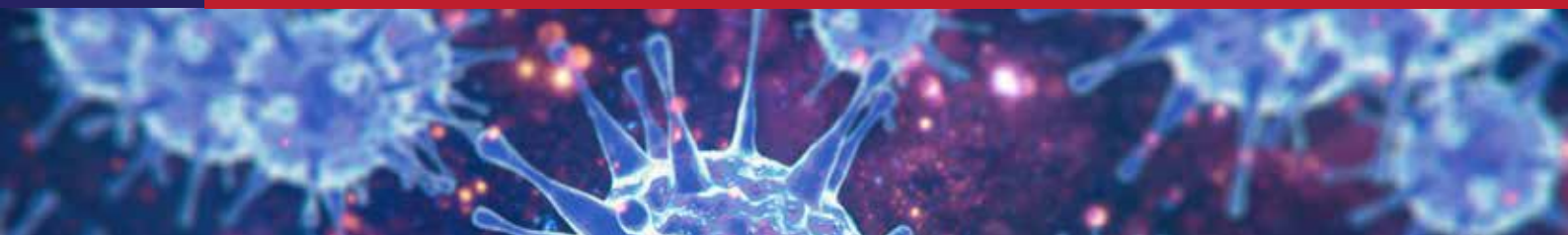


Competition institutions in Mexico in relation to **COVID-19** and the economic recovery

Ignacio Navarro



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to COVID-19 and the economic recovery**

Ignacio Navarro



UNITED NATIONS



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Introduction

The coronavirus disease (COVID-19) pandemic has brought a sharp contraction in economic activity due to the restrictions on production activities imposed to control the spread of the virus.

The strongest effects of the restrictions were felt between March and May 2020, leading to an unprecedented 18.5% fall in gross domestic product in the second quarter of 2020 compared to the same quarter the previous year (INEGI, 2021).

Although restrictions on economic activities began to be phased out in June 2020, they are not expected to be fully lifted until a vaccine that would allow a return to normal becomes available. As a result, annual GDP fell 8.5% by the end of 2020 compared to 2019 (INEGI, 2021), the deepest GDP decline since the Great Depression.

To overcome the crisis, companies have looked to start or boost online sales, in addition to digitizing their internal processes to raise productivity. In that context, the purpose of this report is to document the steps that competition authorities in Mexico are taking to help small and medium-sized enterprises (SMEs) cope with the economic crisis amid increasing digitization.

This study is divided into four chapters. The first chapter examines the problem of market access for SMEs and the major public policy challenge of creating and maintaining suitable competition conditions so that companies, particularly SMEs, face an even playing field in digital markets. The second chapter describes the institutional environment for competition in Mexico, i.e., who is involved in promoting and monitoring competition. It also analyses the most important elements of the Federal Economic Competition Law for creating conditions for competition in digital markets. The third chapter describes the measures and support policies that the competition authorities have implemented to help SMEs get through the crisis. Finally, the fourth chapter presents the conclusions of the study together with some policy recommendations that could be useful in helping businesses contend with the pandemic.

I. The problem of market access for SMEs as a result of the pandemic

The lockdown and partial suspension of economic activities during the COVID-19 pandemic have disrupted the production processes of companies, which have had simultaneously to deal with abrupt major shifts on both the demand and supply sides.

On the demand side, companies face a general downturn in demand associated with the loss of workers' income and uncertainty about the duration of the pandemic. In addition, it has led to a change in consumption patterns and a restructuring of consumer baskets, at least temporarily, with higher spending on consumer products and telecommunications and lower spending on services such as transport, tourism, and entertainment and leisure. Moreover, it has intensified consumers' growing preference for online distribution channels and home delivery of products (Kholi and others, 2020).

On the supply side, the pandemic has strongly affected some economic sectors that have seen both their supply and distribution chains disrupted. Similarly, restrictions on production activities have meant a significant decline in production volume, especially where non-essential activities are concerned. As of December 2020, the number of infections continues to be very high, so restrictions on economic activity remain in place and companies continue to face major operational challenges.

For businesses, the severity of the crisis and the restrictions have brought drastic changes in their operating conditions: low demand, shifts in customer needs, order cancellations, cash flow problems, work stoppages, staff cutbacks, delays in product delivery, etc. In this crisis, obstacles have piled up on top of each other because a problem that originated on the supply side spread to the demand side.

One of the most visible phenomena observed in the response of companies to the coronavirus crisis has been an increased use of digital technologies, particularly in areas such as education, health,

finance, professional services and trade. Teleworking has been particularly important in the current emergency, as it has allowed some work to continue remotely, substantially reducing exposure to infection (ECLAC, 2020).

Among the more relevant patterns concerning SMEs is online shopping, which has grown significantly and enabled SMEs to branch into online sales (Sánchez, 2020). In Mexico, six in every ten SMEs sell online, while two in ten moved into this channel of distribution as a result of the pandemic (AMVO, 2020). SMEs increasingly recognize the importance of e-commerce as a high-growth distribution medium that allows them to diversify away from traditional channels (Asociación de Internet MX, 2020).

This trend of accelerating growth in the digitization of the economy and e-commerce is also expected to continue in the near future. Some of the practices of the digital economy now adopted out of necessity –such as teleworking– will remain part of the new normal even after the problem of the pandemic has been solved.

A. The challenges of digitization

Transformation of business and production

Influenced by teleworking, lockdowns and physical distancing, consumers seek goods and services better suited to their needs; this is producing new consumer trends that have an impact on companies. Businesses need to be able to identify these trends and to be flexible enough to quickly change the characteristics of their goods to meet this shifting demand. They also need to change their internal processes to adapt them to the new conditions, such as lockdowns and physical distancing.

Digital technologies are a valuable tool for achieving the objective of meeting demand and adapting internal processes in the current context. However, it is also a major challenge, especially for SMEs. The challenges are twofold, one falling within the scope of the company itself and the other within the public policy sphere.

As for measures implemented by the company itself, digitizing internal processes and having an online presence requires specialized material and human resources. While large companies usually have a specialized team to help them deploy the necessary communications infrastructure, acquire software, and provide the training needed to establish and leverage their online presence, SMEs generally do not have that capacity and require additional resources to invest in digitization. Platforms allow small companies to have an online presence with fewer resources.

Currently, the online presence of SMEs is very uneven: it can be relatively passive, such as providing information about their products; or more active, through transactional systems that process online sales using an e-commerce platform or their own website.

The survey on the consumption pattern of telecommunication services by SMEs shows the following results (Federal Telecommunications Institute, 2019b): microenterprises use the Internet less intensively for business processes compared to small enterprises, and the same holds true when comparing small and medium enterprises. The only exception to this pattern is the presence of companies in social networks. The highest percentage of businesses with a Facebook page were microenterprises; the percentage was slightly lower for small and medium enterprises.

Table 1
Activities carried out by enterprises with a fixed Internet connection
(Percentages)

	Micro	Small	Medium-sized
Customer attention	60	74	80
Supply purchases	63	70	83
Sales of products or services	55	64	85
Electronic billing	57	79	81
Staff training programmes	22	34	61
Facebook page	90	88	86
Page with business domain	40	61	82
Online banking	30	54	70

Source: Federal Telecommunications Institute, Cuarta Encuesta 2019. *Usuarios de servicios de telecomunicaciones: micro, pequeñas y medianas empresas*, Mexico City, 2019 [online] <http://www.ift.org.mx/sites/default/files/contenido/general/usuarios-y-audencias/cuartaencuesta2019.pdf>.

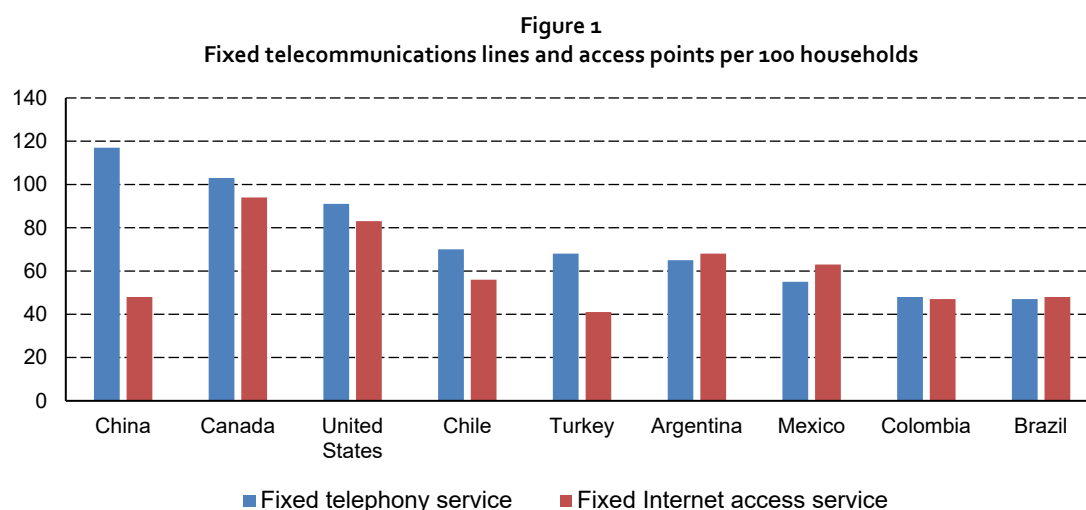
Although it is becoming increasingly common for SMEs in Latin America to use electronic banking and online accounting in their internal processes, it is still less common for them to use digital technology in the management and control of their production, supply chain and logistics processes, which require greater sophistication on the part of enterprises (CAF, 2020).

Infrastructure

On the other hand, the public policy challenges of spurring digitization include the promotion of better connectivity infrastructure, as well as the creation of an institutional framework based on competition that can give SMEs access to markets under the best possible conditions.

The challenge of increasing the availability, accessibility and affordability of broadband infrastructure is fundamental for the incorporation of companies to digitization to be uniform in all relevant dimensions of economic activity, geographical region, degree of urbanization, etc. Usually, the best quality connectivity is deployed in urban areas, whereas in rural areas the connectivity for digitization processes is less efficient, so taking steps to ensure nationwide coverage is a permanent task for public policy makers.

According to information from the Federal Telecommunications Institute (2020d), fixed broadband penetration stood at 40% by the end of 2013, but by December 2019 had already reached 55%, as a result of infrastructure investment of more than US\$ 500 billion. At the end of 2019, there were 19.3 million registered fixed Internet access points in Mexico, of which 84.6% were for residential use, 11.9% for non-residential use, and 3.1% for both. Considering that there are about 37 million homes, household coverage is just over 50%. In terms of connection speed, 88% of users have speeds of 10 Mbps to 100 Mbps, 5% of 2 Mbps to 9.99 Mbps, 4% with more than 100 Mbps; and 1% with 256 kbps to 1.99 Mbps. The connection technology used is coaxial cable in 39% of cases, digital subscriber line (DSL) in 35%, fibre optic in 25%, and satellite in 0.1% (Federal Telecommunications Institute, 2020e).



Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of Federal Telecommunications Institute, "Cuarto Informe Trimestral Estadístico 2019", Mexico City, 2020 [online] http://www.ift.org.mx/sites/default/files/contenidogeneral/estadisticas/ite4t2019_o.pdf.

In relation to other countries, Mexico has a higher fixed-line Internet penetration than Brazil, Colombia and Chile, but lower than Argentina, among Latin American nations. However, it lags well behind the United States and Canada.

The cost of broadband is another factor that may limit the advance of digitization. In that regard, intense competition between telecommunications operators is essential for improving the quality and prices of telecommunications services in general, and broadband in particular.

In terms of costs, according to the Federal Telecommunications Institute (2020f), Mexico offers some of the lowest prices for mobile and fixed Internet services, compared to other member countries of the Organization for Economic Cooperation and Development (OECD). A review of 36 countries carried out by the OECD with data from 2017 for three mobile service packages (low consumption, medium consumption and high consumption) and two fixed internet packages (low consumption and high consumption) found that Mexico ranked fourth in terms of the cheapest mobile services for low and medium consumption packages, and second cheapest for the high consumption package, the eighth cheapest for low consumption Internet access and the sixteenth cheapest for the high consumption Internet access package. Based on October 2019 data, the Federal Telecommunications Institute (2020a) found that the monthly rental cost of fixed internet plans with download speeds of less than 10 Mbps had decreased by around 25 to 30% compared to 2018.

E-commerce platforms

SMEs can engage in e-commerce without large initial outlays of resources by using the services of e-commerce platforms. The main advantage of such platforms is their large volume of potential customers, which an SME would find it almost impossible to replicate. Another advantage of using a platform is that the variety of platforms available to SMEs allows them gradually to build up their online presence, starting with relatively passive promotion of their products on platforms such as Google, Facebook or Instagram, or engaging in the full cycle of buying, selling, and distribution on e-commerce platform such as Amazon or MercadoLibre. Finally, the initial cost to a company of joining an electronic platform is substantially less than developing and managing their online presence on their own. Given those advantages, platforms are the preferred way for SMEs to build their online presence.

