the Senate. These institutions include: (i) collective financing institutions (crowdfunding); (ii) electronic payment fund institutions (e-wallets); and (iii) virtual asset transactions (cryptocurrency). The Commission issued an opinion on the bill to the Senate,²⁴ recommending some changes to the proposal in order to promote competition and innovation. The key recommendations were:

- Clearly establish that users own their information and regulate compensation for the transmission of data.
- Require credit institutions to provide financial services to financial technology institutions (FTIs), on non-discriminatory terms.

²¹ Análisis de Opinión. La prestación del servicio de transporte de personas por medio de plataformas móviles [Opinion Analysis. The provision of passenger transport services through mobile platforms]. Available at: <https://bit.ly/2lBnfVE>.

²² Rethinking Competition in the Digital Economy. COFECE, 2018. Available at: <https://bit.ly/2FKAsRZ>. Opinion OPN-008-2015. Available at https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_ENG_letter.pdf.

²³ Rethinking Competition in the Digital Economy. COFECE, 2018. Available at: https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_ENG_letter.pdf. Opinion OPN-008-2015. Available at: <https://bit.ly/2oxdtTe>.

²⁴ Opinion OPN-007-2017. Available at: <https://bit.ly/2oIv8qh>.

- Explicitly stipulate that FTIs may use any technological infrastructure.
- Add general provisions to the law establishing that new business models or activities, as determined by the authorities, will be permitted.
- Reduce the length of authorisation periods and procedures and provide legal certainty for the operation of new business models through regulatory sandboxes.

43. On 1 March 2018, the Fintech Law was passed. Notable among the improvements to the law derived from the Commission's opinion was the explicit statement that users own their information and that authorities must determine compensation for the transmission of data. In addition, FTI access to information was ensured by establishing the terms and conditions under which interruption to data transmission is authorised. Finally, financial institutions were prohibited from charging differentiated fees to FTIs and other customers.²⁵ COFECE continues to pay close attention to the secondary legislation process to ensure that it promotes innovation and allows access by new competitors.

7. Conclusion

44. There is a twofold challenge for a competition authority in an emerging country such as Mexico, with average income levels and significant income inequality, since there is a focus on improving competition conditions in traditional markets, mainly those accessed by households with lower incomes, where they spend much of their income.²⁶ However, there are sectors in Mexico that are deeply involved in the modern global economy and which are therefore part of the global digitisation trend. COFECE allocates significant resources to these markets, in which it faces the challenge of choosing between two possible stances:

- First, allowing digital markets to regulate themselves through competition, preventing the market from being distorted by actions that the Commission may carry out. This can be achieved through the proper exercise of powers to investigate and sanction any anti-competitive conduct that may arise in these markets.
- Alternatively, the assumption can be made that there tends to be a lack of competition in digital markets, particularly in those involving platforms, and that a more active role can be adopted through regulation. This would involve, for example, making use of tools that have been employed in the water, electricity, railway and telecommunications markets, among others, where the traditional approach to the accelerated growth of businesses has been regulation to prevent abuse of their power of monopoly. The outcome of regulation, however, has not always been as anticipated. As a result, there are two positions in this debate: those who propose regulating dominant companies in digital markets and those who doubt the effectiveness of this strategy (due to the ease, for example, of succumbing

²⁵ Rethinking Competition in the Digital Economy. COFECE, 2018. Available at: https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_ENG_letter.pdf.

²⁶ See Estudio sobre el impacto que tiene el poder de mercado en el bienestar de los hogares [Survey on the impact of market power on household welfare]. Available at: <https://bit.ly/2kwBYRH>.

to regulatory capture or because of the possibility that an innovation may erode companies' dominance at any time).

45. Finally, it should be noted that the LFCE provides mechanisms for intervening in favour of conditions in both traditional and digital markets, through carrying out a case-by-case analysis with the aim of preventing artificial distortions within those markets.

Federal Telecommunications Institute

1. Introduction

46. This contribution outlines the elements that the Federal Telecommunications Institute (IFT) identifies as most relevant to its activities with respect to economic competition in digital and non-digital platforms. This information has been compiled through the following activities:

- *Technical collaboration capacity-building* in the analysis of digital platforms, and digital markets and the digital economy in general. The IFT has relied on close and frequent collaboration and exchange of information, opinions and experiences with bodies, institutions, other authorities and members of the industry in the field of economic competition and other concurrent matters.
- *Enforcement of economic competition and sectoral laws and policies* entrusted to it in Mexico's telecommunications and broadcasting sectors.
- *Advocacy*. The IFT both organises and convenes national and international events and is an active participant in national and international forums. These efforts are aimed at building, sharing and disseminating information on platforms and fostering interaction with other authorities, public policy decision makers and digital market participants. Through these activities, competition authorities are able to develop partnerships to raise awareness of the need for regulatory interventions to address market failures, without undermining the benefits that digital markets can bring to society.

47. The IFT has invested in building knowledge and analytical capacity with respect not only to digital platforms, but to the digital economy in general. This is because the prospects for technological development mean that identification of digital products and markets requires an understanding of their environment and potential evolution. Since digital markets, including *over-the-top* (OTT) markets and platforms, are understood as economic phenomena on a global or multi-jurisdictional scale, authorities are able to use international practice as a basis for developing analytical resources appropriate to Mexico's legislation.

48. This contribution offers a proposed definition of platforms and digital platforms, with an emphasis on their distinctive characteristics. It describes the activities undertaken by the IFT to build and strengthen its capacity for analysing both digital platforms and their environment. It also lists the factors used to identify and evaluate conduct in digital platform markets and details the elements used in the analysis of non-digital platform markets, using broadcasting services as an example. An additional section addresses aspects of collaboration with other entities with concurrent powers and interests.

