



BY MARIA ANDREA LATAPIE ALDANA & NATALIA PATRICIA PATIÑO ESPINOSA¹



¹ Respectively Associate and Junior associate, Associate at Creel, García-Cuellar, Aiza y Enríquez S.C.

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The present article explores the impact of digital transformation in the retail value chain. The integration of digital technology has mined the traditional retail structure, increasing competition by providing consumers with more choices and through the focusing retailers on satisfying consumers' evolving needs through innovative multichannel strategies and. The article also analyzes the impact of digital transformation on global Regulatory and Competition Authorities, and the current debate on antitrust policies on the emergence and growth of digital markets. Finally, the discussion reaches antitrust policies in Mexico, with a debate regarding the question “should the tech companies that participate in digital channels be regulated?” with the Federal Economic Competition Commission engaging in a series of actions aiming to prepare the institution to answer this debate, in an attempt to avoid ex ante obligations that could jeopardize innovation and efficiencies in certain markets.

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I. IMPACT OF THE DIGITAL TRANSFORMATION ON RETAIL

Many retail formats, including online and offline sales channels, have emerged to satisfy the demands of consumers. The retail value chain has been changing, due in large part to the so called “digital transformation” including the emergence of e-commerce and the integration of digital technology into all areas of a business.

The digital transformation has focused on satisfying consumers’ evolving needs, mining the traditional retail structure. This change in the traditional retail chain has increased competition since consumers now have more choices to satisfy their particular needs. We are a long way from the time where the customer was required to shop at the corner store retailer and purchase products offline, in store. Today the big retailers have their traditional stores but also serve consumers through online channels including virtual marketplaces that have become valuable channels for customers and sellers. Today, the internet of things (“IOT tech”) is increasingly allowing manufacturers to engage directly with consumers over the lifecycle of their products. For example, white goods manufacturers, like Samsung, now sell their consumables by enabling their washing machines to order washing detergent automatically after a given number of washing cycles.²

Moreover, this transformation in retail – which has been ongoing for decades – was accelerated by the COVID-19 pandemic. Digital channels have allowed manufacturers and retailers to engage with customers through innovative multichannel strategies. Even small business shifted to multichannel distribution by engaging with online channels, such as Uber, Rappi and Cornershop in Mexico. The COVID-19 pandemic contributed to the evolution of the retail market, particularly, by pressing businesses to expand to multichannel digital strategies and strengthening in consumers the habit to use multiple retailers through multiple channels (multihoming) and to price compare products across many retailers, online and offline, through real-time access to digital price comparison tools.

II. IMPACT OF THE DIGITAL TRANSFORMATION ON GLOBAL ANTITRUST POLICY

The impact that the digital transformation has had in retail and all markets, especially after it was exponentiated by the COVID-19 pandemic, has consequently impacted the policy discussion among Regulatory and Competition Authorities around the world. The last couple of years the question “should the tech companies that participate in digital channels be regulated” has been in the center of most policy discussions.

According to Giuseppe Colangelo, the current debate of antitrust policy is driven by two arguments: (i) so-called digital markets move too fast to be supervised *ex post*, hence antitrust enforcers would often intervene after the tipping point; (ii) the emergence of platform-based companies enjoying a brand-new type of market power implies greater responsibilities and justifies specific responses.³

The European Union (“EU”) has taken the lead in this discussion through by working to finalize its proposed Digital Services Act (“DSA”) and Digital Markets Act (“DMA”). The DMA is intended to regulate “tech companies” based on their size and other criteria for defining their position as “gatekeepers,” including: (i) its “significant impact” on the European market; (ii) whether the service it provides is an “important gateway” between businesses and final consumers; (iii) whether the “gatekeeper” has or will likely soon have an entrenched and durable position.⁴

However, the ongoing legislative discussions have raised controversial debates regarding the digital services that will be included in the DMA and the ex-ante obligations for the gatekeepers. At this stage, DMA includes basically all relevant digital service: online marketplaces, social media, digital advertising, interpersonal communications (like WhatsApp), cloud services, even virtual assistants (like Siri or Alexa) and smart TVs. Therefore, any provider of these services could become a gatekeeper and be subject to the DMA’s ex-ante obligations.

There are several criticisms regarding the DMA, both, internationally (especially since the DMA, in its current form, only impacts U.S. companies) and within the EU. The key concern across different stakeholders (international and regional) highlights the dangerous effect that the regulation could have on market innovations, as well, as on related markets affecting them as collateral damage. For example, the DMA may

2 Reinartz, Wiegand, Imschlo (2019) The impact of digital transformation on the retailing value chain. Available at <https://reader.elsevier.com/reader/sd/pii/S0167811618300739?token=D125099ED785C4E6B6C0BFD2F5809484CA0609E6F8E320FC3C7EA7BE0B443CF54980406961F613C1B907F3EAB321C1F3&originRegion=us-east-1&originCreation=20220307053156>.