The popularity of the platforms has posed a major challenge for the competition authorities. Platforms have technical and economic characteristics that make them prone to market concentration. The presence of strong economies of scale, network economies and economies of scope, as well as the use of big data generate formidable competitors that few can successfully contend with. The markets where platforms operate are prone to lean towards a single competitor, which tends to capture all –or nearly all– the market. Competition authorities have also faced limitations in their regulatory framework when it comes to addressing this challenge, for example, in reviewing potentially harmful acquisitions that fall short of reporting thresholds or defining the relevant market –the main competition analysis tool– when the prices of the services are zero (Lear, 2019; World Bank, 2020).

The main public policy challenge is to create and maintain suitable conditions of competition so that companies, particularly SMEs, have an even playing field in digital markets. Competition authorities have an important role to play in providing a better business environment for SMEs to reap the greatest possible benefits of adopting digital technologies.

The digitization of the economy and e-commerce can help companies to sell their goods better, buy their inputs better and improve their internal production processes, hence the great importance of promoting digitization among SMEs as a response to the pandemic.

Competition authorities also have a very important role to play in providing competitively priced access to inputs needed for production processes in areas such as the energy, telecommunications, financial and transport sectors. Those activities, which are also subject to significant economies of scale and network economies, are regulated in most countries, including Mexico. Competition and regulatory authorities should be closely coordinated to achieve the best quality and price conditions for consumers, especially now during the pandemic and recovery.

In addition, coordination between competition authorities and regulators is necessary when innovative companies can have a significant impact on market competition. For example, financial technology (fintech) companies are beginning to compete successfully with digital tools in markets dominated by traditional financial institutions, which has given an important boost to the financial sector. It is important that regulators do not impose excessive barriers to the development of these companies and that they ensure a level playing field in that sector. The same goes for energy, now that renewable energies have started to become more affordable for consumers.

II. Institutional environment for competition

SMEs face significant challenges in surmounting the economic crisis resulting from the coronavirus pandemic. Restrictions on economic activities have severely affected supply and demand for goods and services, resulting in lower incomes and greater uncertainty. Until it is possible to return to normal business operations, companies may face increasingly critical situations.

An effective way to mitigate the effects of the market disruption caused by the pandemic on traditional distribution channels is through online sales. In this context, an important task for the authorities is to ensure that SMEs have adequate access to telecommunications infrastructure so that they can maintain an online presence, as well as competitive and non-discriminatory access to platforms that enable online sales. This is not only in order to better cope with the pandemic, but also because it will be an important feature of the recovery and the new normality. According to McKinsey (Baig and others, 2020), 75% of first-time users of digital channels indicate that they will continue to them when conditions return to normal.

The disruption of production chains also entails potential dangers in the supply of raw materials and basic inputs, which can be just as harmful to SMEs as lack of access to final markets, as the attendant higher costs can drive them out of business. The authorities also need to ensure that SMEs have adequate and competitive access to energy, transport and financial services.

In Mexico, the task of ensuring fair conditions of competition falls mainly to the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT), the latter for the telecommunications and broadcasting sector. However, there are other regulatory bodies that have a say in competition conditions in specific sectors.

In the digital economy, in addition to COFECE and IFT, the National Institute for Transparency, Access to Information and Personal Data Protection (INAI), the Secretariat of Economy, the Coordination of the National Digital Strategy of the Presidency of the Republic and the Secretariat of Communications and Transportation influence the competition conditions in this sector, although the roles of some of them have changed recently with the new administration, as explained below.

In 2013 the federal government launched the National Digital Strategy (Government of Mexico, 2013), a set of objectives and programmes aimed at digitally transforming the country and grouped around five main areas: government transformation, digital economy, education, health and security. In order to coordinate and follow up on the strategy's lines of action, which were the responsibility of different government institutions, the Coordination of the National Digital Strategy was created as an office under the Presidency of the Republic.

The Coordination was responsible for integrating the National Digital Strategy and coordinating the federal government's digital activities. On 9 December 2019, the regulations of the Office of the Presidency were amended, strengthening the powers of the Coordination to define the digital policy for the federal government. Its new powers include the right to nominate IT managers of federal government agencies and to participate in the specification of standards for the procurement of equipment for federal government entities (Secretariat of the Interior, 2019).

The Secretariat of Communications and Transportation, by contrast, appears to have become less important as a promoter of telecommunications. On one hand, the activities of the Undersecretariat of Communications and Technological Development, which included the promotion of infrastructure, more coverage and improving the digital skills of the population, are now been carried out by the Undersecretariat of Transportation.¹ On the other hand, the most important telecommunications project of this administration, "Internet for All", intended to provide free Internet access in public places, such as educational institutions, health, government offices, community centres and open spaces, will be carried out by the Federal Electricity Commission, the corresponding public utility. These two developments suggest that the Secretariat of Communications and Transportation in this area will play a less relevant role in the near future.

This section describes the powers of the institutions involved in promoting competition in the digital economy. Those related to digital governance fall outside the scope of this study.

A. COFECE

Pursuant to Article 28 of the Political Constitution of the United Mexican States (Chamber of Deputies, 1917), COFECE is an autonomous body, with legal personality and its own assets, whose purpose is to ensure free competition and participation, as well as to prevent, investigate and combat monopolies, monopolistic practices, market concentration and other restrictions to the efficient functioning of markets. According to COFECE, its mission is to promote and protect competition in markets in order to contribute to the well-being of families and the economic growth of the country; its vision is to be a technical authority that serves as a reference in public policy decisions, recognized for protecting and promoting competition for the benefit of society (COFECE, 2019c). In this regard, COFECE uses preventive measures to analyse market concentration that could harm the public interest, and corrective measures to investigate and sanction possible anti-competitive practices. COFECE, as part of its advocacy work, also issues opinions to various authorities to improve market competition conditions.

Article 28 of the Constitution establishes exceptions to the powers of COFECE and identifies various industries that do not constitute monopolies, since their operation is the exclusive purview of the State: postal service, telegraphs and radiotelegraphy; radioactive minerals and nuclear power generation; planning and control of the national electricity system; the public service of electricity transmission and distribution; minting coins and issuing banknotes; and exploration and extraction of oil and other hydrocarbons (in the terms of Article 27 of the Constitution), among others.

¹ The activities of the Undersecretariat of Communications were transferred to the Undersecretariat of Transportation. by means of an executive order published in the Mexican Federal Gazette on November 2 2020.

With the exceptions mentioned in the Constitution, competition oversight is carried out by COFECE and IFT, the latter exclusively in the area of telecommunications and broadcasting. Both institutions act as competition authorities and apply the same Federal Economic Competition Law (COFECE, 2014), but in different economic sectors. To the extent that the dividing line between economic sectors can in some cases be difficult to determine and that actions taken by economic agents in one sector have ramifications in others, the Federal Economic Competition Law itself establishes a procedure (at its Article 5) to determine which institution has competence over a specific matter. The procedure consists of claiming from the other authority jurisdiction over the matters for which it considers itself to be competent. If the authority from which jurisdiction over a matter is claimed does not agree, a court specializing in economic competition, broadcasting and telecommunications determines what is appropriate. This procedure is of great relevance for the purposes of this study, as the determination of which authority is competent in digital markets has been and continues to be the subject of controversy between the two authorities. This issue is discussed in greater detail below.

There are also the energy, transportation, telecommunications and financial markets, among others, whose authorities, in the exercise of their powers, issue regulations that alter the environment in which competition occurs. Sometimes these regulations can unnecessarily restrict economic competition. COFECE engages in advocacy when it considers that the regulator could allow greater competition, without detracting from its regulatory objectives. It also has the power to initiate investigations to determine which regulations or market structures could be hindering competition in a particular economic sector, including regulated sectors. These investigations conclude with recommendations, in the case of authorities, or cease and desist orders in the case of private economic agents. In interactions with sectoral regulators, disputes may also arise about the best way to deal with an issue. A controversy is currently being settled in the National Supreme Court of Justice about the regulation issued by the sector regulator regarding the rules on electricity dispatch, which COFECE considers to be anti-competitive as they favour electricity generation using fossil fuels as opposed to renewable energy. This issue will also be discussed below.

B. IFT

IFT is an autonomous body, with legal personality and its own assets, whose purpose is the efficient development of broadcasting and telecommunications (Federal Telecommunications and Broadcasting Law, 2014). The Federal Telecommunications Institute carries out its mission by: (i) regulating, promoting and supervising the use, development and exploitation of the radio spectrum, infrastructure, networks and provision of services; (ii) promoting conditions for effective competition in those markets; and (iii) promoting access to telecommunications and broadcasting technologies and services (Federal Telecommunications Institute, 2019c).

The Federal Telecommunications Institute plays a dual role, as sectoral regulator and as a competition authority in the telecommunications sector. In its regulator role, it seeks to ensure the best conditions for public access to telecommunications services, particularly for broadband services, which is an essential service for participation in the digital economy.

It also applies the Federal Economic Competition Law to the telecommunications and broadcasting sector. This is an important difference in the Mexican competition promotion institutional framework. In other countries, such as the United States or the United Kingdom, the competition authority and the telecommunications authority wield concurrent powers in telecommunications sector. In Mexico, there is a division of powers and it falls to the Federal Telecommunications Institute to exercise authority over competition in the telecommunications and broadcasting sector. As previously mentioned, this division raises the possibility of conflicts of jurisdiction between COFECE and

the Federal Telecommunications Institute in digital markets, since telecommunications networks play an important role in shaping digital services. This conflict of competence is addressed below.

C. INAI

The digital economy draws on vast amounts of consumer information that can be misused by competitors in markets. Information has also become an essential tool for competing in digital markets. The problems faced in these two disciplines –personal data protection and competition– converge decisively in digital markets.

INAI is the authority responsible for data protection. Article 6 (VIII) of the Constitution (1917), states that INAI is an autonomous, specialized agency, responsible for ensuring compliance with the right of access to public information and protection of personal data.

Specifically, INAI guarantees that any authority at the federal level, autonomous bodies, political parties, trusts, public funds and unions; or any natural or legal person that receives and uses public resources or performs acts of authority, will deliver the requested public information.

On the other hand, and of greater interest for the purposes of this study, it ensures the proper use of personal data, as well as the exercise and protection of the rights of access, rectification, cancellation and objection that every person has with respect to their information (INAI, 2019).

INAI is very important in regulating data held by digital platforms, since these are fed by the information of their consumers, which is either provided directly by them or collected via third parties. Platforms also often share such information with third parties without consumers necessarily being aware of it. As mentioned in a document known as the "Stigler Report" (Stigler Center, 2019), data and their management have shifted from a privacy and protection issue to a competition issue. Data can be used for the benefit of the consumer, to offer better products and services; however, the mass accumulation of information can also give a company market power, which could be used to foreclose competitors or to make a bigger profit from consumers.

Data protection

Information is the main input of companies that participate in digital markets; they use it to increase their competitive advantage by knowing more about the characteristics of their consumers, such as consumption patterns, age, preference and income level.

In this regard, the Federal Law on the Protection of Personal Data Held by Private Parties (2010) aims to protect personal data, in order to regulate their legitimate, controlled and informed processing, so as to ensure the privacy of individuals and their right to decide how their information is used. Specifically, it states that personal data must be collected and processed in a lawful manner; that the owners of the data must be informed of the information that is collected from them and for what purposes, by means of a privacy notice, which should contain at least (i) the identity and address of the data controller collecting the data; (ii) the purposes for which the data is being processed; (iii) the options and means that the responsible party offers the owners of the data for limiting the data's use or disclosure; (iv) the means of exercising the rights of access, rectification, cancellation or objection; (v) as appropriate, the data transfers made. Additionally, Article 36 of the Federal Law on the Protection of Personal Data Held by Private Parties states that when the data controller intends to transfer personal data to third parties other than the data processor, it must inform them of the privacy notice and the purposes to which the data owner conditioned their processing. Consequently, it is the responsibility of the interested parties to review privacy notices and be informed about how their information is handled, as well as the possibility of its transfer to third parties. For example, when making an online purchase on a platform, one must register and accept the platform's privacy notice, which may state that the

information will be used by the company for its own purposes, or by the group to which it belongs, which may include different companies from the one with which the transaction was undertaken.

Connected with the above, INAI has tools to protect the information of individuals in the hands of companies, through their exercise of the rights of access, rectification, cancellation and objection to the processing of personal data (known as ARCO rights). This tool enables individuals to know who has their personal data and what they will be used for; to request rectification of their personal data if it is incomplete or inaccurate; to request its cancellation and to oppose their use, if they were obtained without their consent (INFOCDMX, 2020).