2. Platforms and digital platforms: proposed definitions

2.1. Platforms

49. Broadly speaking, platforms are products (applications or services) that allow two or more user groups to interact, which is a function referred to as *matchmaking*. Platforms

themselves are markets, which can be defined as multi-sided markets or multiple related markets.

50. In economic competition, analysing cases involving platforms usually leads to very specific practical issues, such as:

- Defining the relevant market(s) and the related market(s) in which a specific conduct and its effects on the competitive process must be analysed – when do two or more sides of a platform constitute one or more markets? Determining how to identify a platform’s limits, i.e. how to distinguish the goods or services offered by the platform itself from others that are vertically or horizontally integrated by the same economic agent that controls the platform.
- Identifying whether there is or may be a substantial position of power or dominance in the market and the ability to exercise it – how can the ability to fix prices or non-price-based variables in one or more markets be identified? What factors may create or strengthen a dominant position in the market?

51. Platforms exist in digital and non-digital markets. It is therefore possible, on a case-by-case basis, to *tailor* and *adapt* elements of economic competition analysis traditionally used in the study of non-digital platforms to *digital* platforms, while remembering that their nature demands specific considerations and analytical adjustments.

2.2. Digital markets or the digital economy

52. Digital markets, or the *digital economy*, are characterised by three key elements: modularity; economies of scale, scope and network; and technological developments or dynamism.²⁷

- *Modularity* means the existence on the Internet of an ecosystem comprising elements (e.g. data, information, applications, communications, content, algorithms, networks, devices, etc.) that can be combined and complemented in various ways to create different products (goods or services), generating a vast array of choices for different groups of users.
- Operating through the Internet allows these ecosystems to generate *economies* of scale, scope and network, meaning that costs and prices for producing and adopting new and improved products, or adding new users, can be very low (or even zero or near zero).
- Digital markets are *dynamic*, meaning there are powerful incentives for new and existing participants to invest and innovate either by themselves or through third-party developers. This strengthens competition to create new products, enter new markets and apply new technologies to generate more digital products, at a lower cost and of a better quality, variety and availability.
- In the digital environment, participants and products create synergies and form systems (ecosystems) of great complexity that may be quite unlike anything seen

²⁷ See GSMA (2016), A new regulatory framework for the digital ecosystem, chapters 1 “Introduction” and 2 “Competitive dynamics of the digital ecosystem”. Available at: https://www.gsma.com/publicpolicy/wp-content/uploads/2016/09/GSMA2016_Report_NewRegulatoryFrameworkForTheDigitalEcosystem_English.pdf.

in conventional (physical) markets or industries. They may also operate across several jurisdictions, without having a physical presence or legal representation before the authorities. Identifying markets and the effects of specific conduct is therefore more complex for economic competition policy.

2.3. Digital platforms

53. Within digital markets or the digital economy, platforms comprise a subset of products offered via the Internet, commonly referred to as OTT products.²⁸

54. Digital platforms can be understood as *applications*²⁹ that are accessed through the Internet and that allow interaction in a digital environment (the cloud) to different user groups, as well as data processing, resulting in multi-sided markets or multiple related markets. This is done through the use of complex computer programming in the cloud. Digital platforms are interfaces with more complex functionalities that evolve and innovate dynamically.

55. Platforms have become more important in the digital environment, since the Internet enhances their ability and impact to generate value on a wide scale through:

- communicating or linking (*matchmaking* between) multiple user groups, devices, systems and equipment;
- offering greater functionalities and developing innovations to increase the value they offer to users;
- having various features for optimising transactions, developing innovations and internalising the value they offer (i.e. user group information, cloud computing, algorithms, etc.) – in other words, being designed to generate a virtuous and accelerated cycle of value creation; and³⁰
- offering differentiated products and distinguishing between users, resulting from the massive use of consumer data and profiles (*data*, *big data* and *profiling*) obtained, as well as the use of other elements of the digital ecosystem such as technologies, algorithms, computation and synergies.

56. In short, they are the multiple sides of the digital platform, of differentiated products, the scale and complexity of their operations, their value chain and their high levels of innovation, and thus require the use of specialised conceptual and technological references and the fine-tuning of economic competition analysis.

²⁸ See, for example, Body of European Regulators for Electronic Communications (BEREC) (2016), Report on OTT Services, available at: https://berec.europa.eu/eng/document/register/subject_matter/berec/reports/5751-berec-report-on-ott-services.

²⁹ An application includes the interface and all related elements that allow user interaction through the Internet, such as mobile applications and/or websites (i.e. a set of interlinked web pages with diverse content belonging to a common Internet domain), including servers or data centres, programming, algorithms and links, among others.

³⁰ OECD (2018), The digital economy, multinational enterprises and international investment policy. Available at: <http://www.oecd.org/investment/investment-policy/The-digital-economy-multinational-enterprises-and-international-investment-policy.pdf>. According to the OECD (2018), other economic activities can be referred to as non-digital or traditional.

57. The key tasks for economic competition policy with respect to digital platforms are developing an analytical framework for understanding the competitive process and market failures in order to:

1. apply the economic competition law in a timely, adequate and effective manner; and
2. contribute to constructive discussion and advocate to ensure that other policies and regulations take appropriate account of the digital ecosystem in order to prevent and correct distortions to the competitive process. Such endeavours, aimed at modernising analytical approaches and reflecting the market and the realities of technological developments, will bring benefits for society in terms of investment, consumer choice and economic growth.