3 Colangelo. The European Union’s Digital Markets Act: A Primer. Available at https://gaidigitalreport.com/2020/10/04/evaluating-the-case-for-ex-ante-regulation-of-digital-platforms/#_ftn168.

4 Wall & Lostri (2022) The European Union’s Digital Markets Act: A Primer. Available at [https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20\(DMA,legislation%20aimed%20at%20such%20platforms](https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20(DMA,legislation%20aimed%20at%20such%20platforms).

intervene in the “startup life cycle,” as it can prevent big tech companies from preempt future competition, something that is good for the tech ecosystem as it creates a win- win scenario for both parties (it gives tech giants the upper hand and it brings them up to date and it gives startups initial capital to start their business). As well, DMA may have a harmful impact on Europe’s small and medium sized enterprises (“SMEs”) and will devalue cloud services, something that SMEs heavily rely on.⁵

III. IMPACT OF THE ANTITRUST POLICY GLOBAL DEBATE IN MEXICO

The policy debate regarding the question “should the tech companies that participate in digital channels be regulated” has also reached Mexico. The Federal Economic Competition Commission (“COFECE”) has engaged in a series of actions aiming to prepare the institution to answer this debate. In 2020, COFECE issued its Digital Strategy as a mid-term strategic planning exercise to “*execute actions that contribute to approach the digitization phenomenon.*” COFECE’s Digital Strategy set forth five actions to be executed before 2021, namely to:

1. Produce a document with public policy proposals for digital markets to benefit more Mexican consumers.
2. Organize fora with international experts to permanently update and strengthen the knowledge of COFECE’s personnel on the operation of digital platforms, particularly of big technological companies.
3. Strengthen capacity building and technological infrastructure to gather and analyze large amount of data. COFECE will develop a plan for managing the exploitation and processing of Big Data.
4. Create a specialized Digital Markets Unit for the analysis of the development of the digital economy and its repercussions on the processes of competition.
5. Strengthen international cooperation with competition authorities and regional and international organizations.⁶

In the first action COFECE’s Digital Strategy aimed to produce a document with public policy proposals for digital markets to benefit more Mexican consumers. Among other issues, this document was intended to address the specific effects of digital markets on the Mexican economy and the possible measures to face them, including the following:

“— Whether it is necessary to identify under specific categories those digital platforms with certain capacities to influence or distort markets; (...)

—Whether it is necessary to take into consideration specific regulations to limit conducts from digital platforms that fall under said categories or that may otherwise distort the markets; (...)

*— Assess the need to modify or extend the existing functions and powers of competition authorities to: allow the implementation of remedies to potential problems posed by digital platforms; impose sanctions to market-distorting conducts currently not foreseen in norms and particular to this kind of platforms; (...)*⁷

However, COFECE has not released or published a document to answer these questions regarding the antitrust policy that should be taken to handle the challenges and market changes related to the digital transformation. Therefore, in Mexico the debate is still staring with multiple questions but few answers.

5 Wall & Lostri (2022) The European Union’s Digital Markets Act: A Primer. Available at [https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20\(DMA,legislation%20aimed%20at%20such%20platforms](https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20(DMA,legislation%20aimed%20at%20such%20platforms).

6 COFECE’s Digital strategy. Available at https://www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_ENG_V10.pdf.

7 COFECE’s Digital strategy. Available at https://www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_ENG_V10.pdf.

Indeed, COFECE's Digital Markets Unit was created and today it is "responsible of analyzing the development of digital markets and their implications in matters of economic competition and free market access"⁸. The following are among the principal functions of COFECE's Digital Markets Unit:

- (i) To analyze and develop regulation proposals for digital markets that have as a purpose promoting and protecting competition and free market access.
- (ii) To provide technical support to the competent areas of the Commission in the elaboration of opinions on draft regulations, legislative initiatives, laws, rules, agreements, decrees, official Mexican standards, and other provisions of general observance that have as their purpose protect or promote economic competition and free market access in the digital markets.⁹

Therefore, it seems that COFECE's Digital Markets Unit will play an important role in Mexico regarding the policy debate about the establishment of regulation for tech companies that participate in digital channels.

The task in the hands of COFECE's Digital Markets Unit is not an easy one. The unanswered questions on COFECE's Digital Strategy will press the authority to analyze the benefits and dangers of the creation of categorizations, ex- ante obligations (specific antitrust regulation), and tailored faculties to sanction or correct situations related to the digital transformation of markets. Waiting for the results of the EU experience, the results of the application of the DMA and the DSA, could give some light to help COFECE with this debate. However, the impact that of the DMA and the DSA will not be clear in a considerable time.