Regulators in other countries have identified that information can be misused and have set up public agencies to regulate and monitor the use of information by companies. One of them is the European Community which in February 2020 pointed out that the strategy for the use of information is a pillar of the European Community's new digital strategy and that it aims to create a single market for data to ensure Europe's global competitiveness and data sovereignty (European Commission, 2020).

D. Secretariat of Economy

The Secretariat of Economy's mission is to develop and implement comprehensive policies for innovation, diversification and productive and commercial inclusion, as well as to stimulate domestic and foreign investment, in addition to fostering productivity and competitiveness in industrial activities in order to enable their integration into regional and global value chains and so help to generate wellbeing for Mexicans (Secretariat of Economy, 2019a). The Secretariat of Economy has a number of powers relating to competition, which are set out below.

Power to impose price ceilings and request investigations

The Secretariat of Economy is empowered to request the initiation of various proceedings before COFECE and IFT when it considers that competitive conditions do not exist. These procedures only include products that are not regulated by other legal provisions, i.e., where there is no specific sectoral regulation.

According to Article 34 (I) of the Organic Law of the Federal Public Administration (1976), the Secretariat of Economy may formulate and direct general policy on industry, foreign and domestic trade and prices, with the exception of prices of goods and services of the Federal Public Administration. Likewise, Article 9 (II) of the Federal Economic Competition Law provides that the Secretariat of Economy may set price caps or ceilings on goods and services, provided that there are no effective competitive conditions in the market in question, as determined by COFECE.

Article 9 is very important as it allows for competition to be the main mechanism to determine prices. The Secretariat of Economy may only impose price caps if COFECE determines that there are no competitive conditions in specific markets. This provision protects companies from arbitrary price ceilings, because an independent third party, in this case COFECE, verifies that there are no competition conditions before the government can impose a price cap.

To a large extent this provision benefits SMEs that produce food products for the basic consumption basket. Up until the early 1990s, products such as tortillas, beans, milk and chicken were subject to maximum prices, primarily as a response to political pressure. As an autonomous, technically sound institution, COFECE gives credibility to the procedure and helps avoid its politicization.

Article 12 (XIV) and (XV) of the Federal Economic Competition Law state that the Secretariat of Economy may request, on behalf of the federal executive branch, opinions on laws, regulations, decisions, circulars and administrative acts of a general nature related to free participation and economic competition.

Finally, according to Article 66 of the Federal Economic Competition Law, the Secretariat of Economy may request an investigation of barriers to competition, of which the Investigating Authority of COFECE will be in charge. It is worth reiterating that the separation between the agency that requests a competition investigation and the one that decides in the proceeding is one of the strengths of the institutional framework for competition promotion in Mexico.

Box 1

Investigation procedures requested by the Secretariat of Economy

In 2016 the Secretariat of Economy, through the Competition and Public Policy Unit, requested the opening of an investigation into the public freight transportation service in the state of Sinaloa in order to identify the existence of barriers to competition (COFECE, 2017a).

COFECE decided that there was an absence of conditions for effective competition in the market for public transportation services for general freight, construction materials and agricultural products in Sinaloa, since it identified various state regulatory barriers that artificially divided the market into segments, restricted supply, granted undue advantages and accorded broad discretion to the authority in granting concessions and permits, as well as in setting rates. As a result, COFECE recommended that the Sinaloa's executive branch and lawmakers make the necessary reforms to do away with those regulatory barriers. On 20 June 2017, COFECE noted that, with the passing of the amendments to the Transit and Transportation Law in the state of Sinaloa, moves were being made towards eliminating barriers to free competition and participation in the freight transportation service.

In another case, on 24 February 2020, COFECE made a ruling in an investigation whose purpose was to determine the existence of barriers to competition and free participation that could have anti-competitive effects in the market for the production, distribution and/or commercialization of unprocessed cow's milk for industrial use whose origin and/or destination was the state of Chihuahua (Investigated Market). The investigation was called for by the Undersecretariat of Competition and Standards of the Secretariat of Economy on 2 August 2017. COFECE decided that there were no conditions for effective competition in the investigated market, since there were legal regulations that amounted to a barrier to the entry of external suppliers to the state of Chihuahua. With the aim of eliminating those regulatory barriers, COFECE issued several recommendations to the Congress of the State of Chihuahua, the Ministry of Rural Development and the Governor of Chihuahua, in order to reform, abrogate and repeal certain regulations that generated barriers to competition and free competition in the market for the supply of raw milk in the state of Chihuahua (COFECE, 2020f).

Source: Federal Economic Competition Commission (COFECE), "Análisis de caso: barreras a la competencia en el transporte público de carga en Sinaloa", *Análisis de Casos*, Mexico City, 2017 [online] <https://www.cofece.mx/wp-content/uploads/2017/11/SinaloaVer1.pdf#pdf>; "Datos relevantes de la resolución emitida en el expediente IEBC-002-2017 por el Pleno de la Comisión Federal de Competencia Económica", *Diario Oficial de la Federación*, Mexico City, 9 March 2020 [online] https://www.dof.gob.mx/nota_detalle.php?codigo=5588731&fecha=09/03/2020.

Foreign Trade

Foreign trade is an important source of competition. COFECE sits on the Foreign Trade Commission, which is the consultative body that discusses foreign trade regulations and reviews requests for tariff modification and the establishment of import quotas. COFECE's participation in this consultative body allows it to carry out its advocacy work on this issue, which is very important for maintaining competition conditions, mainly for manufactured goods markets.

In June 2017, COFECE published "Política Comercial con Visión de Competencia" (Trade policy with a competition vision) (COFECE, 2017c), in which it advocates for an open trade policy that benefits the consumer. In particular, it called for any tariff increase to be fully justified and documented in terms of economic efficiency.

COFECE expressed concerns about the prevailing tariffs for countries with which there are no trade agreements, specifically for the footwear and apparel industry, since the main sources of supply are located in countries to which very high most-favoured-nation tariffs are applied, which has a strong adverse impact on consumers. It also expressed concern about the Sector Promotion Programs that

offer the possibility of importing with tariff benefits (for previously registered producers) various inputs and machinery that other producers in the same sector do not enjoy, which can generate exclusive advantages in favour of certain economic agents and market distortions.

In that publication, COFECE recommended that the Secretariat of Economy should promote market efficiency and consumer welfare and avoid imposing measures that raise the cost of inputs for many producers to the benefit of a few ones in concentrated sector.

E. PROFECO

The Federal Consumer Protection Agency (PROFECO) protects consumer rights and promotes reasoned, informed, sustainable, safe and healthy consumption, in order to strengthen the domestic market and public welfare (PROFECO, 2019).

Although COFECE and PROFECO have different powers, both direct their efforts at protecting consumers: while COFECE monitors competition between companies in the interests of greater variety, better quality and better prices for consumers, PROFECO monitors companies to ensure that they do not commit abuses when selling their products and services (COFECE, 2018c).

PROFECO's powers are linked to those of COFECE. First, under Article 66 of the Federal Economic Competition Law, PROFECO has the power to file requests for the investigation of anticompetitive practices with COFECE; second, in accordance with Article 77, if an investigation conducted by the COFECE investigating authority finds evidence of any anti-competitive conduct that harms consumers, it shall submit its findings to PROFECO for its consideration.

In addition, in accordance with Article 191 of the Federal Telecommunications and Broadcasting Law, IFT signed an agreement with PROFECO to protect the minimum rights of telecommunications and broadcasting users. These minimum rights range from the freedom to choose a service, to the right to telephone number portability and clear, fair and equitable contracting conditions (Federal Telecommunications Institute, 2015a).

This type of agreement is even more important in these times of pandemic, where users in general, including SMEs, have a greater need for such services, and the companies that provide them may have incentives to take advantage of their position and increase their rates or change the terms and conditions under which they provide their services.

F. Legal framework

The Federal Economic Competition Law (2014) regulates the application of Article 28 of the Constitution as regards free participation, economic competition, monopolies, monopolistic practices and market concentration; it is a public order law of social interest that applies to all areas of economic activity and its observance is universally required throughout the Republic.

Article 2 of the Federal Economic Competition Law states that its purpose is to promote, protect and ensure free participation and economic competition, as well as to prevent, investigate, combat, effectively prosecute, severely punish and eliminate monopolies, monopolistic practices, illicit market concentration, barriers to free participation and economic competition, and other restrictions on the efficient functioning of markets.

The promotion of competition and free participation is the main idea behind the law; however, it is not an end in itself, but a means to achieve a greater goal, which is the efficient functioning of markets. In this sense, the law underlies the idea that the process of competition and free participation leads to the efficient functioning of markets for goods and services.

However, seeking better competition conditions in digital markets entails the application of traditional competition tools, as well as new tools and initiatives aimed at addressing situations and challenges posed by digital markets that are not properly covered by law or that are not sufficiently explored in practice.

This section discusses the tools available to competition authorities to ensure better competition conditions. In parallel, it examines the problems that arise when applying these traditional tools to digital markets and the proposals to address them that have been advanced by academics and international authorities.

Box 2

Competition policy concerns raised by digital markets

- **"Winner takes all":** digital platforms facilitate a dynamic in which competition for the market becomes more important than competition in the market. In other words, the competition process is not within the market itself, but about being the first or among the first to monopolize it. This dynamic is largely due to the network effects that characterize digital platforms, whereby the first platform to attain a critical mass of users reduces the possibility of competitive pressure from another platform.
- **"Zero prices":** as a result of changes in the cost structure and the existence of network externalities, digital platforms have incentives to offer, at least to one of the sides or actors of the market, services at no monetary cost, also known as "zero price". However, these zero prices are not strictly zero, as they may imply that, unbeknownst to them, users provide personal information to the platform, which the platform uses for profit. For competition authorities this poses new challenges. For example, in defining the relevant market, the application of traditional tests may not apply when zero prices are involved.
- **New forms of collusion or price fixing:** the use of algorithms powered by big data could increase the ability of companies to fix prices or collude, even without the need for human intervention.
- **Acquisition of potential competitors:** Established companies have incentives to acquire start-ups or potential competitors to prevent future competition. Such acquisitions can be challenging to analyse because the company targeted for acquisition is at too an early stage of development to determine with certainty whether or not they could be potential competitors. It is important for competition authorities to consider the impact of such acquisitions on innovation, as well as new theories of harm that allow a better understanding of the dynamics of these transactions.
- **Market power through unilateral conduct:** in the digital environment, digital platforms with a dominant position could exercise market power through conduct such as price discrimination, predatory pricing, refusal to deal, tied sales and most-favoured-nation clauses, among others.
- **Consumer behavioural biases:** the market power of firms operating in digital markets may be increased by biased consumer behaviours, including their tendency to prefer the status quo (e.g., consumers do not change pre-set programmes on their computers or mobile devices), or because, in some cases, it may be expensive to migrate all information from one platform to another (high switching costs).

There is also the difficulty of choosing from many options of products or services or from a lot of information, or the tendency of consumers to select the first results that information search engines yield, rather than looking for more alternatives located further down on the same page or on other search engines. Knowing these behavioural biases, platforms will try to steer consumers towards the option that is most profitable for them.

- **Market power by exploiting consumer data:** firms can exercise market power in ways other than price increases. For example, they can exploit consumer data and information to prevent more competitors from entering the market, prevent other companies from also using consumer data and information, or influence consumer decisions.

Source: Federal Economic Competition Commission (COFECE), "Estrategia Digital COFECE", Mexico City, 2020 [online] https://www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_V10.pdf.

Traditional competition tools

In its report entitled *Estrategia Digital* (Digital Strategy), COFECE lists the challenges that digital markets pose for competition authorities, which are presented in Box 2. That list contains some challenges whose solution might require regulatory changes, while others require the acquisition of skills that competition authorities usually do not have, such as mass data processing or deep knowledge of algorithms.

The main difference between traditional and digital marketplaces is that in traditional marketplaces the relationship between consumers and sellers is a direct relationship, unlike digital marketplaces, in which it is an indirect one. There are platforms that function as intermediaries between two or more markets, bringing together market participants (buyers, sellers, advertisers, etc.), who otherwise would not easily interact or connect with each other (COFECE, 2020h). The main implication of this arrangement are that platforms are often subject to strong network economies. When combined with economies of scale in data collection, they produce markets that are prone to tilt towards a single player. These features encourage conduct on the platforms that may be anti-competitive. Knowing that competitors will not be strong enough until they attain sufficient scale, they may engage in a variety of behaviours designed to keep potential competitors relatively small. This includes trying to expand into markets that are seemingly unrelated to their core market, but which, based on the data they accumulate, could become so in the future.