58. Incurring a false positive, in any area and for any authority, can reduce innovation and efficiencies in digital markets. A false negative or late intervention could cause significant damage to a multiplicity of users and reduce actual and potential competition. A knowledge of digital markets, including platforms, and their competitive dynamics, is therefore one of the biggest contributions that competition authorities can make, and one which requires multidisciplinary collaboration.

3. Digital platform studies and training

59. The IFT, as a competition authority and regulator in the telecommunications and broadcasting sectors, has continued to engage and collaborate with national and international authorities, bodies and forums in order to help build knowledge and provide information on the specificities of the digital economy, including platforms.

60. During 2019, the IFT has actively participated in digital platform and economic competition policy studies, including:

1. *APEC Workshop on Competition Policy for Regulating Online Platforms in the Asia-Pacific Region*, which was attended by various competition authorities from members of the Asia-Pacific Economic Cooperation (APEC), as well as invited experts. The workshop discussed issues relevant to economic competition policy and shared experiences on various cases at the international level.³¹

The information gathered at this workshop was published in the report *Competition Policy for Regulating Online Platforms in the APEC Region*³² (IFT-APEC Report) which provides, inter alia:

- a proposed definition for digital platforms;
- references to relevant cases;

³¹ Held from 7 to 9 May 2019 with the participation of 13 APEC economies: Canada, Chile, Indonesia, Malaysia, Mexico, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei, the United States of America and Viet Nam. Representatives from the European Union, OECD, the Latin American Internet Association, academia, legal firms, digital platforms and other industries were also invited to attend.

³² IFT-APEC (2019), *Competition Policy for Regulating Online Platforms in the APEC Region*. Economic Committee, Competition Policy and Law Group (CPLG). Available at: <https://www.apec.org/Publications/2019/08/Competition-Policy-for-Regulating-Online-Platforms-in-the-APEC-Region>.

- identification of challenges and opportunities for economic competition law and policy;
 - tools for defining markets, establishing the existence or abuse of substantial market power or dominance; analysing the possible effects of conduct and concentrations; considering efficiencies; using dynamic and case-by-case (*rule of reason*) analysis;
 - the role of data in these markets;
 - elements considered in public policy, legal frameworks and the application of competition laws in order to address the study of digital markets, including platforms.
2. Collaboration on the report on digital platforms and competition in Mexico, published by the OECD, at the request of the Ministry of Economy.³³
 3. Participation in activities carried out by the OECD Committee on Digital Economy Policy (CDEP),³⁴ which studies cross-cutting issues for the digital economy. The institute's main activities include:³⁵
 - *Digital economy measurement and analysis* – Methodologies for measuring digital business risk management practices, measurement of digital skills and e-commerce, statistical analysis of cross-border data flows, international trade and foreign direct investment, as well as contributions to the OECD *Going Digital* initiative are discussed.³⁶ These actions are aimed at building the next generation of data and indicators capable of meeting the challenges of digital transformation, such as making digital transformation visible in economic statistics, understanding the economic impacts of digital transformation, measuring its effects on well-being and designing new approaches.
 - *Artificial intelligence (AI)* – Participation in working groups and in the *Scoping Principles to Foster Trust in and Adoption of AI* multidisciplinary initiative, aimed at setting out a series of general principles to promote trust in and the adoption of AI and framework principles for generating public policies in this area, due to the many different applications of AI in digital markets. For example, AI tools are used in digital platforms to anticipate or predict the demands or types of use of users or user groups, in order to acquire or strengthen their ability to generate economies that optimise their business model.

³³ <https://www.oecd.org/daf/competition/eng-digital-platforms-and-competition-in-mexico.pdf>.

³⁴ The main objectives of the CDEP are to strengthen the foundations of the digital economy by developing, monitoring and promoting a coherent regulatory framework; to coordinate with other OECD committees to develop analyses, policies and good practices that leverage the potential of digital transformation for growth and well-being through enhanced entrepreneurship, ICT skills and employment, and better health and well-being, and to further develop and implement a medium- to long-term measurement road map for digital transformation.

³⁵ It should be noted that IFT commissioners currently occupy the vice-presidencies of the CDEP and the Working Party on Communication Infrastructures and Services Policy.

³⁶ OECD (2017), OECD Digital Economy Outlook 2017. Available at: <https://www.oecd.org/sti/ieconomy/oecd-digital-economy-outlook-2017-9789264276284-en.htm>.

61. The IFT has invested in building knowledge and analytical capacity with respect not only to digital platforms, but also to the digital economy in general because the prospects for technological development mean that identification of digital products and markets requires an understanding of their environment and potential evolution.

62. In addition, a working group comprising staff from the IFT's specialist regulation and economic competition units has recently been set up to study and analyse the evolution of markets, structures and practices in digital markets, including platforms, in a convergent fashion. This solution arose from the practical need to identify and evaluate the potential effects on competition of market practices and possible *ex ante* and *ex post* regulatory instruments specific to economic competition law (LFCE) and the sectoral law on telecommunications and broadcasting in Mexico.

63. This practice has made it possible to comprehensively address technical, economic and legal aspects, as well as to exchange information and *expertise* to build shared knowledge and create harmonised solutions. It is certainly a practice that the IFT recommends that economic competition authorities undertake, both internally and with other relevant authorities and bodies, above all to strengthen their capacity for providing technical support to other authorities on the design of appropriate regulatory instruments and public policies.³⁷

4. Study and analysis of digital platforms

64. The study and analysis of digital platforms complies with the elements and methodology set out in the LFCE: defining relevant and related markets, including their characteristics; assessing the competition conditions (or effective competition) or the existence of substantial power; and analysing the effects of the specific case or conduct under analysis (i.e. concentrations, practices, barriers, existence of essential inputs or others) in the competition or free market access process.

