

COFECE identifies potential barriers to competition in e-commerce platforms

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I. Introduction

In the context of the investigation launched by the Federal Economic Competition Commission ("COFECE" or "Commission") in the e-commerce platforms (marketplaces) market in the Mexican national territory (the "Relevant Market") back in 2022 under file number IEBC-001-2022, the Investigative Authority of the Commission has preliminarily determined that there is no effective competition in the Relevant Market¹.

The purpose of the COFECE investigation was to determine the possible existence of barriers to competition in the Relevant Market. According to the Federal Competition Act ("FCA"), barriers to competition are "*any structural characteristic of the market, fact or actions of economic agents that have the intent or effect of preventing the access of competitors or limiting their ability to compete in the markets; that impede or distort the process of competition and free access, as well as the legal provisions issued by any government order that unduly impede or distort the process of competition and free access*". In this sense, it is important to note that this investigation does not aim to verify whether there have been violations to the FCA, but rather to analyze the structure and dynamics of the Relevant Market itself.

This procedure takes place in a context in which both the Commission and other national and international competition authorities are highly focused on analyzing digital markets. For example, in 2023, COFECE itself initiated an investigation into possible abuse of dominance in the market for the development, marketing, and sale of digital goods and/or services; and in 2022, the Federal Telecommunications Institute also launched an investigation into potential abuse of dominance in the market for app stores.

¹ Excerpt from the preliminary opinion available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2024/02/DOF-13febrero2024-01.pdf>

II. Competition condition in the Relevant Market

The Investigative Authority preliminarily determined that there are no conditions of effective competition in the Relevant Market for the following reasons:

- On the sellers' side, the Relevant Market is highly concentrated; Amazon and Mercado Libre² would jointly have the largest market share, accounting for more than 85% of sales and transactions.
- From the buyers' point of view, the top three players would account for 61% of the Relevant Market. Amazon and Mercado Libre would also be the leaders on this side of the Relevant Market.
- The existence of strong network effects constitutes a barrier that limits the entry of new entrants and represents a virtually impossible challenge for the expansion of the most important players in the Relevant Market.
- There are barriers to entry related to the high amounts of investment for the development of a marketplace, as well as for the development of technological tools integrated into it, such as Buy Box, automatic price configuration, and data collection and processing systems.
- There are barriers to entry related to investments in advertising, marketing, and public relations. To attract a significant number of buyers and sellers to the platform to ensure business success, it is imperative to have a brand that is positioned, recognized, and reputable.
- Market participants exert insufficient competitive pressure on Amazon and Mercado Libre, because the lack of a significant number of active buyers and sellers on their marketplaces makes it difficult to compete with the economic agents with a greater presence in both markets.
- Two economic operators impose price MFN clauses on their sellers in their terms and conditions for the provision of the marketplace service.

² The Commission identified that Servicios Comerciales Amazon México, S. de R.L. de C.V. ("Amazon") and MercadoLibre, S.A., de C.V., Institución de Fondos de Pago Electrónico ("Mercado Libre") have the largest market shares and have the capacity to fix prices.

III. Barriers to competition identified and proposed remedies

In view of the above, the Investigative Authority determined that there are three possible barriers to competition that could be affecting the functioning of the Relevant Market. For each of them, it proposed different measures to be implemented.

a. Barrier 1. Artificiality in some components of marketplace loyalty programs

The Investigative Authority preliminarily concluded that there are other services in loyalty programs that, without being directly linked to the ability of marketplaces to carry out or facilitate transactions between buyers and sellers, affect the behavior of buyers and, coupled with the existence of strong network effects, represent a barrier to competition the anticompetitive effect of which contributes to the absence of effective competition conditions in the Relevant Market.