Behavioural economics is becoming increasingly relevant in the analysis of digital markets, as it helps to improve our understanding of the real choices that consumers face when making decisions. This branch of economic knowledge suggests that digital companies can take advantage of the consumer when they exploit consumers' systematic biases (Stigler Center, 2019, p.58). For example, people may attach excessive importance to the information that is presented to them most prominently, even if might not be the most relevant. Consumers are often biased towards the status quo, even when it is not optimal. Perhaps the most important consumer biases are impatience and lack of self-control, because immediate rewards are given far greater weight than any decision that has a relatively distant horizon. Behavioural economics literature argues that these biases are highly relevant to antitrust analysis. Platforms that have huge amounts of data and analyse consumer behaviour can exploit these biases by presenting choices to make certain information stand out (framing). Those choices are profitable for the platform, yet induce addictive behaviours in consumers, generating sales through impulsive consumption and exploiting consumers' lack of time or willingness to conduct exhaustive searches. Another frequently used bias is the propensity to go with default options, which the consumer often accepts without considering the consequences.

Market concentration

Article 61 of the Federal Economic Competition Law defines market concentration as any merger, acquisition of control or act by virtue of which companies, associations, shares, equity interests, trusts or assets in general are consolidated among competitors, suppliers, clients or any other economic agents. It also states that it will not authorize or, as the case may be, will investigate and sanction those concentrations whose purpose or effect is to diminish, damage or impede competition and free participation with respect to the same, similar or substantially related goods or services.

Article 63 sets forth the elements that COFECE must consider in order to determine whether a concentration should be authorized or sanctioned, which consist of the following:

- (i) The relevant market, in the terms prescribed by the Law;
- (ii) Identification of the main economic agents that supply the market in question, analysis of their power in the relevant market, and the degree of concentration in said market;

- (iii) The effects of the concentration on the relevant market with respect to other competitors and consumers of the good or service, as well as on other related markets and economic agents;
- (iv) The market share of those involved in the concentration and the share of other economic agents with those involved in the concentration, provided that such economic agents participate directly or indirectly in the relevant market or in related markets;
- (v) The evidence provided by the economic agents to show the greater market efficiency that would be achieved as a result of the concentration and that would have favourable impact on competition and market access, and
- (vi) The other criteria and analytical instruments established in the Regulatory Provisions of the Federal Economic Competition Law and the technical criteria issued by COFECE.

In this regard, Article 86 of the Federal Economic Competition Law sets forth the assumptions and monetary thresholds established to engage the obligation to report market concentration to the competition authority before it occurs; those assumptions are:²

- i) When the act or succession of acts that give rise to them –regardless of where they take place– amount in the national territory, directly or indirectly, to more than the equivalent of 18 million times the general daily minimum wage in force for the Federal District (equivalent to \$ 1.613 billion pesos);
- (ii) When the act or succession of acts that give rise to them, entail the accumulation of 35% or more of the assets or shares of an economic agent, whose annual sales originating in the national territory or assets in the national territory amount to more than the equivalent of 18 million times the general minimum daily wage in force for the Federal District (equivalent to \$ 1.613 billion pesos), or
- (iii) When the act or succession of acts that give rise to them entail an accumulation in the national territory of assets or capital stock in excess of the equivalent of 8.4 million times the general daily minimum wage in force for the Federal District (equivalent to \$752.9 million pesos) and the concentration involves two or more economic agents whose annual sales originating in the national territory or assets in the national territory, jointly or separately, amount to more than 48 million times the general daily minimum wage in force for the Federal District (equivalent to \$ 4.302 billion pesos).

Finally, Article 92 of the Federal Economic Competition Law indicates which are the cases in which it is clear that a concentration will not have the purpose or effect of diminishing, damaging or impeding free participation and economic competition, rendering its reporting to the competition authority unnecessary.

As regards concentrations, there are several obstacles to adequately address the challenge of promoting competition in digital markets. The first is the threshold for reporting concentrations. Technology companies have been very active in acquiring growth companies (e.g. start-up companies). A recent report by the Subcommittee on Antitrust, Commercial and Administrative Law of the United States House of Representatives (Nadler and Cicilline, 2020), lists hundreds of acquisitions by technology giants Apple, Google, Amazon and Facebook over the past decade, the vast majority of which did not have to be notified because the value of the transaction did not meet the reporting thresholds. If a technology company considers that a small innovative company might pose a threat in

² Although thresholds are established in the Federal Economic Competition Law according to the general daily minimum wage in force for the Federal District, since 2016 those amounts have been calculated according to the value of the Unit of Measurement and Update (UMA). As of February of 2021, the value of the UMA is 89.62.

the future, it may be cheaper to acquire it now rather than fight it for the market later, particularly when the value of the transaction means that it does not require scrutiny by the competition authority.

Even if the notification is made, it is difficult to determine the effects of the market concentration when it is a small innovative firm whose product or service is still far from occupying a strong market position. It is difficult for competition authorities to determine when a small digital company could become potential competition for a large company.

Several academic studies and competition authorities worldwide have proposed the declaration of a special status for certain large digital platforms as a possible solution to these problems. On the assumption that any acquisitions by declared platforms would have a high likelihood of harming the market, all acquisitions by these platforms would have to be notified, regardless of the size of the transaction. On the other hand, in order to circumvent the problem of determining whether the company, through an acquisition, might represent potential competition, these reports propose that the burden of proof be reversed. Usually, in order to object to a market concentration, the onus is on the authority to demonstrate that the concentration would have anti-competitive effects or reduce competition. Reversing the burden of proof would mean that the acquirer would have to prove that, growing organically, it could not develop or perform on its own the goods, services or functions developed by the company to be acquired. In Mexican law, these proposals require legislative changes.

Another important problem, which not only arises in concentrations, but also for unilateral practices, revolves around the definition of the relevant market in two-sided or multi-sided markets. The relevant market is the most important methodological tool available to competition authorities. In jurisdictions such as Mexico, not only is it a very important tool, but it is also a legal requirement to define the relevant market in order to analyse whether a market concentration should be challenged or not, or to determine whether a company has substantial market power that might enable it to engage in anti-competitive practices. On digital platforms, the prevalence of multi-sided markets and the presence of zero prices in some of them, do not fit into the traditional practice of competition analysis, which has made technical analysis considerably more difficult, just as it has the reporting requirements to satisfy the standards of proof required by law. In response to this problem, the fundamentals for better analysing these markets have slowly begun to develop academically. Competition authorities have significant training and updating work to do in order to be able to apply the latest developments in relation to digital platforms.

Anti-competitive practices

The Federal Economic Competition Law has tools to investigate, sanction and correct anti-competitive practices that may harm competition and free market participation. According to Article 52 of the Federal Economic Competition Law, monopolies, monopolistic practices, unlawful concentrations and barriers that, under that Law, diminish, damage, impede or condition in any way free participation or economic competition in the production, processing, distribution or commercialization of goods or services are prohibited. In this regard, the following is a brief description of the anti-competitive conduct described by the Federal Economic Competition Law:

- **Absolute monopolistic practices:** Consisting of contracts, agreements, arrangements or combinations thereof between competing economic agents, the purpose or effect of which is to increase prices, restrict supply, divide the market among themselves, coordinate in bidding procedures and exchange information. Such anti-competitive practices are considered the most serious misconduct that an economic agent can commit, since they have an immediate significant harmful effect on the market.
- **Relative monopolistic practices:** Those consisting of any act, contract, agreement, procedure or combination thereof, the purpose or effect of which is to displace other

economic agents from the market, impede market access or give advantages or preferences to other economic agents in the market. It is considered that these anticompetitive practices are only punishable when an economic agent abuses its market power without an economic rationale that justifies it, for which the competition authority reviews the market power of that economic agent, the effects on the market and, if applicable, the anti-competitive or pro-competitive effects of the specific case.

There are also significant enforcement challenges in the area of anti-competitive practices. One of those challenges is mentioned in the previous section and has to do with the difficulty of defining the relevant market in digital platforms.

Another problem is that, particularly in unilateral practices or vertical restrictions, which in Mexico are framed in the law as relative practices, the wide variety of business models developed by digital platforms and the application of new technologies that are novel for competition authorities create substantial difficulties when it comes to configuring easily verifiable theories of harm, compared to those established for traditional markets, since the harm is often not reflected in price increases, as usually happens in traditional markets, or it may occur in markets seemingly unrelated to the market where the practice is committed. An example of this is the use of consumer data and information to gain market power and making it difficult for other competitors to access that data.

Barriers to competition and essential inputs

The traditional competition tools are the review of market concentrations and anti-competitive practices. Mexico also has a tool that few authorities possess and which can be very useful where digital platforms are concerned: the barriers-to-competition and essential inputs procedure.

Traditional competition tools are limited to sanctioning and correcting misconduct by economic agents such as cartelization, abuse of dominance and monopolization. The Federal Economic Competition Law is uniquely innovative in that it includes an investigative tool that does not require the verification of anti-competitive conduct; instead, the COFECE or the IFT can order measures to eliminate barriers that restrict competition, even if the economic agent does not engage in deliberate acts to monopolize the market or foreclose competitors. Barriers can be any structural market element or any regulation that gives rise to a lack of competition.

The barriers to competition can be useful in digital markets where technological or structural conditions make it difficult to maintain a competitive environment. If evidence of barriers to competition is found, the authority can order economic agents to eliminate the barrier, order divestiture or, if there is an essential input, impose conditions of access and prices. Under this procedure, the competition authority can, in fact, introduce individual regulations to encourage greater openness to competition in a market. This procedure, set out in Article 94 of the Federal Economic Competition Law, is very powerful and only exists, with some variations, in a handful of countries, such as the United Kingdom.³

Article 94 of the Federal Economic Competition Law

The constitutional amendment published on 11 June 2013 in the *Diario Oficial de la Federación* granted the competition authority a new investigative tool with which it can initiate investigations into the existence of barriers to competition and free participation or of essential inputs that may generate anti-competitive effects (COFECE, 2014, Art. 94).⁴

³ For more information regarding the procedure in the UK, see Lear (2019).

⁴ Decree amending and adding various provisions in Articles 6, 7, 27, 28, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States, regarding telecommunications (Secretariat of the Interior, 2013), published in *Diario Oficial de la Federación* on 11 June 2013.

If the investigation finds evidence of an absence of competition conditions, the investigating authority issues a preliminary opinion in which it proposes the corrective measures it considers necessary to eliminate the restrictions to the efficient functioning of the investigated market.

After the preliminary opinion is issued by the investigating authority, the Plenary of COFECE, having heard the economic agents that demonstrate a legal interest, issues a resolution that may include: (i) recommendations to the public authorities; (ii) an order to the relevant economic agent to remove a barrier that unduly affects the process of free participation and competition; (iii) a determination as to the existence of essential inputs and guidelines to regulate, as appropriate, modalities of access, prices or rates, technical conditions and quality, as well as an application timetable; or (iv) the divestiture of assets, rights, equity interests or shares of the economic agent involved, in proportions necessary to eliminate the anti-competitive effects. Divestiture is an extreme measure appropriate only when other corrective measures are not sufficient to address the identified competition problem.

As regards Article 94 and the need to change the competition law to have better tools for digital markets, COFECE has stated the following:

"As a result of the 2013 constitutional amendment, COFECE has "incremental powers", established in Article 94 of the Federal Economic Competition Law, that empower us to analyse structural and regulatory characteristics of markets and allow us to impose remedies to strengthen competition in them. More specifically, these investigations allow us to determine the existence of barriers to competition, introduce structural and behavioural remedies, as necessary, and determine the existence of essential inputs and regulate their access. It is a "hybrid" competition and regulatory tool, the advantage of which is that it allows us to conduct in-depth and detailed analyses of markets using our research tools, and also to impose remedies when we identify competition problems arising from the market structure and other factors not directly related to traditional anti-competitive behaviour.

With this tool we could conduct deeper analyses of market structures, highlighting elements that limit competition but usually go unnoticed in traditional investigations of anti-competitive practices, such as behavioural biases, practices that affect competition but are not included in our catalogue of relative monopolistic practices, the use of personal information and the behaviour of other competitors, all of which are important in the context of digital markets. This tool would allow such problems to be solved. In that sense, the use of this tool could, for example, present a great opportunity to use market research to regulate access to essential inputs, a theory of harm that is increasingly relevant to digital markets, particularly when thinking about the importance of big data today.