4.1. Relevant and related markets

65. Identification of the market(s) corresponding to a particular platform, part of the substitution analysis on the supply and demand side, taking into account product and geographic and temporal (availability) dimensions.³⁸ These general elements should be adapted to the particular case being studied.

66. These markets may also be vertically or horizontally related. It is therefore important to distinguish between what is specific to the market and the sides of the platform and what is not. For example, a user's experience may be of a platform that offers multiple interlinked goods and services (i.e. data, peer-to-peer communication, interactions, e-commerce, etc). On the supply side, however, there may be a synergy of platforms with other OTT services that are not provided by the same economic agent, or even if they are, do not form part of the market specific to the platform of other integrated services.

³⁷ In addition, the IFT Study Centre conducts studies of digital markets. Details of these studies and the research areas defined for 2015–2018 are available at: <http://centrodeestudios.ift.org.mx/4lineas.php>.

³⁸ Article 58, LFCE.

67. Thus, in order to determine relevant and related markets for digital platforms, the following elements, among others, must be considered:

- They are digital (i.e. Internet or OTT) products that enable interaction between two or more distinct but interdependent user groups. User groups need one another and, in the absence of the platform, would not be able to capture the value of their interactions or engage in exchanges. They rely on the platform as a catalyst that facilitates the tools and functionalities for interaction and exchange in conditions that generate value for them.
- Operators of OTT platforms may specialise in meeting the specific needs of different groups and types of users, allowing them to interact and make transactions through the platform. By offering various differentiated products and monetising the value generated in these interactions, digital platforms have been able to develop different business models and access various sources of income. In this regard, the existence of different business models should be carefully considered when identifying whether substitutes are present, for one or more sides of the digital platform.
- They involve multi-sided markets, in which two or more user groups interact and where the decisions of one group affect outcomes for another group, usually through an externality.
- In multi-sided markets, price levels and structures are the mechanism for encouraging different user groups to join or adopt the platform. Even the use of a zero price on one side of the platform constitutes a market instrument for generating value that may be captured or monetised on another side of the market.
- They have significant economies of scale and scope (including network economies), allowing them to add users and functions at a near-zero marginal cost. Direct network effects lead the value of the platform to increase for a group of users as more users are incorporated. Indirect network effects, however, lead to the value of the platform increasing for one user group as more users of another group are incorporated.
- They involve high levels of innovation and technological development, and their analysis therefore demands a forward-looking and dynamic approach.
- Platforms in turn can supply and demand products from various providers of both digital and traditional products (e.g. commerce, transport and accommodation). However, it should be taken into account that platforms themselves are distinct markets that are distinguishable from other economic activities (digital and non-digital) from which they make demands (inputs) or to which they supply services (*aftermarkets*).
- Generally speaking, the business model of digital platform or OTT providers is based on the following sources of revenue:
 - commissions and compensation collected from users for accessing the OTT platform and allowing and managing real-time interaction and communication between users demanding and users supplying a good or service;
 - the use and sale of data and analytics – this type of database is very valuable for the platforms (allowing them to offer more personalised services) and for other users, such as advertisers and banks; and/or

- the sale of space to advertisers who want to promote the characteristics of the goods and services they provide.

68. In short, the following analytical sequence can be followed when defining the relevant markets for digital platforms and their sides:

- The products – services or functionalities – provided by the digital platforms under analysis (i.e. for the sale of services or for the provision of transport or accommodation services between private individuals).
- Identify whether products provided by digital platforms have substitutes on one or more platforms or OTT services, taking into account the transaction costs of accessing other sources.
- Determine whether multi-sided markets exist on the platform, through identifying user groups that have access to the platform and the interactions that take place between them through the platform.
- Identify whether the digital platform, with the information it gathers from or provides to its user groups, participates in a different market associated with the data and analytics value chain (i.e. collection, big data, analytics, profile generation, etc).
- Evaluate the possibility of defining a different market for the provision and sale of advertising spaces within digital platforms.
- Identify the geographic scope of digital platforms, taking into account the location of different users and the costs to them of accessing platforms. Issues such as language, differences in user patterns and culture should also be considered.
- Consider the interrelationship between the various consumer groups connected by a digital platform.³⁹ A first distinguishing element is the identification of two types of digital platforms: (i) transactional platforms, in which two or more consumer groups interact simultaneously, generating a transaction that is observable by the platform, which charges a commission for each transaction;⁴⁰ and (ii) non-transactional platforms, in which two or more consumer groups interact without the platform being able to observe transactions between these groups.
- Evaluation through the hypothetical monopolist test (*SSNIP test*) must take into account the sign and magnitude of the indirect network effects between the sides, which can significantly alter the profitability of a price increase. In addition, the optimum price structure (or proportion) set by the platform may be modified in response to price increases. Accordingly, each iteration of the *SSNIP test* should consider the following three scenarios: (i) a monopolist may increase one price and leave another at the same level; (ii) increase one price and reduce another; or (iii) increase both prices. If these scenarios are not considered, there is a risk of overestimating the size of the market.

³⁹ OECD (2018), Rethinking Antitrust Tools for Multi-Sided Platforms. Available at: <http://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

⁴⁰ Filistrucci, Lapo, “Market Definition in Multi-Sided Markets” in OECD (2018), Rethinking Antitrust Tools for Multi-Sided Platforms.

- Defining the relevant market in digital platforms and services should also involve analysis of the simultaneous use of multiple platforms or services by users to access a specific product or service (*multihoming*).⁴¹ This practice should be carefully analysed on each side, as it can show either substitution between platforms or their complementarity (where there is wide differentiation between platforms).⁴² The reasons for consumer behaviour and the degree of substitution between the products or services offered by platforms must therefore be understood correctly.