In response to Barrier 1, the Investigative Authority proposed the following measures:

- Measure 1.1. Ordering Amazon and Mercado Libre to disassociate streaming services from memberships and/or loyalty programs, as well as any other service that is not related to the use of the marketplace (e.g., games, music, among others). This measure implies that both platforms would be free to offer the streaming programs, as well as any other services, but these cannot be offered as part of the same package of services related to the marketplace. In this sense, streaming services should be offered and charged independently and separately from any loyalty program or subscription service.
- Measure 1.2. Ordering Amazon and Mercado Libre to stop promoting streaming services, as well as any other services that are not related to the use of the marketplace, on their marketplaces.

b. Barrier 2. Opacity in the Buy Box

The alleged lack of information regarding the choice of an outstanding offer to which sellers on the Amazon and Mercado Libre platforms would have access, would represent a barrier to competition, the anticompetitive effect of which would have an impact on the absence of competitive conditions in the Relevant Market.

In response to Barrier 2, the Investigative Authority proposed the following measures:

- Measure 2.1. Ordering Amazon and Mercado Libre to take all necessary and sufficient actions so that the member or members of its economic interest groups³ ("GIE") share the information required related to the Buy Box, to implement, in a timely manner, the measures 2.2. and 2.3 below.
- Measures 2.2 and 2.3. Ordering Amazon and Mercado Libre to create a section on their seller portal in which sellers are informed of all the variables and considerations that the Buy Box takes into account to choose the featured offer, and to make it known to sellers through all their means of contact. This portal must inform them of any adjustments or modifications made to the variables and considerations of the Buy Box, as well as the implementation and operation of any other tool that aims to choose an outstanding offer.
- Measure 2.4. Ordering Amazon and Mercado Libre to announce to their users all the corrective measures, as well as the Commission's contact details, on their respective seller portals.

c. Barrier 3. Logistics solutions

The current configuration of the logistics solutions of the marketplace service to sellers could represent a barrier to competition, the effect of which could affect competitive conditions in the Relevant Market due to the fact that: (i) Amazon and Mercado Libre do not allow the interconnection of their Application Programming Interface ("API") with all logistics companies, and (ii) there is a link between the positioning of the seller's products, through the Buy Box and/or distinctive labels, with the adoption of fulfillment programs offered by the same platforms.

In response to Barrier 3, the Investigative Authority proposed the following measures:

- Measure 3.1. Modify the criteria of the Buy Box, so that the contracting of logistics solutions with a specific economic agent is not considered as a variable or influence. Such criteria must be transparent and identical regardless of who the service provider is.
- Measure 3.2. Allow interested logistics companies to integrate with their platform through their respective APIs, in order to facilitate the offer of logistics services in an appropriate way in the marketplace. To do this, it is necessary for Amazon and Mercado Libre to be transparent about the standards they consider appropriate to provide such service.

³ A GIE is a "group of natural or legal persons who have related commercial and financial interests and coordinate their activities to achieve a certain common objective". (Jurisprudence I.4o.A. J/66)

- Measure 3.3. Modify the criteria for assigning the “Prime” or “Full” label/badge, as well as any other equivalent badge, so that these tags/badges are not assigned exclusively and/or preferentially, to sellers who contract the fulfillment services of Amazon and Mercado Libre, respectively. Consequently, the criteria for assigning such badges must be established on the basis of efficiency and performance, in accordance with the strategy of each economic agent subject to the measure.

IV. Procedure and possible outcomes

In accordance with Article 94 of the LFCE, these preliminary findings must be notified to the economic agents who could be affected by the proposed corrective measures so that they can respond and provide evidence that they consider relevant to the Commission.

Once the deadline for the above expires, the Commission will process all the evidence provided and after that, the economic agents participating in the procedure will be able to present closing written arguments to the Board of Commissioners. In addition, these economic agents may propose to the Commission suitable and economically viable measures to eliminate the competition problems identified at any time and until the file is integrated for the Board of Commissioners to issue its resolution.

The resolution of the Board of Commissioners may include the measures proposed by the Investigative Authority, which may be modified, added or eliminated according to the contributions of the economic agents that have participated in the procedure, at the discretion of the Board of Commissioners of COFECE.

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