Our experience with this tool leads us to believe that there is an opportunity to map out innovative solutions to solve complex competition problems that have been created by the growth of the digital economy, such as highly concentrated markets that present "tipping points" as a result of network effects, economies of scale and scope, accumulation of big data, self-referencing, zero pricing and price discovery algorithms, to name a few. The foregoing, without the need for legislative reform."⁵

The competition barriers procedure can be very useful even without the need for changes in legislation when it is determined that there are barriers to competition that generate anti-competitive

⁵ Response to a questionnaire prepared by the author for this study.

effects. This procedure can lead to the regulation of specific inputs or the divestiture of assets, which makes it a very flexible procedure for correcting all kinds of market failures.⁶

Other relevant legal provisions for SMEs to deal with the pandemic

The Federal Economic Competition Law contains provisions that are not common in other jurisdictions and are particularly useful for SMEs during the pandemic. These are the procedure for imposing maximum prices in unregulated sectors and the exception from the application of competition law for export cooperatives.

Procedure for imposing maximum prices

Under Article 28 of the Constitution and Article 9 of the Federal Economic Competition Law, the federal executive branch has exclusive authority to determine, by decree, those goods and services that may be subject to maximum prices, provided that there are no conditions of effective competition in the market in question. COFECE will issue a declaration stating if there are no conditions for effective competition.

This is important because at the beginning of the 1990s some basic food basket products, such as tortillas, were subject to price ceilings, even though there were no structural competition problems affecting supply. Article 9 of the Federal Economic Competition Law establishes a procedure to ensure that price controls are introduced in response to market considerations, not political ones. The imposition of maximum prices can cause major distortions in markets and this provision in the law ensures that, if the case arises, the analysis carried out to impose maximum prices is a technical one that takes into account the structural conditions of markets, not political considerations of the moment.

Export cooperatives

Pursuant to Article 28 of the Constitution and Article 8 of the Federal Economic Competition Law, COFECE shall not consider as monopolies associations or cooperative societies of producers that, in defence of their interests or of the general interest, sell domestic or industrial products directly in foreign markets, provided that: (i) those domestic or industrial products are the main source of wealth of the region where they are produced or are not basic commodities; (ii) their sale or distribution do not take place within the national territory; (iii) those associations or cooperative societies are under the supervision or protection of the federal or state government, and their incorporation in each case is previously authorized; (iv) membership in those associations or cooperative societies is voluntary and members are allowed free entry and exit, and (v) they do not grant or distribute permits or authorizations the issuance of which corresponds to agencies or entities of the Federal Public Administration.

The Federal Economic Competition Law severely sanctions price-fixing or market-sharing arrangements between producers but makes an exception in the case of export cooperatives, which in certain circumstances are exempt from the law's provisions. This mechanism can be used by SMEs to achieve better access to the market by joining forces, provided that it does not entail a deterioration in conditions for consumers.

⁶ This procedure has been used, for example, to investigate barriers to competition arising from conditions of access to landing and take-off slots at Mexico City airport (case IEBC-001-2015), as well as barriers to competition in the market for the production, distribution and marketing of malting barley seed and grain used in beer production (case IEBC-001-2016).

III. Measures and policies to support SMEs during the pandemic and in the recovery

The following is a description of the measures, policies and programmes implemented by various institutions aimed at helping SMEs cope with the economic crisis resulting from the coronavirus pandemic. The actions described are part of the overall topic of market access for SMEs in an environment of increasing economic digitization in which, on the one hand, companies may face competition problems to access online distribution channels and, on the other hand, companies may face obstacles when seeking to establish a digital presence, such as access to connectivity infrastructure, financing and others.

A. COFECE

1. Actions in digital markets

The first relevant cases addressed by COFECE in digital markets occurred around 2015 with advocacy documents on sharing economy platforms and those of financial technology companies.

Sharing economy platforms had been an important catalyst in driving the individual passenger transport and accommodation markets by putting competitive pressure on traditional players, who tried to introduce regulatory changes, at times successfully, to stop the platforms from growing.

On 4 June 2015, COFECE issued an opinion on the impact on free participation and economic competition of passenger transport services through mobile platforms. In that opinion, COFECE noted that the development of mobile applications for passenger transportation solved problems of information asymmetries and coordination problems between drivers and passengers, in addition to contributing to urban mobility, promoting innovation and offering efficient consumption options that can generate social well-being. The opinion was addressed to local governments, which are the

local transport regulators, and recommended that they recognize transport network companies as a new transportation model. In the event that local governments issued regulations in this regard, COFECE recommended that they be limited to safeguarding public policy objectives in the area of user safety and protection, so as not to affect supply through rationing or any market division system (COFECE, 2015).

On 19 October 2017, COFECE issued an opinion on the proposed Law to Regulate Financial Technology Institutions (Fintech Law). COFECE considered that this proposed law could promote competition and free competition in financial services, because it would provide legal certainty to innovative companies in the sector. However, to ensure that the potential of the innovations was realized, some changes to the legislation were suggested. Specifically, COFECE recommended that the new law should expressly stipulate that users are the owners of their information, that users can order a financial institution to share that information with other financial institutions and that the regulator should put a cap on the price of transmitting that information; ensuring the provision of financial services by credit institutions to fintechs, under non-discriminatory conditions; and eliminating any type of technological or infrastructure restriction that could limit the entry of new participants to this market (COFECE, 2017b). This opinion was recognized by the World Bank as winner of the 2018-2019 (COFECE, 2019a).

Report *Repensar la competencia en la economía digital* (Rethinking competition in the digital economy)

In 2018 COFECE conducted a review of the main economic characteristics of digital markets and their implications for economic competition. It published its findings in a report entitled *Repensar la competencia en la economía digital* (COFECE, 2018f).

The report analysed the prevailing situation in digital markets in 2018, some of which had shown encouraging results. The disruptive innovation of some digital platforms, especially the sharing economy in transportation and accommodation, had had very visible positive effects on sectors dominated by traditional economic actors. These platforms had invigorated competition by forcing traditional players to respond with better products and services, which benefited consumers.

However, it also found that the network economies and economies of scale that are often an important feature of digital markets could lead to large market concentration and potentially harm consumers. In particular, the report shared the concerns raised by other competition authorities regarding the concentration achieved by big technology companies –Google, Facebook, Apple, Amazon and Microsoft– and their potential to engage in anti-competitive practices.

The report analysed the different positions of academics and international competition authorities regarding the role that competition authorities should have in promoting digital markets and it outlined two basic positions: one was to let digital markets be disciplined by competition, thus avoiding the authority's actions potentially causing unnecessary distortions in markets, bearing in mind the need to take special care not to inhibit innovation; the second was to assume that the tendency towards lack of competition in digital markets was very strong, particularly in markets with platforms, which would require greater intervention and ex ante regulation by authorities. COFECE found that the positions were not conclusive enough to allow it to take a definitive position.

Box 3**Characteristics of digital markets that hamper the introduction of competition**

- *Winner takes all*: This can be the case that an agent has a business model, product and/or service that is so innovative that it displaces competitors and acquires a large market share, eventually becoming the only participant.
- *Multi-sided market*: A diverse number of consumers and suppliers can interact on digital platforms, depending on what the platform is used for. For example, social networks can be used by users to interact with acquaintances, or by establishments to advertise their products.
- *Network effects*: This is where the value of a product increases based on the number of its users. This effect can be direct in the cases of a single service and the number of users who use that particular service increases, and indirect when users of different categories interact on a given platform and the usefulness of the network for users on one side of the market gains as the number of users on the other side increases.
- *Switching costs*: The cost to the user of switching platforms or networks, given that they have already invested time in learning how to use a platform, or the possible loss of information in the migration to another platform, among other factors.
- *Multi-homing*: The possibility of a user using several platforms at the same time in order to satisfy their needs.
- *Big data*: This refers to the amount of information collected and used by digital platforms, consumers and/or competitors, which is used to make predictions and optimize processes.

Source: Federal Economic Competition Commission (COFECE), *Repensar la competencia en la economía digital*, Mexico City, 2018 [online] <https://www.cofece.mx/estudios-de-promocion-de-la-competencia-repensar-la-competencia-en-la-economia-digital/>.

Report “Estrategia digital COFECE” (COFECE digital strategy)

In March 2020, COFECE published a report entitled “Estrategia Digital COFECE” (COFECE, 2020h), which is a roadmap of the actions COFECE intends to take to promote competition in digital markets. In that regard, COFECE stated that the strategy consists of (1) preparing a document with specific public policy proposals for digital markets to benefit more Mexican consumers; (2) forums with international experts so that the experience of other countries can help COFECE to enforce competition law more effectively; (3) strengthen staff capacities and strengthen COFECE’s technological infrastructure to exploit big data and understand the scope of artificial intelligence; (4) establish a Digital Economy Competition Unit to advance understanding of digital markets and more effectively exercise the powers under competition law; and (5) strengthen international cooperation, with the aim of sharing experience and identifying possible joint actions that contribute to the functioning of digital markets.

Some of the actions proposed in the digital strategy are already underway. Specifically, the General Directorate of Digital Markets has already been created (COFECE, 2020a), forums with renowned international experts such as Jason Furman, Fiona Scott, Jacques Cremer, Lina Khan, among others, have been held throughout the year, and a report with specific public policy proposals for digital markets is currently in preparation.

2. Enforcing competition law in digital markets

COFECE has taken increasingly frequent action in digital markets, both in a preventive capacity through concentration control, and in terms of investigations. In terms of concentrations, it made decisions on concentrations involving Walmart-Cornershop, PayClip-General Atlantic, Banorte; Kavak Holdings-LA Holdings, General Atlantic, Greenoaks Capital; and it recently ruled on the Uber-Cornershop concentration. In terms of investigations, it has been active in the area of e-commerce and it recently started an investigation into digital advertising.

Concentrations

Walmart-Cornershop

In 2018, Walmart and Cornershop notified COFECE of Walmart's proposed acquisition of the entire capital stock of Cornershop. Walmart is a self-service store with a presence throughout Mexico while Cornershop is a home delivery platform, mainly of products from self-service stores. The operation was blocked by COFECE in 2019 because after analysing the effects that the operation would have on the market for the logistic service purchase and immediate delivery of products offered by self-service stores and price clubs via websites and mobile applications to end users, it concluded that the operation could have several effects that could harm competition and free participation, including the following: (i) unduly foreclosing competitors of the Cornershop platform, since Walmart's product offering is essential for other platforms to compete in the market; (ii) displacing other self-service stores that compete with Walmart through improper use of information collected by the platform from its individual users (location, prices and quantities; items purchased, times of purchase, periodicity of purchases, etc.; (iii) preventing access to the platform by Walmart's competitors and offering preferential treatment to self-service stores and price clubs that belong to the group; and (iv) causing Walmart's competitors to abandon the platform as a result of the loss of trust and uncertainty about Cornershop's use of information generated by the product purchases via the app in its self-service stores (COFECE, 2019c and 2019b).

COFECE argued that, had it been approved, the concentration could have adversely affected competition, since Walmart would have strengthened its market power in both the physical and the digital market, and could potentially use that market power to impose prices or conditions on its suppliers or displace small businesses that participate in Cornershop by imposing abusive conditions to force them to leave the application and its distribution network.

Uber-Cornershop

In October 2019, COFECE received a concentration notice from Uber and Cornershop. The operation consists of the increase of Uber's participation in Cornershop in order to provide intermediation services for different groups of users.

IFT, in exercise of the powers contained in Article 5 of the Federal Economic Competition Law, asked COFECE to refer the case to it, as it considered that it was competent to review that case (COFECE, 2019e). COFECE, too, felt that the case was under its jurisdiction, so the case was sent to the Collegiate Administrative Court Specializing in Economic Competition and Broadcasting to determine jurisdiction in the matter. On 21 May 2020, the Court ruled that COFECE was the competent authority to decide on the concentration of Uber and Cornershop, since: (i) the notifying parties were not telecommunications concessionaires, but merely use them to provide their services via a digital platform; (ii) the services provided were not telecommunications, but logistics and intermediation between users, drivers and deliverers; and (iii) the notifying parties use the internet as an input, which does not constitute the service provided by the platforms nor represent the source of their revenues (COFECE, 2020g).

The ruling on Uber-Cornershop concentration was delivered in December 2020. The importance of this case has to do with the fact that it is the first concentration case involving two digital platforms where both COFECE and the Federal Telecommunications Institute claimed jurisdiction. The arguments used by the specialized tribunal may be useful in future cases where there is a lack of clarity over jurisdiction between the two bodies.

Other concentrations in digital markets

PayClip - General Atlantic, Banorte

In early 2020, COFECE authorized the acquisition by several investment funds and a financial institution of PayClip, a financial technology company that provides non-bank mobile payment solutions, specifically for SMEs. COFECE concluded that this operation would be unlikely to affect free participation and economic competition in the market for card payments and provision of point-of-sale terminals to merchants (COFECE, 2020h).

COFECE considered that this transaction would allow PayClip to grow and expand its payment services and point-of-sale terminals, which would have positive effects for SMEs, since this operation implies that SMEs could access payment methods, with lower costs and better quality.