4.2. Analysis of competition conditions or determination of substantial market power

4.2.1. Barriers to entry and expansion

69. Entry into digital markets may require low capital and infrastructure amounts and low costs for the introduction and development of new products or services. Even a digital platform or service could quickly enter a different market by adding components or modifying the product or service it already offers, if users adopt it massively.

70. In studying digital platforms, the identification and analysis of barriers could consider the following elements:

- *Entry and change requirements and costs for users.* The cost of change for the user can be increased to the extent that there are barriers to entry in the absence of interoperability and portability (data, history, goods or services) between the platforms, as well as the existence of loyalty programmes (i.e. bonds, rewards or improvements in permanence or activity).
- *Possibility to use the platform services of one or more suppliers (single or multihoming).*⁴³ The presence of *multihoming* may impair or restrict the ability of a digital platform to exercise market power, provided that the user groups or groups observe those alternatives as substitutes.
- *Direct and indirect network effects.* Direct effects are generated when one side of the platform increases its number of users, which raises their usefulness and can discourage them from switching to another platform. Indirect effects are when an increase in users on one side raises the usefulness of users on another side.⁴⁴ The presence of direct and indirect network effects can create a dynamic in which a single platform significantly increases its market share, even to the extent of

⁴¹ Armstrong, Mark (2006), Competition in Two-Sided Markets, *The RAND Journal of Economics*, vol. 37/3, pp. 668–691. Available at: <http://www.jstor.org/stable/pdf/25046266.pdf?refreqid=excelsior%3A15b7252f47763063fd9fc448b7659579>.

⁴² Wismer, Sebastian and Rasek, Arno, “Market Definition in Multi-Sided Markets” in OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*.

⁴³ Belleflame, Paul and Peitz, Martin (2018), Platform competition: Who benefits from multihoming? *International Journal of Industrial Organization*. ISSN 0167-7187. Available at: <https://www.sciencedirect.com/science/article/pii/S0167718718300353?via%3Dihub>.

⁴⁴ Bundeskartellamt (15 February 2019), *Case Summary. Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing*. Available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3.

monopolising it (*market tipping*).⁴⁵ Some elements that increase the likelihood of the *market tipping* are:⁴⁶ (i) the lack of differentiation between products or services; (ii) the existence of highly pronounced indirect network effects; (iii) the presence of economies of scale and the need to generate a critical mass of users; and iv) the absence or low use of *multihoming*.

- *Access, accumulation and durability of information or data.* Data are a key asset that digital platforms or services employ to innovate, improve quality and customise services (or experience of use) giving rise to feedback circles (*feedback loops*). As an economic agent accumulates a greater volume of data, in the digital platforms market or in other related markets, derived information (i.e. *profiling* or *personalised offers*) can be used to gain or increase the ability to exploit economies of scale, scope or network effects.⁴⁷ If a single platform accumulates data and information that can be used exclusively or on a scale that cannot be matched by other participants, this will constitute a barrier to entry and to the expansion of others that facilitates that platform's exercise of market power.⁴⁸ This situation can be aggravated if:
 - the same economic agent controls multiple platforms and therefore has access to a volume and variety of data on a scale that cannot be replicated by its competitors, both current and potential, and restricts the sources that its rivals may use to generate their own data or information;
 - users do not have the capacity or interest to limit the practices described in the previous paragraph.⁴⁹
- *The existence and power of its competitors.* Competition in digital markets is often *by the market* and not *on the market*. In the early stages, several suppliers actively compete on the market until one or a few reach the scale sufficient to develop economies that their competitors cannot replicate. This situation may be temporary or not, depending on the stability that can be generated in the market, considering the impacts of innovation. The dominant company can be quickly displaced by a rival or entrant with better technology, higher quality or a different business model, in a *process of creative destruction*. As the products or services offered by the platform are homogeneous, they increase the possibility of their current or potential competitors exerting greater competitive pressure. However, given the existence of differentiated products or services, the possibility of replicating competitors is reduced. In this way, the existence of market competition does not relieve the need

⁴⁵ Collyer, Kate, Mullan, Hugh and Timan, Natalie (2017), "Measuring market power in multi-sided markets", in OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*.

⁴⁶ Rysman, Marc (2009), *The Economics of Two-Sided Markets*. *Journal of Economic Perspectives*, vol. 23(3), pp. 125–143.

⁴⁷ OECD (2018), *Digital Platforms and Competition in Mexico*. Available at: <https://www.oecd.org/daf/competition/digital-platforms-and-competition-in-mexico-2018.htm>.

⁴⁸ Argenton, Cédric and Prüfer, Jens (2012), Search engine competition with network externalities. *Journal of Competition Law and Economics*, vol. 8(1), pp. 73–105.

⁴⁹ OXERA (2018), *Market Power in digital platforms*. Available at: <https://www.oxera.com/wp-content/uploads/2018/10/Market-power-in-digital-platforms.pdf>.

to analyse whether there is substantial power or dominance in the market, should such a position be maintained or sustained for a relevant period of time.

- *Alternative sources of inputs.* In digital markets, the ability to innovate is a significant input. Analysis of access to inputs can consider the ability of competitors to access levels of capitalisation, specialised computer or technological resources and/or talent (trained personnel) that generate the innovation capacity needed to compete. Interoperability between platforms, access to application stores or operating systems, and data portability are aspects where entry barriers or access to relevant inputs may arise.

