

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Personalised Pricing in the Digital Era – Note by Mexico (COFECE)

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More documentation related to this discussion can be found at:

www.oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm

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Mexico (COFECE)

1. Executive Summary

1. The use of technology has irreversibly-transformed business structures and supply chains around the world, bringing multiple benefits and spillover effects. On the other hand, some technology applications, particularly algorithms,¹ can foster some practices contrary to the well-being of markets and consumers.

2. In Mexico, it is the responsibility of both the competition and consumer protection authorities to ensure that the use of technology by companies is conducted in such manner as to maximize the benefits of the markets for the general population.

3. Considering the expansion of internet access in Mexico and the increasing prevalence of technology adoption in the business sector, the Mexican Federal Economic Competition Commission (COFECE) carries out advocacy and enforcement actions to foster the proper-functioning of markets for the benefit of consumers.

2. Digital Personalized Pricing and Mexican Institutional Design

4. It seems undeniable that technology has reshaped the course of the economy in recent decades with an unprecedented intensity, both for supply and demand, more since companies now have mechanisms to measure consumer's desires and willingness to pay. In this regard, the use of technology in markets has increased the speed of decision-making processes of companies, thus, generating benefits for the market and overall consumers. However, some technology-driven processes can also become a concern for the authorities in charge of maximizing the benefit of markets towards consumers.

5. For this to happen, companies need to have access to a large volume and variety of customer's data and the resources to manage this information for it to be useful.

6. Adoption of algorithms in the decision-making processes of medium-size and large companies has been a cutting-edge issue in the international discussions of regulators for some years, given that their implications are still not entirely clear for the functioning of markets, and furthermore, its implications for consumer welfare. Some of the frequent purposes that algorithms serve for companies are the following:²

- To predict: Some algorithms calculate the probability of occurrence of an event, based on the analysis of a large amounts of information collected in real-time or

¹ An algorithm is a sequence of logic commands executed in an exact order to carry out a certain task, for example, a food recipe or solving a mathematical problem. Technological advance has led to the development of Artificial Intelligence, allowing computers to solve increasingly complex problems, and even make more efficient predictions than humans. OECD, *Big Data: Bringing competition policy to the digital era*, 2016. Available at bit.ly/2uA6ddK; and Canada Competition Bureau. *Big Data and Innovation: Implications for Competition Policy in Canada*, 2017. Available at bit.ly/2oL8HAu.

² COFECE, *Rethinking competition in the Digital Economy*, 2018. Available at: <https://goo.gl/sUjqVz>.

historic information. Algorithms may therefore be used, for example, to estimate demand, price changes, consumer behavior and their preferences, exchange rates and even natural disasters. This allows firms to improve their decision-making processes more efficiently and to develop innovative services.

- To optimize business processes: some algorithms allow businesses to foster competitive earnings by reducing their production or transaction costs, by helping them, for example, to know when a farmer should use an irrigation system or even how to segment their consumers according to price.

7. However, companies may also use algorithms to restrict and monitor their platform users' decisions. Thus, algorithms can become a means to facilitate abuse of dominance. For example, a retailer with substantial market power that desires to set a resale price for a product to displace competitors, may use an algorithm to monitor when a salesperson uses a platform to offer a lower price to the end consumer, and exert pressure so that the salesperson aligns the price offered with the recommended price. Algorithms may also become a medium to implement aggressive pricing strategies (fixing prices below their cost at certain moments) to block other companies from competing,³ and eventually push them out of the market.⁴

8. The main concerns for both, competition and consumer protection authorities are behaviors carried out by companies that have the potential to negatively-impact the overall welfare of markets and consumers. One overlooked and frequently-sanctioned kind of practice by competition authorities are relative monopolistic practices (abuse of dominance), such as and price discrimination, that can be facilitated through the use of technological tools such as algorithms.

9. In Mexico, the institutional design has been developed in such a manner that different authorities are empowered to foster competition and consumer protection. The authority entrusted with supervising the correct functioning and competition throughout the markets is the COFECE;⁵ the authority in charge of protecting and defending the rights of consumers is the Federal Consumer Protection Commission (PROFECO).⁶

³ An example of an unlawful use of algorithms to fix prices is the case of the fine imposed on several poster vendors through Amazon. The Department of Justice of the United States found evidence that the vendors agreed to fix the prices of certain posters sold in that country through the Amazon Marketplace. To implement their agreement, they adopted a series of price-fixing algorithms for the sale of certain posters with the objective of coordinating prices in accordance with the collusive agreement. United States Department of Justice, 2016. *Former e-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution*. Available at bit.ly/2oBjSvn

⁴ OECD (2017). *Algorithms and Collusion- Background Note by the Secretariat*. Available at: <https://goo.gl/t566R8>.

⁵ From the 2012-2013 Constitutional Amendments and the publication and enactment of the Federal Economic Competition Law, COFECE has mandate in all Mexican markets, except for telecommunications, where the Federal Institute of Telecommunications (IFT) is responsible for monitoring the competition processes. The Federal Economic Competition Law is available in Spanish at <https://goo.gl/emy7py>.

⁶ Unlike COFECE, which constitutional autonomy, PROFECO is administratively-subordinated to the Ministry of Economy. At present, PROFECO has a total of 32 delegations and 19 sub-

10. Also, another authority comes to play; the National Institute of Transparency, Access to Information and Personal Data Protection (INAI as per its initials in Spanish) responsible for overseeing data privacy and protection matters.