Kavak Holdings-LA Holdings, General Atlantic, Greenoaks Capital

In March 2020, COFECE authorized the acquisition of part of Kavak Holdings—a start-up that buys and sells used cars directly or through its digital application—by investment funds in the technology and internet sectors (COFECE, 2020h).

This operation is an example of how an activity carried out in the traditional market, such as buying and selling cars at commercial premises, can migrate to digital markets. Consumers may find it more efficient for their car to be appraised and sold via an app or website, simply by providing basic data, and then sell their car in the physical marketplace or online.

Anti-competitive practices

Tie-in sales in e-commerce

In September 2017, the investigating authority opened an inquiry of tie-in sales in the market for e-commerce platform services and other related services. Specifically, the COFECE investigating authority probed whether the provision of Mercado Libre's services was conditioned to the use of the online payment solutions offered by Mercado Pago, its subsidiary. The Plenary of COFECE decided to close the case, finding that there was insufficient evidence to suggest the existence of a monopolistic practice (COFECE, 2020l).

Digital advertising

In August of this year, COFECE initiated an investigation into possible relative monopolistic practices in the market for digital advertising services and related services. According to COFECE, digital advertising have provided advertisers with new means to promote their products, and users to have more options as regards enjoying content or comparing and buying different goods and services (COFECE, 2020b). In this regard, Mexico ranks second in Latin America in terms of investment and growth in digital advertising, with an annual rate of 20%. The investigation, which is at its initial stage, aims to determine whether the economic agents under investigation are engaging in relative monopolistic practices in that market (displacement, monopolistic control, abuse of power, etc.). If sufficient evidence is found, the investigated entities could face a penalty and be ordered to take steps or cease certain activities in order to correct the problems identified.

Barriers to competition

Card payment networks

On 26 October 2018, COFECE launched an investigation into the market for the system of payments whose processing involves a clearing house for card payments, in order to look into the

existence of barriers to competition and free participation and/or of essential inputs that could have anti-competitive effects (COFECE, 2018e). According to COFECE, the investigation is concerned with the various fees, quotas and protocols imposed by clearing houses to process card payments for the purchase of goods or services, a market that, according to data from the Bank of Mexico, was worth \$1.7 billion pesos in 2017 (COFECE, 2018b). If it finds elements to determine the existence of barriers to competition, COFECE may order a set of behavioural or structural remedies to eliminate them.

3. Measures for dealing with the pandemic

Since the start of the pandemic-related restrictions on economic activities, COFECE has published two documents to help businesses grapple with the crisis brought on by the pandemic: the decision not to prosecute collaborations between competitors when certain conditions are met and an advocacy document putting forward 12 measures that different public agencies could adopt to benefit SMEs and consumers.

Decision not to prosecute collusion

On 27 March 2020, COFECE made public its position on enforcing the Federal Economic Competition Law during the health emergency caused by COVID-19. COFECE said it was aware of the difficulties that the emergency could create for businesses, consumers and the functioning of markets in general. In order to avoid disruptions to supply chains or artificially restricting supply and making goods and services more expensive, COFECE stated that: (i) any collaboration agreement between economic agents that, in the context of a public health emergency, was necessary to maintain or increase supply, satisfy demand, protect supply chains, or avoid shortages or hoarding of merchandise, and that was not intended to displace competing agents that also supply the market, would not be subject to prosecution; (ii) COFECE advised economic agents that any price increase must be due to individual and independent decisions by companies and not induced, encouraged or recommended by associations, confederations or chambers to their members; (iii) COFECE stated that in the current circumstances, any agreement between competitors to manipulate prices, restrict the supply of goods and/or services, segment markets, and coordinate bids or refrain from bidding, was particularly serious; accordingly, it would exercise its powers to prosecute and punish any such conduct in accordance with the applicable rules; (iv) markets where indiscriminate price increases were observed would be reviewed in order to assess and, as appropriate, rule out the possibility that they were caused by arrangements between competitors, which would require an investigation to be opened; and (v) COFECE pledged to expedite reviews of concentration notices that arose as a result of the need for synergies and additional production capabilities to ensure that demand for popular consumer products as well as all necessary items to address the crisis is satisfied in a timely and sufficient manner (COFECE, 2020k).

In relation to point (ii) of the decision, in the initial weeks of the health emergency, the COFECE investigating authority issued two warnings: one to the National Chamber of the Sugar and Alcohol Industries (CNIAA) and the other to the Association of Real Estate Developers (ADI). In the former case, CNIAA was warned that any increase in the price of pure alcohol, a necessary input for the production of sanitizing gel, could be due to arrangements between competitors to manipulate the prices of those products. In the latter case, COFECE was aware that ADI had encouraged its members to give discounts to renters, a market severely affected by the mandatory closing of stores and restaurants, which could be contrary to the Federal Economic Competition Law if such discounts were set on the basis of an agreement among tenants that had the purpose or effect of establishing a quota or a maximum ceiling to be granted.⁷

⁷ COFECE's response to the questionnaire prepared for this study.

Additionally, since January 2020 it has been mandatory for concentration notices to be submitted electronically to COFECE, enabling it to conduct such procedures remotely. Likewise, proceedings in investigations were able to be conducted remotely from June onwards.

Twelve economic stimulus measures

On 13 October 2020, COFECE proposed 12 measures on economic competition to support reactivation of the economy in Mexico in the wake of the COVID-19 pandemic. According to COFECE, the measures are designed to encompass the largest possible number of companies, to contribute to a sustainable recovery of the economy and to generate benefits for consumers. Those measures are as follows (COFECE, 2020d):

- i) Expand access to credit for more Mexicans and small businesses by facilitating their credit assessment, using the flow of information in the hands of the government.
- (ii) Provide more options for families to purchase medicines at better prices by speeding up the entry of generic medicines into the market.
- (iii) Make electricity costs as competitive as possible by ensuring compliance with the existing legal framework for the economic dispatch of electricity and non-discriminatory access to transmission and distribution networks.

On 15 May 2020 the Secretariat of Energy issued its the “Acuerdo por el que se emite la Política de Confiabilidad, Seguridad, Continuidad y Calidad en el Sistema Eléctrico Nacional” (Decision adopting the Policy of Reliability, Security, Continuity and Quality in the National Electric System) (Secretariat of Energy, 2020), which aims to ensure that what is known as “base” electricity is generated primarily by the Federal Electricity Commission, with intermittent renewable generation left mainly to private companies. COFECE filed a challenge on constitutional grounds against that decision with the Supreme Court of Justice, arguing that it ran contrary to Articles 16, 28 and 133 of the Constitution, as well as the applicable electricity laws. COFECE also argued that the decision prevented the promotion and protection of competition and free participation in the electricity market, since the basic elements for it to function under competitive conditions no longer existed (COFECE, 2020c).

Towards the end of July, the Supreme Court of Justice ordered the suspension of the policy challenged by COFECE, in order to avoid possible harm from its application while it conducted a thorough review of the policy.

- (iv) Promote the lowest possible gasoline prices, through the expeditious and not unduly discriminatory granting of permits for the import and sale of gasoline and diesel, encouraging competition throughout the value chain.

COFECE's recommendation is based on the following: (i) there is no intense competition in the wholesale market since PEMEX continues to be the main supply source, providing 87% of the gasoline consumed in Mexico; (ii) since November 2018 the Secretariat of Energy has only granted one-year gasoline import permits and no new 20-year import permits; (iii) resolution times for applications for retail permits have doubled, and there are currently more than 200 unresolved cases; (iv) authorizations for the transfer of permits are not disposed of promptly, making it difficult for more brands to enter the Mexican market; and (v) there are regulatory obstacles for the installation and operation of service stations in state and municipal regulations, which limits competition among them to reduce their margins (COFECE, 2020j).

A study conducted by the Bank of Mexico showed that if there were more participants in the market, the decrease in gasoline prices as a result of the fall in international oil prices could have been greater, to the benefit of end consumers.

- (v) Ensure that, for the benefit of taxpayers, government procurement of goods and services takes place in a timely manner and in the best possible conditions in terms of price and

quality, by amending the Procurement Law to maximize participation and free competition in public procurement procedures.

In that regard, COFECE published the *Agenda de competencia para un ejercicio íntegro en las contrataciones públicas* (Competition agenda for probity in public procurement), which states that public procurement should lay the foundations to achieve the best conditions for the State in the purchase of goods and services, as well as in public works contracting. In keeping with that, it recommends making market research transparent and public (before the start of any contracting procedure), limiting opportunities for contracting procedures other than by public bidding, eliminating exceptions provided in the laws on the subject for contracting between agencies and entities, allowing the participation of other interested bidders in restricted procedures, limiting the simultaneous participation of companies from the same economic group to avoid competition simulation, and introducing a General Law on Public Procurement (procurement and public works) that adheres to international standards (COFECE, 2019a).

- (vi) Encourage lower ticket prices for foreign passenger ground transportation by making an amendment to the regulation in order to promote competition among the offering companies and to allow the participation of new players.
- (vii) Bring about the entry of more companies at the state level in the gasoline, LP gas and freight transportation markets through the prompt issuance of guidelines by the National Commission for Regulatory Improvement.
- (viii) Keep open purchasing options for Mexicans through trade by avoiding the imposition of restrictive measures on foreign trade without a prior analysis of potential harm to consumers.
- (ix) Recover public goods whose concessions are about to expire and grant new ones through tenders, so that the winners are those that really offer the best conditions for users.
- (x) Increase the efficiency of the entry of goods by sea by amending the Port Law to incorporate competition principles.
- (xi) Ensure that products reach consumption centres at lower cost through the development of an integrated railway network, for which it is proposed to reform the Railway Service Law.
- (xii) Ensure that regulations do not hinder competition by amending Article 105 of the Constitution which empowers COFECE to mount legal challenges against the constitutionality of general norms that violate competition principles.

B. IFT

IFT plays a dual role as sectoral regulator and competition authority in telecommunications and broadcasting. This section reviews the measures IFT is implementing to support SMEs during the pandemic and the recovery, both in its role as regulator and as competition authority.

In October 2020, the Federal Telecommunications Institute held several roundtables to analyse the impact of telecommunications and broadcasting on the economy and their role in the economic recovery of the country in the wake of the COVID-19 pandemic (Federal Telecommunications Institute, 2020b). The outcome of those discussions underscored that reactivating the economy through the use of telecommunications and broadcasting required intensifying competition, SME digitization, a State policy on development of the sector, narrowing the digital divide in rural areas, the gender gap and the take-up gap, and promoting digital transformation in the areas of Mexico that lagged furthest behind (Federal Telecommunications Institute, 2020g). This outline is a good summary of what the IFT is trying to accomplish to help users during the pandemic.

1. Report *Estrategia IFT 2020-2024: hoja de ruta preliminar* (IFT Strategy 2020–2024: a preliminary roadmap)

In July 2020 the Federal Telecommunications Institute submitted the document *Estrategia IFT 2020-2024: a preliminary roadmap* (Federal Telecommunications Institute, 2020h) for consultation, which sets out the regulatory lines of action that it proposes for the coming years. This exercise is based on two premises. The first is that since telecommunications networks and infrastructure are the essential foundation on which the digital ecosystem is built, the Institute will continue to pursue efforts to promote the deployment of such networks and infrastructure (especially new generation ones) in order to ensure the appropriate basis for the development of the digital ecosystem and for closing access disparities in the country. The second premise is that protecting economic competition and free participation promotes an environment of innovation in the digital ecosystem, developing new technologies and maximizing the benefits for society as a whole.

The Federal Telecommunications Institute considers that, in terms of competition and free participation, the scope of analysis of the institution should be the digital ecosystem and not only the telecommunications networks and their concessionaires, since there are vertical relationships in several markets, as well as cross-competition between regulated and unregulated sectors that must be analysed jointly (for example, content delivery across regulated and over-the-top networks). In this regard, in addition to continuing the efforts made to date to ensure development in the telecommunications sectors, the Federal Telecommunications Institute seeks to collaborate proactively with other authorities to take advantage of the Institute's extensive experience and expertise in technological and digital issues in order to monitor, analyse and protect competition and free participation in the telecommunications sectors within the digital ecosystem as a whole.

Potential measures in relation to competition include a comprehensive assessment of the implications, costs and benefits of adapting the application of economic competition policy to a context of relevant markets in the digital ecosystem; weighing the need to make changes in the current regulatory framework in order to accommodate this regulatory approach; and proactively proposing guidelines for the efficient allocation of cases between the Federal Telecommunications Institute and COFECE when doubts about jurisdiction arise.

2. Infrastructure

Adequate access to connectivity infrastructure facilitates the entry of SMEs into digital markets, so several of the measures adopted by the Federal Telecommunications Institute are oriented in that direction. Regarding the deployment of infrastructure to enable universal access to services and reduce the digital divide, the Federal Telecommunications Institute focuses primarily on promoting infrastructure sharing and reducing barriers to the deployment of new infrastructure.