4.2.2. *Anti-competitive conduct*

71. In the assessment of concentrations and anti-competitive practices, the following characteristics of digital platform markets can be considered:⁵⁰

- *Predation.* The mere observation that a price is below cost on one side is not an indication of this practice.⁵¹ Indirect network effects on a platform can explain that *subsidising* use on one side of the platform, if it has the ability to capture value or income on another side, is optimum. To assess whether the provision of goods or services on one side of the platform below its costs constitutes an anti-competitive depredation can be considered if it is an instrument to attract users and is therefore profitable if it fully or partially recovers the costs incurred on one side with the benefits it gets on another side.⁵²
- *Exclusivities.* In assessing such conduct, the impact of such a practice on the costs of rivals can be considered, particularly if given the existence of economies of scale between the sides generated by the indirect network, the practice makes it difficult for competitors to attract and generate a user base on all or other sides. The intensity of competition must also be considered, i.e. whether the presence of these clauses obliges the platforms to shift from competing in prices to competing for exclusiveness with users.
- *Tied packaging and sales.* One aspect common to digital markets is that they offer sets of goods and services that can be perceived or used by users as one. A relevant challenge for competition authorities is to identify the boundaries between the different goods or services, and to understand the business models involved in identifying whether there are packaging and tied sales behaviours.⁵³
- *Excessive discrimination and conditions.* The LFCE does not refer to exploitation conduct, although this may be analysed as part of constructive forms of discriminatory practices (i.e. establishing significantly different conditions between economic agents placed on an equal footing) or negative practices (i.e. offering excessive conditions for de facto denial of treatment). Such conduct may occur in the access or use of data and information that can be used to improve or customise

⁵⁰ OECD (2018), Rethinking Antitrust Tools for Multi-Sided Platforms.

⁵¹ OECD (2018), Rethinking Antitrust Tools for Multi-Sided Platforms.

⁵² Katz, Michael (2017), “Exclusionary conduct in multi-sided markets”, OECD (2018). Rethinking Antitrust Tools for Multi-Sided Platforms.

⁵³ OECD (2018), Digital Platforms and Competition in Mexico. Available at: <https://www.oecd.org/daf/competition/digital-platforms-and-competition-in-mexico-2018.htm>.

their prices. However, price limits can also be set to avoid excessive levels, as is the case with Uber's dynamic tariff cap.⁵⁴

- *Vertical restrictions.* Such conduct is frequent⁵⁵ and may require greater scrutiny in digital platform markets. When cross effects (between user groups) of a network are strong, vertical restrictions may be necessary in some cases to prevent opportunistic use (*free riding*) and improve platform performance.⁵⁶ Such restrictions can also damage competition if they deter existing and potential competitors from implementing aggressive pricing strategies or facilitate collusion agreements.⁵⁷ Some platforms can also penalise users (e.g. shops and dealers) if they employ *multihoming* (subscribing as users on more than one platform), by relegating them in order allocation or search results, delaying payments or suspending them from the application. Such practices can have an anti-competitive effect if they are able to limit the ability of competing platforms to reach the critical mass that will allow them to generate the aforementioned economies, which is estimated unlikely.
- *Discrimination.* Digital platforms such as search engines can treat their operations and those of their competitors in a discriminatory manner, initially listing the results that favour their own operations and deteriorate those of their competitors. However, some dominant platforms in their respective markets could try to extend this dominance to new markets they enter, exploiting resources from their home market as the customer base. Such practices are often called *discriminatory advantages* and have gained greater relevance in digital environments.⁵⁸
- *Concentrations.* Assessing concentrations between digital platforms has gained increasing interest among authorities, with cases increasing in the last decade.⁵⁹ Authors such as Shapiro⁶⁰ warn that some of these transactions may reduce competition in the future, when one established platform acquires another that does not represent a competitive rival in the short term, but that could have placed it under competitive pressure in the longer term by introducing new goods and

⁵⁴ Uber elimina tarifa dinámica en fase de contingencia [Uber eliminates dynamic tariff in contingency phase]. El Economista, 3 May 2016. Electronic version. Available at: <https://www.eleconomista.com.mx/tecnologia/Uber-elimina-tarifa-dinamica-en-fase-de-contingency--20160503-0113.html>.

⁵⁵ OECD (2018), Digital Platforms and Competition in Mexico. Available at: <https://www.oecd.org/daf/competition/digital-platforms-and-competition-in-mexico-2018.htm>.

⁵⁶ OECD (2018), Rethinking Antitrust Tools for Multi-Sided Platforms.

⁵⁷ Buccirosi, P. (2013), *Vertical Restraints for On-line Sales – OECD background note*. Available at: <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>.

⁵⁸ OECD (2018), Digital Platforms and Competition in Mexico. Available at: <https://www.oecd.org/daf/competition/digital-platforms-and-competition-in-mexico-2018.htm>.

⁵⁹ OECD (2018), Digital Platforms and Competition in Mexico. Available at: <https://www.oecd.org/daf/competition/digital-platforms-and-competition-in-mexico-2018.htm>.

⁶⁰ Shapiro, Carl (2017), Antitrust in a time of populism. *International Journal of Industrial Organization*, Elsevier, vol. 61(C), pp. 714–748. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

services. The network effects, both direct and indirect, economies at scale, multi-sided markets *and multihoming* practices should also be taken into account.

4.2.3. Assessment of efficiencies of specific practices or conduct

72. In the event that unlawful practices are demonstrated, a concentration has the intention to or effect of obstructing, diminishing, damaging or preventing free market access and economic competition, or essential inputs or competition barriers are being determined, the elements provided by economic agents to demonstrate efficiency gains and that favourably influence the competition and free market access processes are summarised as follows:⁶¹

- the introduction of new goods or services;
- cost reductions resulting from the creation of new production techniques and methods, the integration of assets, increases in the scale of production and the production of different goods or services with the same production factors;
- the introduction of technological advances that produce new or improved goods or services;
- the combination of productive assets or investments and their recovery, which improve the quality or extend the attributes of goods or services;
- improvements in quality, investments and their recovery, opportunities and services that favourably impact the distribution chain; and
- others demonstrating that net contributions to consumer welfare exceed anti-competitive effects.

