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COFECE IDENTIFIES POTENTIAL BARRIERS TO COMPETITION IN THE RETAIL E-COMMERCE MARKET

Pursuant to the **“EXTRACT of the Preliminary Findings in Case File IEBC-001-2022, issued on February six, two thousand and twenty four”** (*EXTRACTO del Dictamen Preliminar del Expediente IEBC-001-2022, emitido el seis de febrero de dos mil veinticuatro*) (the “Preliminary Findings”) published in the Official Gazette of the Federation on February 13, 2024, the Investigative Authority of the Federal Competition Commission (*Comisión Federal de Competencia Económica*) determined the existence of potential barriers to competition in the retail e-commerce market in Mexico (the “Investigated Market”).

The Preliminary Findings identify several business models that concur in the Investigated Market, and highlights marketplaces, described as “[d]igital platforms whose main purpose is to facilitate interaction between buyers and sellers to carry out commercial transactions through the services provided by the platform”. In this regard, COFECE defined the relevant markets of focus in its Preliminary Findings as the marketplace services market for sellers, with a national geographic dimension, and the marketplace services market and online stores of multiple categories for buyers in Mexico (the “Relevant Markets”).

The Relevant Markets are interconnected, due to the existence of network effects (i.e., the value of the service increases as more people use the network), and a decrease in competition on one side has an impact on the other. Based on this, the Investigative Authority conducted an analysis of the conditions of competition pursuant to Article 59 of the Federal Antitrust Law (*Ley Federal de Competencia Económica*) (“LFCE”), and determined, on a preliminary basis, that there are no conditions of effective competition in the Relevant Markets, since:

- Both markets are highly concentrated, with a majority participation of MercadoLibre, S.A., de C.V., Institución de Fondos de Pago Electrónico (“Mercado Libre”) and Servicios Comerciales Amazon México, S. de R.L. de C.V. (“Amazon”), while other participants have a significantly smaller share in both markets.
- There are barriers to entry, such as: (i) network effects and the need to reach a critical mass of users; (ii) investment costs and recovery period required for the development of a marketplace, the development of technological tools, logistical infrastructure and working capital; and (iii) high investment costs in advertising, marketing and public relations to position a brand.
- Mercado Libre’s and Amazon’s competitors in the Relevant Markets exert insufficient competitive pressure on them.
- Two economic agents impose on their sellers price parity clauses in their terms and conditions for marketplace services.

After assessing the conditions of effective competition in the Relevant Markets, the Investigative Authority identified three potential barriers that hinder free competition:

- **the artificiality in certain components of the loyalty programs of marketplaces** as some of the services included in such programs are not directly linked to the ability of the marketplaces to conduct or facilitate transactions between buyers and sellers (e.g., streaming services), but have an impact on buyers’ behavior, which generates an artificial strategy that attracts and retains them over alternative marketplaces;
- **the opacity in the operation of the marketplaces’ Buy Box**, which is a bid management system that, based on a series of algorithms, selects and highlights a particular offer that is displayed to buyers as the best offer, but the lack of transparency in its operation could be affecting the efficient operation of these marketplaces; and
- **the preference for marketplaces’ own logistics solutions**, when they do not allow their sellers to choose freely the logistics company to use (by preventing, for example, the interconnection of their API (Application Programming Interface) with all logistics companies or by favoring sellers who use their logistics services by attributing them distinctive features over other sellers), which favors the exposure of the products of sellers who contract the service offered by the same marketplace.

In order to eliminate the identified restrictions, the Investigative Authority proposed the following corrective measures:

- Regarding the first barrier listed above, the Investigative Authority proposes ordering Amazon and Mercado Libre to disassociate streaming services and any other service unrelated to the use of the marketplaces (e.g., games, music...) from memberships and/or loyalty programs, and to stop promoting these services in their marketplaces.
- Regarding the second barrier listed above, the Investigative Authority proposes ordering Amazon and Mercado Libre to report the totality of variables and factors used by the Buy Box to choose the featured offer (as well as any adjustments or modifications) in their sellers' portals and to inform sellers of such variables and factors. Moreover, it proposes ordering Amazon and Mercado Libre to publish in their portals the totality of the corrective measures established in the Preliminary Findings and the contact information of COFECE to report any non-compliance; and to take all necessary and sufficient actions to share the required information in order to implement the described measures.
- Regarding the third barrier listed above, the Investigative Authority proposes modifying the Buy Box criteria so that the hiring of logistics solutions with a specific economic agent is not considered as a variable or factor, so that it is driven by efficiency and performance criteria that are transparent and identical regardless of the service provider. Moreover, it proposes allowing interested logistics companies to integrate the relevant platform through their respective APIs. To this end, the Investigative Authority proposes that Amazon and Mercado Libre make their standards for providing such services transparent and that such standards be approved by COFECE.

Finally, the Investigative Authority also proposes modifying the criteria for assigning the "Prime" or "Full" label/distinctive, as well as any other equivalent distinctive, so that they are not assigned exclusively and/or with preference to sellers that hire Amazon and Mercado Libre's logistics services, but rather that such criteria respond to terms of efficiency and performance and are identical for all suppliers.

In addition to Mercado Libre and Amazon, any economic agent that demonstrates having legal standing in the matter may submit evidence and present arguments in this case. If the Preliminary Findings are confirmed, the Board of Commissioners could issue orders directing the economic agents to eliminate the barriers that affect the process of free concurrence and competition in the Investigated Market and Relevant Markets.

At Ritch Mueller, we have extensive experience in antitrust matters, with a team of professionals available to advise clients and prospective clients whose activities may be impacted by COFECE's recommendations and orders related to the retail e-commerce market.