Shared network

The wholesale shared network is a public telecommunications network intended exclusively to market wholesale telecommunications capacity, infrastructure or services to other concessionaires or marketers, in accordance with Article 140 of the Federal Telecommunications and Broadcasting Law (2014).

The wholesale shared network is a project led by the Secretariat of Communications and Transportation through a decentralized agency called PROMTEL and its implementation envisaged from the outset that a private company would be involved in the design, financing, deployment, operation and marketing of its services (Secretariat of Communications and Transportation, 2015). The objective of the shared network is to increase telecommunication services coverage, enable the provision of broadband services in areas that are currently unserved or that have only one choice of

service, promote competitive prices, raise the quality of services to international standards and encourage innovation in digital services. The shared network facilitates the provision of services by telecommunications concessionaires in low-density areas because sharing the infrastructure avoids duplication of investment and allows services to be offered at lower costs.

The shared network is already operating through the company Altán Redes. As of January 2020, the company had reached 50% coverage. It is obliged to meet coverage targets of 85% by January 2022 and 92.2% by January 2024. The expansion of coverage to practically all population centres in the country will allow SMEs to integrate with production chains that go beyond their local level, as well as improve their production processes through digitization.

Spectrum for 5G networks

On 21 October 2020, the Federal Telecommunications Institute published in *Diario Oficial de la Federación* the *Programa Anual de Uso y Aprovechamiento de Frecuencias Radioeléctricas 2021* (Annual Programme for the Use and Development of Radio Frequencies 2021) (Federal Telecommunications Institute, 2020i), which includes the spectrum available for the deployment of 5G networks on the 3.4Ghz band. This spectrum will be made available to the market and telecommunications operators so that it can be used in the country for fixed wireless internet access for commercial use. It is planned that the bidding process for the spectrum will begin in 2021.

Fifth-generation technologies enable much higher speeds, latencies of less than 1 millisecond and the ability to connect up to one million devices per square kilometre. In addition, 5G networks facilitate deployment of other technologies such as the Internet of things, artificial intelligence or big data, which together have a sweeping impact on things like automation of industrial processes, intelligent and autonomous transport, tele-education, tele-medicine, virtual reality and augmented reality entertainment, e-government and e-commerce, among many other applications.

In the context of the debate on the Federal Duties Act, the legal instrument establishing the fees for use of the spectrum, the Federal Telecommunications Institute was concerned about the amount established by the Chamber of Deputies for the deployment of 5G Internet and mobile telephone services IFT called on the Senate, in its capacity as the review chamber, to consider reducing the amounts of those fees. The Institute argued that the amounts of the fees that the proposed reform of the Federal Duties Act for the 600, 1,500 and 3,000 megahertz (MHz) spectrum bands, earmarked for the provision of 5G services, were 186% higher than those suggested by the Institute, which could jeopardize the bidding processes planned for this portion of the radio spectrum and delay the roll-out of these technologies in Mexico, to the detriment of the entire population and the country's competitiveness (Federal Telecommunications Institute, 2020c).

The Chamber of Senators did not alter the fees established by the Chamber of Deputies for this portion of the spectrum, which will increase the costs of broadband provision for operators and, potentially, the cost of access for users.

Investigations of competitive barriers to infrastructure deployment

In 2018 the IFT investigating authority opened two investigations into barriers to competition that relate directly to barriers to infrastructure deployment. One of the investigations looked into the fixed telecommunications services market in the State of Mexico; the other was also concerned with fixed telecommunications, but in the State of Guanajuato.

The regulatory barriers to entry detected by the investigating authority were related to the deployment of passive fixed telecommunications infrastructure; therefore, the authority recommended that the state governments concerned adopt a series of measures to ensure that their regulations did

not hinder infrastructure development. The investigations have not yet concluded, and the processes remain ongoing before IFT.⁸

3. Digital services

Investigation of barriers to competition in digital markets

On 22 October 2020, the Federal Telecommunications Institute published in the *Diario Oficial de la Federación* an excerpt of the decision by which the IFT investigating authority launched the investigation into the markets of online search services, social networks, mobile operating systems, cloud computing services and related services, in order to determine the possible existence of barriers to competition and free participation or essential inputs that might generate anti-competitive effects (Federal Telecommunications Institute, 2020j).

According to the excerpt, the new dynamics of the digital ecosystem pose challenges for competition. The data collection and analysis, as well as the conduct of economic agents that offer their goods and services using digital platforms, can impact competition and free competition, innovation, the economy and consumer welfare. The Institute's investigating authority said that it found evidence to suggest the existence of potential barriers to competition or essential inputs in the above-mentioned markets.

The investigation launched by the Institute will have potentially significant effects on SME access to online sales and digital advertising markets, which are some of the markets found in online search and social networking services, as well as on their production processes amid the growing dependence on cloud computing of administrative and production processes.

Digital markets have been a source of contention between COFECE and IFT regarding their competence to process and decide these cases. COFECE recently initiated an investigation into relative monopolistic practices in the digital advertising market, a market that potentially overlaps with this IFT investigation. So far, COFECE has not claimed jurisdiction in these markets but if it does, it is uncertain what the specialized court would decide.

4. Measures for dealing with the pandemic

The measures implemented by IFT to support telecommunications users in the most demanding months of the pandemic include the following:

- Through coordination between IFT, the telecommunications industry and the federal government, users receive free text messages with announcements, recommendations and other updated information about COVID-19.
- Users of mobile virtual network operators that rely on the wholesale shared network, operated by Altán, have access to the "Quédate en Casa" plan, which includes unlimited calls and short messages (text messages), as well as 10 GB for Internet browsing at a cost of \$ 100 pesos per month;
- IFT Institute issued emergency guidelines to carry out the general guidance procedure via electronic media; and

⁸ The Federal Telecommunications Institute does not make public preliminary opinions from its investigations; however, the Plenary adopts a decision instructing the Institute's Economic Competition Unit to notify the parties mentioned in the preliminary opinion before moving forward with the procedure. The decision can be consulted at <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/vppift25119741acc.pdf#P/IFT/25119741>.

- Mobile prepaid users could request through May a free emergency plan, consisting of 100 voice minutes and 150 text messages.

Educational content streaming facilities

To help students receive educational content on open-signal television during the school closures due to the pandemic, in April 2020 the IFT granted facilities to broadcast educational content across multiprogramming channels on open-signal television, so that concessionaires that so wished could broadcast free of charge educational content provided by the Secretariat of Public Education, i.e., they could request multiprogramming access to transmit school lessons. In this regard, the Federal Telecommunications Institute said that this temporary multiprogramming transmission would end when the competent health and education authorities determined that face-to-face school activities should resume throughout the country (Federal Telecommunications Institute, 2020a).

C. Secretariat of Economy

1. Lending

On 4 April 2020, the Secretariat of Economy published in the *Diario Oficial de la Federación* the "Lineamientos para la Operación del Programa de Apoyo Financiero a Microempresas Familiares" (Operating Guidelines for the Family Microenterprise Financial Support Programme) as a result of the COVID-19 pandemic. The purpose of the programme is to mitigate the effects of the economic slowdown in Mexico (SE, 2020d). The aim of this initiative was to help SMEs through the economic crisis resulting from the public health emergency caused by COVID-19, both to protect their economic activity and to maintain the jobs they generate. The programme offered two types of loans: one type, for family microenterprises (non-agricultural SMEs with at least 6 months of operation), was available in certain municipalities and states; the other, the so-called (Solidarity Loan), was for SMEs with a current registration in the Mexican Social Security Institute and was available nationwide.

The programme included access to financial assistance of \$ 25,000 pesos that was delivered individually to the persons or legal representatives of the legal entities that met the eligibility criteria and the established requirements. The goal for this programme was to deliver one million loans for a total amount of \$ 25 billion pesos (about US\$ 1.1 billion). By the end of September 2020, the number of loans provided reached 1.2 million, exceeding the target.

2. Training to confront the crisis

SMEs usually require specialized training to move into online sales or digitally transform their internal processes. The Secretariat of Economy built a digital platform for that purpose (Secretariat of Economy, 2020a). On that platform, users can find training courses focused on financially weathering the crisis caused by the pandemic, training courses on selling online, covering topics such as access to e-commerce, digital payments and digital advertising (Secretariat of Economy, 2020e) and courses on safe product delivery.

There is also has a list of accredited trainers on the portal, where SMEs can hire specialized business development services and have the opportunity to grow their businesses, through financing (Secretariat of Economy, 2020c) and information on how to certify their activities by meeting standardization standards or obtaining certification through different agencies, such as the Mexican Accreditation Entity (Secretariat of Economy, 2020b).

D. Coordinating measures and policies in the digital economy

The digital economy includes a number of disciplines that usually fall under the jurisdiction of different regulators and promotional bodies. Therefore, coordinating policy measures aimed at digital transformation is important for the success of such policies.

The Organization for Economic Cooperation and Development (OECD) noted in the report *OECD Telecommunication and Broadcasting Review of Mexico 2017* (OECD, 2017) that the roles and responsibilities as regards policies for the digital economy and programme implementation were spread across several agencies and that the division of powers that correspond to different entities, in particular with respect to the overall digital strategy, digital inclusion, e-government the use of information and communications technologies (ICT) in the public sector and the digitization of the economy, could be improved between the Secretariat of Communications and Transport, the Coordination of the National Digital Strategy, the Secretariat of Economy and the Secretariat of the Civil Service.

In November 2019, the regulations of the Office of the Presidency were reformed, and the powers of the Coordination of the National Digital Strategy strengthened, giving it greater powers in the area of government procurement of ICTs, as well as e-government, in addition to maintaining its authority to design the national digital strategy. The new powers of the Coordination of the National Digital Strategy are a step forward in clarifying the roles and responsibilities of the promotional institutions in some areas of the digital economy, but there are still important definitions to be addressed among regulators that have a say in the digital economy, in particular COFECE, IFT and INAI.

1. Division of Powers between COFECE and the Federal Telecommunications Institute

COFECE is in charge of enforcing the Federal Economic Competition Law in all sectors of economic activity except telecommunications and broadcasting, where the Federal Telecommunications Institute serves as the competition authority. This division of powers has created some problems in determining which body is competent to adjudicate in cases involving digital market because they cover a range of economic sectors and activities of all kinds, including telecommunications.

In order to settle disputes as to which has jurisdiction over a specific matter, the Federal Economic Competition Law establishes a procedure in Article 5, under which either institution may claim or dissociate itself from a specific case. In the event that both institutions claim jurisdiction over a particular case, the court specializing in competition matters decides which institution is responsible for resolving the case.

Since the 2013 constitutional reform, there have been three jurisdictional disputes between the Federal Telecommunications Institute and COFECE in which both argued that they were the competent authority to investigate digital cases or cases related to the telecommunications and broadcasting sectors.

On 18 June 2015, Nokia and Alcatel notified the Federal Telecommunications Institute of a market concentration that would have effects in Mexico, namely an international transaction whereby Nokia acquired shares in Alcatel. During its review, IFT informed COFECE of the merger and requested comments on the transaction. COFECE responded by stating that it was its responsibility to evaluate that concentration and requested IFT to turn over the pertinent files. For its part, the Institute argued that it was the responsible authority, so it sent the file to the court to resolve the dispute.

The concentration mainly concerned active infrastructure equipment for access networks and for core networks. The court decided this first jurisdictional dispute in favour of the Federal Telecommunications Institute on 14 October 2015, finding that the markets concerned belonged to the telecommunications sector and, in light of its specialization, the Institute should be the competent authority to take cognizance of and resolve the concentration (Federal Telecommunications Institute, 2015b).

In 2016, the proposed merger between AT&T and Time Warner Cable sparked another jurisdictional dispute between IFT and COFECE, but with a different outcome. AT&T and Time Warner

Cable filed notices with both IFT and COFECE, each in markets that they considered to be within the respective jurisdiction of each authority. The court decided to allow the authorities to work together on the case, taking into account that the operation also affected sectors other than telecommunications and broadcasting, whose market concentration should be analysed by COFECE. Some of the markets that the court found COFECE to have jurisdiction over were video games, wholesale intellectual property licensing, collectibles, and licensing and distribution of audiovisual content for personal and theatrical use, in various formats, including digital (OECD, 2017).

The third case involving a dispute jurisdiction between COFECE and IFT was the concentration between Uber and Cornershop, two digital platforms. The Commission raised several arguments to support its position regarding its competition, among others, the fact that the digital platforms Uber and Cornershop do not provide telecommunications services, but only use them as an input to offer their respective services.