73. In particular, it may be relevant to identify the frequency with which disruptive innovations occur. Frequent innovations can indicate changes in market conditions as a result of innovations or the development of new products and services, meaning the situation of an economic agent with high market shares can change significantly in the short term. The development of the market and the agents involved should therefore be observed, as well as the likelihood of disruptive innovations modifying it.

74. Digital platforms can generate innovations by incorporating technological elements such as algorithms, supervised and non-supervised learning, neural networks and complex models that extract data value. The use of technologies such as AI enables these platforms, for example, to identify individualised offers based on historical user choices. In this sense, the volume of data and the use of technologies for data analysis enable digital platforms to improve the attributes of their services and products, reflected in a higher perception of quality, diversity and availability on the part of users.

⁶¹ Articles 55, 63 and 94 of the LFCE.

5. Non-digital platforms analysis: broadcasting services

75. In a large number of cases, the IFT has identified and evaluated open commercial television services and commercial sound radio in economic competition.⁶² These services have been defined as platforms and analysed as *two-sided markets*, as there are two distinct user groups in each of them.

76. The analysis of these non-digital platforms has considered that, on the one hand, there are audiences (viewers or listeners) and, on the other, advertisers, that both user groups interact through the platform (the television or radio service) that provides a product to both groups, and the decisions of one group affect the results of the other. The platform (the programmed television or radio service) offers content to audiences at zero prices in exchange for dedicating their time to observing advertisements for which advertisers (the other user group) pay the platform to insert in the programming.⁶³

77. In these cases, the IFT has defined two relevant markets:

- provision and sale of time for commercial messages or advertising via the broadcast signal – television or radio, as appropriate; and
- provision and transmission of programmes (audiovisual or audio) via the broadcast signal, direct and free of charge to the population.

The following indicators have been used to estimate market shares:

- income from advertising sales, when available; and/or
- audience levels (*rating*).

78. These indicators are used to measure the value of the service that the platform (signal) offers to a group of users (audiences), which it can monetise on the other side of the market by marketing advertising spaces to advertisers. The audiovisual or audio content with higher *ratings* has greater value for advertisers, indicating the capacity of the broadcaster (the platform) to set prices or other conditions in markets.

⁶² These include concentrations and the issue of economic opinions on radio frequency tenders and licence assignments. See, for example:

Opinion of participants in the call for tenders to provide concessions for the use and commercial exploitation of broadcasting channels for the provision of the public digital broadcasting service, in order to form two national channels in the United Mexican States. Available in Spanish: http://apps.ift.org.mx/publicdata/P_IFT_EXT_131114_218_Version_Publica.pdf and

Opinion of participants in the call for tenders to provide concessions for the use and commercial exploitation of 148 transmission channels for the provision of the public digital radio broadcasting services (Tender No. IFT-6). Available in Spanish: <http://www.ift.org.mx/industria/espectro-radioelectrico/television/2016/licitacion-no-ift-6-television-radiodifundida-digital>

Resolution agreements for E-IFT/UC/OCC/0002/2013, E-IFT/UC/OCC/0007/2013, E-IFT/UC/ONP/0012/2013 and E-IFT/UC/ONP/0028/2013. Available in Spanish: http://apps.ift.org.mx/publicdata/versionpublicapift18031590_1.pdf, http://apps.ift.org.mx/publicdata/versionpublicapift18031591_2.pdf, <http://apps.ift.org.mx/publicdata/versionpublicapift18031592.pdf> and http://apps.ift.org.mx/publicdata/P_IFT_011014_352_Version_Publica.pdf.

⁶³ In Mexico, commercial television and radio services are free for audiences.

79. The availability of relevant inputs – mainly radio frequencies, which is the physical medium for broadcasting content – has also been evaluated in order to prevent radio frequencies increasing to levels that are contrary to the public interest. In tenders for the allocation of concessions for the commercial use of frequencies, the accumulation limit has been set at a maximum of 12 MHz per economic interest group for the television service,⁶⁴ while the limit for radio is 30 per cent of the available frequencies. Both limits are established at the local level.⁶⁵

6. Exercise of power and mechanisms for collaboration and coordination between authorities

80. In 2018, the IFT published its strategic vision for the exercise of its powers as an economic competition authority and regulator in the telecommunications and broadcasting sectors. This document stated that *“the challenges posed by digital markets in general can be effectively addressed through the coordination of different public authorities whose faculties or attributes coincide within the sphere of the digital economy.”*⁶⁶

81. Cross-cutting issues that are relevant to the development of digital markets include Internet governance, network neutrality policies, the Internet of Things (IoT), IPv6, economic competition, privacy, big data and data exploitation, AI, consumer protection, cybersecurity and non-discrimination, among others that involve multiple public authorities in Mexico.⁶⁷ It is therefore necessary for economic competition authorities to consider developments and trends in the digital ecosystem in order to incorporate these into analyses in a timely and appropriate manner, so as to underpin the application of competition law and the exercise of advocacy powers.

⁶⁴ For example, in both the IFT-1 and IFT-6 call for tenders, the IFT established a frequency accumulation limit of 12 MHz in any coverage area for interested parties.

Frequency accumulation limit, p. 31 of the IFT-1 Call for Tenders Guidelines. Available in Spanish:

<http://www.ift.org.mx/sites/default/files/industria/espectro-radioelectrico/radiodifusion/2014/1/basesmodificadas240914.pdf>.