But COFECE and regulators throughout the region must recognize that "traditional" markets have been transformed by digitalization, and that so-called big tech companies are very different from each other. Therefore, one size fits all regulation – like the DMA – would likely result in unintended consequences for consumers.

For example, the DMA proposes general obligations for the gatekeepers taking into consideration problematic issues previously investigated by Competition Authorities, such as so-called self-preferencing practices. The European Commission's decision in *Google Shopping* has raised this specific concern that now is being prohibited ex ante by the DMA obligations for gatekeepers. However, self-preferencing, particularly in retail, is a legitimate and common business practice that can be good for customers and actually promote competition.

In retail, digital transformation is increasing the consumer's needs. The digital era has helped the passive customer that used to shop in the big institutional retailer into an active player that demands personalized interactions with retailers and expects improved convenience and multichannel selection options. This characteristic is making the retail market a high demander for data and self-learning artificial intelligence solutions to attend customer segmentation. But many companies, including omnichannel retailers, already make it easy for customers to access, manage, and delete their personal data any time.

Therefore, considering the vast differences across digital economies and differences in the business models of "big tech" companies, the creation of general *ex ante* antitrust obligations, rigid categorizations and tailored faculties to sanction or correct situations related to the digital transformation of markets could significantly affect innovation, competition, and consumer welfare in a very different manner between markets.

IV. MEXICO'S ANTITRUST TOOLS AGAINST THE DIGITAL TRANSFORMATION OF MARKETS

This is not the first-time antitrust law and policy has faced pressure from market dynamics transformations. In fact, some decades ago, the policy debate questioned the capacity of the antitrust tools and doctrines to assess and correct market dynamics on retail, when the big institutional retailers (like Walmart) became dominant. Today we know that antitrust had the necessary tools to prevent unlawful exercise of monopoly power of those big institutional retailers. Daniel Sokol, a professor at the University of Southern California, has stated that "[i]n a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics."¹⁰

⁸ Article 36 TER of the Organic Statute of The Federal Economic Competition Commission. Available at https://www.cofece.mx/wp-content/uploads/2022/01/ESTATUTO-ORGANICO-ENG_.pdf

⁹ Article 36 TER 1 of the Organic Statute of The Federal Economic Competition Commission. Available at https://www.cofece.mx/wp-content/uploads/2022/01/ESTATUTO-ORGANICO-ENG_.pdf

¹⁰ Daniel D. Sokol, (2020) Antitrust's "Curse of Bigness" Problem. Available at https://gaidigitalreport.com/2020/10/04/evaluating-the-case-for-ex-ante-regulation-of-digital-platforms/#_ftn168.

To avoid generalizations and a Nietzschean debate regarding history repeating itself as memory fades, it is useful to deeply assess if the Mexican Competition Law and the prevailing doctrine have the adequate tools to guard the competition dynamics in the digital era. Mexican Competition Law was reformed in 2013 to introduce important new competition tools to assess markets, considering that, as COFECE has pointed out that the Mexican markets have important particularities:

“The Mexican economy has the particular characteristic that, as a consequence of the high degree of concentration persistent in some traditional markets in our country (i.e., energy, telecommunications, finance and health), (...).”

The main new tool established in Article 94 of the Law, was based on the essential facilities theory that was developed in the 19th century by the United States to control bottlenecks in railroad networks that enabled gatekeeping monopolists to exclude competitors from crucial markets. It was deemed necessary for the Mexican competition toolkit due to the high degree of concentration that characterize regulated markets in Mexico. However, today, it offers a useful tool for analyzing competition between offline and online channels in retail, and for avoiding ex-ante obligations that could jeopardize innovation and efficiencies in certain markets.

Article 94 allows the Competition Authority the imposition of regulatory-type remedies after a procedure of investigation that is ruled by the safeguards and formalities that apply to the investigations of monopolistic practices on a case by base analysis. The former president of COFECE, Alejandra Palacios, has considered that this tool could be relevant to analyze the problems that have recently been addressed by antitrust policy debate and even to address *“behavioral barriers used by economic agents who, despite having no substantial market power, can still engage in conducts that accelerates the “tipping point” and may affect the competitive process.”*¹¹

Considering that Mexican antitrust authorities already have tools to analyze antitrust risk in markets that have been transformed by digitalization, including sectors like retail that have robust competition between online and offline channels, regulators should resist inflexible ex-ante proposals that may have adverse effects in evolving markets, like retail, and could end up discounting consumer welfare and undermining economic growth and innovation.

¹¹ Palacios (2021) Competition tools for Digital Markets in Mexico: Section 94 of the Economic Competition Federal Act. Available at <https://www.competitionpolicyinternational.com/competition-tools-for-digital-markets-in-mexico-section-94-of-the-economic-competition-federal-act/>.



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