In May 2020, the court decided to grant jurisdiction to hear and resolve the concentration between Uber and Cornershop to COFECE, in view of the fact that the notifying parties were not telecommunications concessionaires, but that they merely used telecommunications to provide their services via a digital platform; the services provided were not telecommunications, but logistics and intermediation between users, drivers and deliverers; and the notifying parties use the internet as an input, which does not constitute the service provided by the platforms nor represent the source of their revenues (COFECE, 2020g).

The decisions of the courts were different in all three cases but seemed to take into account how closely the sectors in question were linked to those described in some way in the Federal Telecommunications and Broadcasting Law. For example, in the first case (Nokia-Alcatel), IFT was the recognized jurisdiction because the case involved active telecommunications infrastructure, which is explicitly established in the Federal Telecommunications and Broadcasting Law. In the Disney-Fox case, IFT was tasked with analysing markets directly linked to broadcasting, which is one of the sectors covered by the Law, while the role of COFECE was to analyse markets in which a telecommunication or broadcasting concession is not required. In the third case, the concentration between Uber and Cornershop, IFT was not responsible for analysing any market segment, since, according to the court, telecommunications services on these platforms are used as inputs and no concessionaire participates in the provision of the final service. In other words, the judges seem to have adhered to the letter of the law. However, it is not clear that the courts will rule likewise in the future, as market dynamics make it very difficult to predict the market, or that judges might not adopt other criteria as a result of developments in the sector.

The disputes analysed above all involve cases of concentration, that is mergers and acquisitions. In more recent cases, both COFECE and the Federal Telecommunications Institute have initiated investigations that may involve a potential conflict of jurisdiction.

In August 2020, COFECE launched an investigation into practices relating to digital advertising; IFT also started an investigation October 2020 into barriers to competition in the markets for online search services, social networks, mobile operating systems and cloud computing services. Search services and social media are generally two-sided markets in which one side is digital advertising; therefore, two different authorities could be acting on the same market, which would be problematic for all concerned. To date neither authority has claimed jurisdiction over these matters in cases initiated by the other authority.

At present, the division of powers as set out in the law may pose significant potential problems in the future, as uncertainty as to which is the competent authority may result either in them not pursuing cases in the belief that it is the other authority's responsibility, or in the court taking increasingly longer to determine jurisdiction. Also, this division could also lead the economic agents

involved to act strategically, since they could invoke problems of jurisdiction to try to invalidate proceedings that are not favourable to them. Finally, the judicial proceeding could add months of delay and greater uncertainty in the procedures of the two authorities.

2. Coordination between COFECE, the Federal Telecommunications Institute and INAI

Customer and supplier data form the backbone of digital marketplaces. In competition, data can become an essential input that can be used to monopolize or abuse market power. As a result, competition authorities are increasingly concerned that digital platforms do not use their customers' data in an anti-competitive way. On digital platforms, competition and data protection authorities have a major problem to solve that requires a great deal of coordination.

Data protection authorities, such as INAI, are concerned that consumers have sufficient protections from providers to access, modify or delete the information they have about them and to be informed about how their data will be treated, including, for example, if the data will be transferred to other companies or agencies. Digital companies have been especially successful in obtaining information from their customers at low cost and monetizing that information, either by using the information in organizing services or simply selling it to third parties.

In a report entitled *Privacidad de la información de los usuarios en el uso de servicios digitales* (Privacy of user information in the use of digital services), IFT found the following:

- All the companies analysed that own operating systems, terminal equipment, social networks, digital services that enable the provision of online commerce, transportation and entertainment services share the information they collect from their users with their partners, third parties, affiliates and others who use that information for their own ends.
- The information that is mostly collected by digital services is usernames, email addresses, GPS locations, contacts, IP addresses, cookies and terminal equipment data.
- Based on the contents of most of the data collection policies analysed, the declared objective is to collect information to offer personalized services to users.
- The privacy policies of telecom devices and operating system providers do not establish a procedure for deleting information when the device is no longer in use, but merely state that the associated information can be deleted.
- Social networks are the digital services that collect the most information from users.
- Some of the privacy policies indicate the possibility of filing complaints or claims in the event of disagreements or irregularities; However, most do not clearly state the procedure for submitting them.
- In most of the privacy policies analysed, it was observed that no defined times are established for users' information to be deleted when they stop using the services. In addition to the above, it is stated that such information will be deleted as long as it is not necessary for the digital service.
- Less than 50 percent of the policies analysed mentioned the possibility of portability, export or migration of the information provided by the user; However, no mechanisms or procedures are established to do so, and it is not made clear what happens to the information and the account after it is done.

The findings of the Federal Telecommunications Institute were troubling because the privacy notice was sufficient for companies to share users' information with third parties. Also, although they all allow for the information to be deleted, the procedures for doing so are not clear.

At the same time, when a digital platform accumulates large amounts of information on its clients and allows it to offer services that cannot be replicated by competitors, the platform can gain substantial power and abuse it. For that reason, some competition authorities have encouraged the sharing of information held by platforms with other competing economic agents, in order to boost multi-homing, as suggested by the United Kingdom Competition and Markets Authority (CMA) in a report on Google searches (CMA, 2020, p. 365).

The task of competition and data privacy is complex. To ensure that competition is promoted while consumer privacy is respected, it is advisable for competition and data protection authorities to coordinate on possible policies to be applied in cases involving digital markets.

IV. The road ahead

A. Lessons learned

The COVID-19 pandemic has caused a strong economic contraction, as reflected in a sharp fall in GDP in 2020. Restrictions on productive activities, which have been the main measure used in an attempt to reign in the pandemic, have caused a major disruption in the supply of goods and services and loss of income for many workers.

Physical distancing measures and uncertainty about the duration of the pandemic have wrought significant changes in the population's consumption patterns, both in the type of goods and services sought and in the distribution channels. The simultaneous presence of different problems on both the supply and the demand side has been an unprecedented challenge for companies. The digitization of the economy and e-commerce can help companies to sell their goods better, buy their inputs better and improve their internal production processes, hence the great importance of promoting digitization among SMEs as a response to the pandemic.

One consumer trend that had already become visible and that accelerated with the crisis is online shopping. It is likely that the consumption patterns adopted out of necessity will remain part of the new normal even after the problem of the pandemic has gone away.

To support the digital transformation process, the Government has the task, on the one hand of increasing the availability, accessibility and affordability of connectivity and broadband infrastructure to extend the benefits of digitization to the largest possible number of businesses, regardless of economic activity, geographic region, size, etc. On the other hand, it has the job of promoting the digital transformation of companies with training and financing so that they can take full advantage of the benefits of digitization. Finally, it must ensure adequate competitive conditions so that companies, particularly SMEs, have a level playing field in terms of market access, allowing them to successfully break into digital markets.

B. Conclusions

The popularity of electronic platforms has posed a major challenge for the competition authorities. Platforms have technical and economic characteristics that make them prone to market concentration. The presence of strong economies of scale, network economies and economies of scope, as well as the use of big data generate formidable competitors that few can successfully contend with. The markets where platforms operate are often prone to lean towards a single competitor, which tends to capture all –or nearly all– the market.

In several countries important initiatives and discussions are underway with a view to modifying the legal framework for competition, in order to ensure that digital platforms are properly regulated. The Federal Economic Competition Law has traditional tools to prevent and combat anti-competitive practices. Much of the current international discussion is about whether such traditional tools are up to the task of regulating digital platforms. Both COFECE and IFT are analysing those elements of the law that would need to be modified to better address competition issues in digital markets.

However, the Federal Economic Competition Law is uniquely innovative in global terms in that it includes an investigative tool that does not require the verification of anti-competitive conduct; instead, COFECE or IFT can order measures to eliminate barriers that restrict competition, even if the economic agent does not engage in deliberate acts to monopolize the market or displace competitors. Barriers can be any structural market element or any regulation that gives rise to a lack of competition.

Investigations into competition barriers attempt to verify whether any structural or regulatory elements combine to erect a barrier to competition that has anti-competitive effects. If evidence of barriers to competition are found, the authority can order economic agents to eliminate the barrier, order the divestiture of assets or, if an essential input is found, impose conditions of access and prices. In other words, it is a procedure that can be used to individually regulate economic agents without the need to change competition law to try to accommodate the characteristics of specific markets, such as digital markets. This procedure only exists, with some variations, in a handful of countries, such as the United Kingdom, where it is known as market investigations.

Both COFECE and the Federal Telecommunications Institute have intervened recently in digital markets using the traditional tools for market concentration and anti-competitive practices, as well as with advocacy, but also with the new instruments.

As part of its advocacy measures, in March 2020 COFECE published its “Estrategia Digital COFECE” (COFECE Digital Strategy), which seeks to concretely establish the policy actions needed to address digital market issues. A report with specific proposals is currently being prepared and will be submitted for discussion and consultation in the near future.

One of the first measures by COFECE to help avoid supply chains disruptions was the publication in April 2020 of the decision not to prosecute collusion in certain cases. The decision stated that agreements between competitors would not be subject to prosecution if, in the context of a health contingency, they were necessary to maintain or increase supply, satisfy demand, protect supply chains, and avoid shortages or hoarding of goods, and if their purpose was not to displace competing agents that also supply the market;

On 13 October 2020, COFECE proposed 12 measures in the area of economic competition to support the reactivation of the Mexican economy in the wake of the COVID-19 pandemic. According to COFECE, these measures, which are policy measures or recommendations directed at different sectoral regulators, are designed to increase competition in economic sectors with a cross-cutting impact, such as energy and transportation, in order to benefit as many companies as possible.

In October 2020, COFECE initiated an investigation into possible relative monopolistic practices in the market for digital advertising services and related services. The investigation aims to determine whether the economic agents under investigation are engaging in relative monopolistic practices (foreclosure, monopolization, abuse of power, etc.). If sufficient evidence is found, the investigated entities could face a penalty and be ordered to take steps or cease certain activities in order to correct the problems identified. Digital advertising is one of the first steps SMEs take when attempting to break into online sales.

IFT also published its regulatory roadmap in which it plans to address the changes needed in competition law in order to be more effective in digital markets.

In addition, on 22 October 2020, the Federal Telecommunications Institute published in the *Diario Oficial de la Federación* an excerpt of the decision by which the investigating authority of the Federal Telecommunications Institute launched the investigation into the markets of online search services, social networks, mobile operating systems, cloud computing services and related services, to in order determine the possible existence of barriers to competition and free participation or essential inputs that might generate anti-competitive effects. This procedure covers a wide number of markets that affect SME access to online sales.

C. Policy recommendations

COFECE and IFT need to coordinate more closely to successfully address digital markets. According to the OECD (2020), the potential difficulties of having cases reviewed by both competition authorities include duplication of costs, inefficiencies, legal uncertainty and risk of inconsistencies. In addition, as digital marketplaces, online companies and platforms grow and develop, it is very likely that shared issues will increase and make the allocation of cases between COFECE and IFT more complex. OECD argues that third parties demand greater transparency on how work between the two bodies is divided, as they consider it unclear. In this regard, OECD believes that Mexico should consider providing guidance on the criteria as to how cases are allocated between the competition authorities.

Both institutions are engaged in investigations into digital markets and trying to determine the necessary modifications that the competition law needs so that they can be more effective in their efforts to improve competition conditions in digital markets. It would be prudent that, as suggested by OECD, as far as possible, criteria be issued so that economic agents can understand the rationale for the jurisdictional division. Likewise, close coordination between the two institutions would be beneficial should either of them seek to submit a proposed reform of the competition law to the legislature.

Another area where coordination would be advisable is between COFECE, the Federal Telecommunications Institute and INAI regarding the implications of data management and information on competition conditions in digital markets. The privacy notice, which is mandatory and where data processing is regulated, needs to be rethought in a competition context in order to be more effective. Conduct such as framing and nudging, which are concepts that originated in behavioural economics by which suppliers take advantage of some traits of human behaviour to acquire more information, without the consumer being aware of what they are giving up, can have anti-competitive effects. The current situation is not optimal from the point of view of data protection and competition. Since this is a relatively new issue that is being explored, it would be advisable that from the outset there be unity of purpose and coordination among the authorities to achieve the best possible outcomes.

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This study is part of the activities envisaged under the “Enhance access to markets” cluster of the Development Account project “Global Initiative towards post-COVID-19 resurgence of the MSME Sector”. Its main purpose is to analyse the measures adopted by the competition authorities of the governments of Latin America and the Caribbean in support of small and medium-sized enterprises during the coronavirus disease (COVID-19) pandemic, in order to facilitate their recovery. The aim of this study is to examine the main policy actions implemented by Mexican competition authorities to address the economic crisis brought about by the pandemic and to stimulate economic recovery of SMEs. In terms of the operational measures taken by SMEs to contend with the crisis, digitization appears an important tool, enabling them to pivot to new online distribution channels and new ways of organizing production. This highlights the importance of competition authorities ensuring that SMEs have access to marketplaces and digital platforms on competitive terms.



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