11. In 2014 COFECE and PROFECO signed an inter-institutional agreement in order to increase the margins of protection for the salaries of the general and avoid practices that threaten the Mexican families' economy. This instrument seeks to generate a common front that adds authorities whose role is fundamental in the protection of consumer rights.⁷

12. However, as privacy and data protection play an increasingly important role in the digital economy when companies engage in price discrimination, it is in the competition authority best interest to increase cooperation with INAI since the regulation it issues can impact directly the possibility of companies for personalized pricing by collecting and processing data.

3. COFECE and digital personalized pricing

13. COFECE, as the competition authority in Mexico, undertakes a key role in digital markets and e-commerce.⁸ The Commission's work includes fostering a competitive regulatory framework, in which companies are able to offer goods and services through digital technologies, as well as the enforcement of the competition regulatory framework when companies undertake actions outside the boundaries of the law.

14. PROFECO oversees e-commerce from the consumers' perspective, particularly, regarding the relationships among vendors and consumers and enforcement of consumer rights and vendor obligations in compliance with Federal Consumer Protection Law. In the domain of e-commerce, one of PROFECO's programs designed to this end is the Virtual Shop Monitor.⁹ To date, PROFECO monitors 866 e-commerce websites in Mexico.¹⁰

15. COFECE has been active in the vigilance of technology use and its consequences in the markets. In September of 2017, it initiated an investigation covering e-commerce platform services and other related services in the Mexican territory, given that sufficient evidence was found on the possible existence of anticompetitive practices. The initiation of this investigation was published in the Federal Official Gazette on February 1, 2018.

16. Practices and activities considered for the investigation include companies or individuals that control e-commerce platforms that connect both suppliers and buyers of

delegations, which totals 51 offices throughout Mexico. The Federal Law for Consumer Protection is available in Spanish at <https://goo.gl/hAnaky>.

⁷ This agreement is comprised by six main areas: one-stop shop, where PROFECO receives, through its delegations and sub-delegations, complaints, queries, requests and any writing addressed to COFECE; annual mutual training program; dissemination and education campaigns; verification and strengthening of law enforcement acts; exchange of information related to collective actions and price increases; and joint publications in relation to market studies and promotion of good practices. PROFECO press release on the subject is available in Spanish at <https://goo.gl/YLavlj>.

⁸ Except for the broadcasting and telecommunications sectors, for which the IFT is responsible for.

⁹ Further information of MTV, in Spanish available at <https://goo.gl/eAwbjU>.

¹⁰ PROFECO. *Monitoreo de Tiendas Virtuales*, 2018. Retrieved from <https://goo.gl/UKHYYo>.

products and services (the company that controls may also serve as consumer and producer), companies or individuals that use the platform as a mechanism to carry out transactions, or any combination of these structures.¹¹

17. The services that are normally related to these type of electronic platforms, and therefore, are included in the aforementioned investigation are:

- Financial services, whether through bank payment methods, cash or credit.
- Logistic services, which may include warehouses that ensure the timely-delivery of products purchased by the consumer.
- Advertising of goods and services offered on the digital platform.
- Digital space, which allows for sellers to group all the products offered.
- Other goods and services linked to the platform.

18. The unlawful practice investigated is a relative monopolistic practice (abuse of dominance), which occurs when one or several companies abuse their power in a specific market, by discriminating prices, conditioning or linking the sale of one product to the sale or purchase of another product or service.

19. This investigation occurs in a context of growth in the e-commerce sector. According to *Asociación de Internet.mx*, a Mexican association that monitors online trends and key issues on the use of Internet in the country, in the Latin American and Caribbean region, Mexico has reached second place in e-commerce, just after Brazil, and it is expected to grow 21.5% on average in the next three years. In 2016, the estimated value of the e-commerce market in Mexico was 329.85 billion Mexican pesos (17.63 billion U.S. dollars). A 28.3% increase relative to the 2015 estimate of 16.22 billion U.S. dollars.¹²

20. Furthermore, according to the study developed by AT Kearney, “2016: The Tipping Point for E-Commerce in Mexico”, it is projected that in 2019, e-commerce in Mexico will reach more than 40 billion U.S. dollars.¹³¹⁴

4. Conclusions

21. International trends are such that the attention of competition and consumer protection authorities is increasingly oriented towards markets and practices within the digital economy. In Mexico, the impact of internet access and digital consumer trends is clearly increasing.

22. The role of the competition and consumer protection authorities, will play a key role to maximize the benefits of the technology adoption, as well as to prevent and sanction practices contrary to the overall welfare of markets and consumers.

¹¹ COFECE. Press Release COFECE-006-2018, *COFECE probes the market of e-commerce platform services in Mexico*. Mexico City, 2018. Available in Spanish at: <https://goo.gl/a1hJy8>.

¹² Asociación de Internet.mx. *Ecommerce Study Mexico 2017*. Available at: <https://goo.gl/syUxaG>.

¹³ A.T. Kearney 2016: Tipping Point for E-Commerce in Mexico. A.T. Kearney. Available at: <https://goo.gl/s8bGcQ>.

¹⁴ 2016 average exchange rate: 1 USD = 18.71 MXN

23. In Mexico, COFECE, IFT and PROFECO are constantly working to address the emerging technologies, improve communication and coordination channels among them and with other governmental bodies, as well as toward businesses, the civil society and the general public, in order to carry out advocacy and enforcement efforts according with the competition and consumer protection legal frameworks.