Frequency accumulation limit, p. 44 of the IFT-6 Call for Tenders Guidelines Available in Spanish:

<http://www.ift.org.mx/sites/default/files/industria/espectro-radioelectrico/radiodifusion/2016/6/baseslicitacional.pdf>.

⁶⁵ Frequency accumulation limit, p. 35 of the IFT-4 Call for Tenders Guidelines. Available in Spanish:

http://www.ift.org.mx/sites/default/files/industria/espectro-radioelectrico/radiodifusion/2016/4/basesift-4_1.pdf.

⁶⁶ IFT (2018), *Visión regulatoria de las telecomunicaciones y la radiodifusión, 2019–2023* [Regulatory vision for telecommunications and broadcasting, 2019–2023]. 66 pages. Mexico. Available in Spanish:

<http://www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/1vision19-23.pdf>.

⁶⁷ The IFT published a paper that includes a section on Internet and telecommunications regulation in the digital ecosystem.

82. The IFT is the competition authority and the regulator in the telecommunications and broadcasting sectors in Mexico. In the case of OTT services, including digital platforms, the main activities include:

- Protecting the principle of neutrality of the network so that access to the Internet occurs under principles of free choice, non-discrimination, transparency and quality, among others.⁶⁸ One of the objectives is to prevent Internet service providers from obstructing, interfering, inspecting, filtering or discriminating by origin or destination of traffic, content, applications or services, including OTT services and in turn digital platforms. Under this topic, for example, commercial practices among OTT services, which include platforms and other applications, and Internet service providers, including zero price offers (*zero rating*), protected spaces (*walled gardens*) or contracting of traffic management services are reviewed.
- Applying competition law with respect to concentrations and anti-competitive practices involving OTT services in the telecommunications and broadcasting sectors. The most interesting commercial practices are those related to the use of digital applications and platforms via the Internet, especially mobile broadband, including *zero rating*, *walled gardens* and *bundling*.
- Coordinating with other authorities, for example, the Office of the Federal Prosecutor for the Consumer (PROFECO) and the National Institute for Transparency, Access to Information and Personal Data Protection (INAI), to protect consumer rights⁶⁹ and data privacy and property rights, respectively,⁷⁰ and above all to establish measures or consistent and effective guidelines with measures for Internet service providers, OTT services, platforms and applications, to protect consumers and individuals.

83. As regards economic competition, COFECCE should coordinate with another authority. According to article 28 of the Political Constitution of the United Mexican States, there are two economic competition authorities in Mexico: the IFT for the telecommunications and broadcasting sectors, and COFECCE for the other sectors of the economy.⁷¹

84. In cases involving online digital products (OTT), platforms, applications or other services, jurisdictional boundaries have been defined on a case-by-case basis. Cases are subject to a mechanism provided for in the LFCE, in which specialised economic competition courts determine which authority is competent to hear the case in question. These decisions assign the case to one authority or to both, separating case analysis by

⁶⁸ Articles 145 and 146 of the Federal Telecommunications and Broadcasting Law are available. Available in Spanish: http://www.diputados.gob.mx/LeyesBiblio/pdf/LFTR_020419.pdf.

⁶⁹ Article 20 of the Federal Consumer Protection Law, which refers to the powers of PROFECO. Available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/113_120419.pdf.

⁷⁰ Article 39 of the Federal Law on Protection of Personal Data Held by Individuals refers to the powers of INAI. Available in Spanish at: https://www.gob.mx/cms/uploads/attachment/file/123648/Ley_Federal_de_Proteccion_de_Datos_Personales_en_Posecion_de_los.pdf.

⁷¹ Available in Spanish at: http://www.diputados.gob.mx/LeyesBiblio/pdf/1_090819.pdf.

markets, determining risks for the comprehensive analysis of cases, and generating inconsistent or contradictory resolutions between authorities.

85. So far, the OTT services that have been declared part of the telecommunications sector and therefore fall within the scope of the IFT are:

1. Similar products to telecommunications and broadcasting services. For example, audiovisual OTT products that *resemble* television subscription services (Netflix, PrimeVideo and others). Under this criterion, OTT products that resemble *telephony* or *messaging* would also be included (WhatsApp, Skype or others). It should be noted that this criterion is used to define whether an OTT service or digital platform belongs to the telecommunications sector; it is not a criterion for identifying substitutions between services. As a reference, audiovisual OTT services such as Netflix have not been considered as substitutes for pay-TV or subscription services.⁷²
2. Products that are closely linked (i.e. interdependent) with the former or others in the telecommunications sector, so that their analysis cannot be carried out independently.

86. For other OTT services, the jurisdictions shall be defined in accordance with cases that make the definition necessary and with greater references to which attributes, principles or considerations are relevant for defining the areas of competence. A principle used by the specialised courts in the field of economic jurisdiction in Mexico is specialisation in this area. Under this principle, as regards an issue not defined in the regulations, it can be determined which authority fits to the area of competence, taking into account the nature of the act and the specialisation necessary for its analysis.

87. This example illustrates the situation that may arise between authorities (with overlapping powers), which requires them to determine who is responsible for a subject or issue in digital markets, for which the areas of competence have not been precisely defined in the regulations, that are usually designed to deal with non-digital markets.

88. These considerations are relevant to the evolution of OTT services and digital platforms, where the boundaries between digital markets tend to diffuse as a result of the high levels of integration that can be developed.

⁷² See, for example, IFT decisions on the AT&T/Time Warner (*UCE/CNC-004-2016*) and Disney/Fox (*UCE/CNC-001-2018*) concentrations, whose public versions are available in Spanish at: http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf and <http://apps.ift.org.mx/publicdata/verpubpift110319122canx.pdf>.