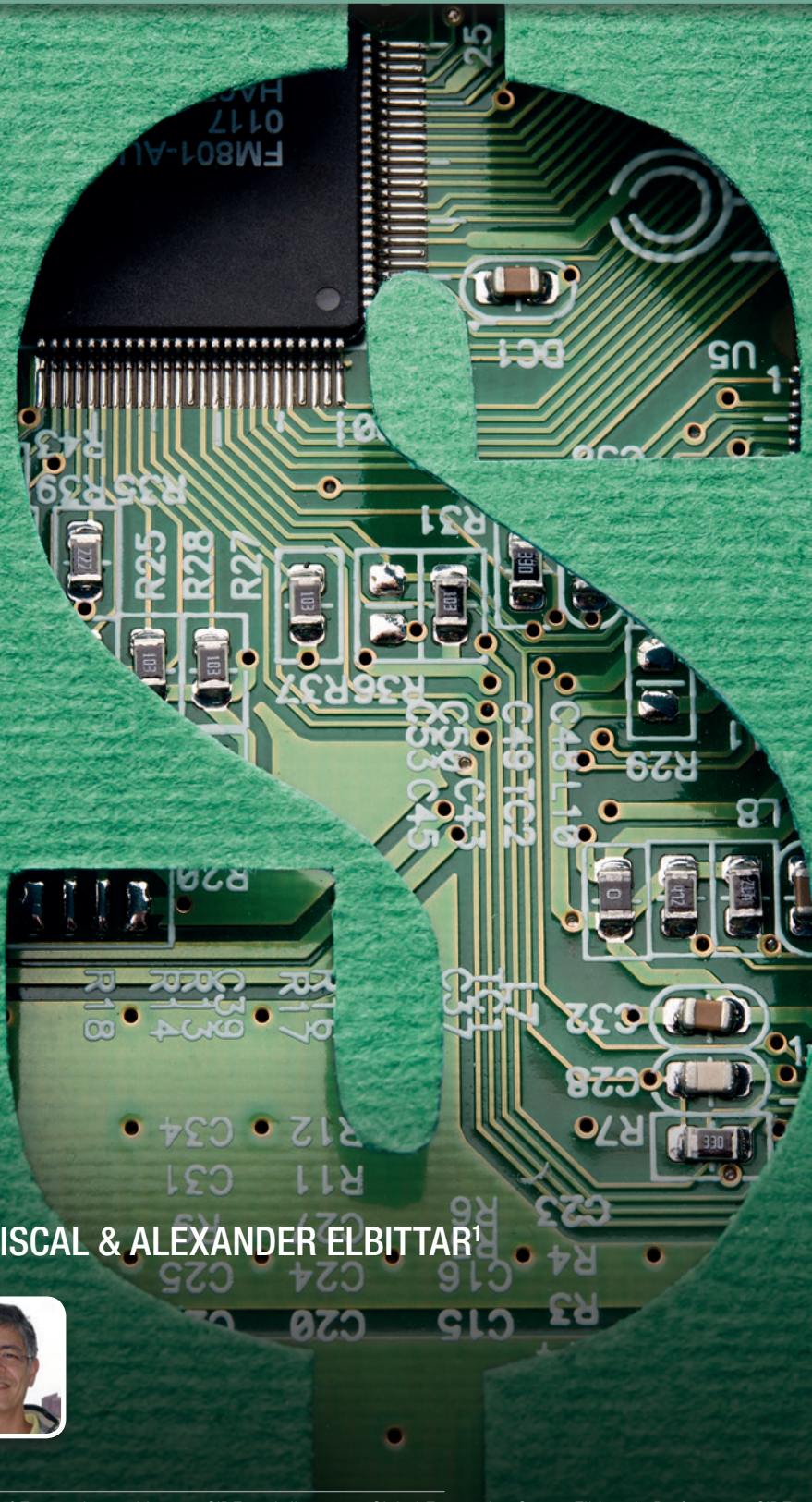


# PRIDE AND PREJUDICE: INVESTIGATIONS & MERGERS IN DIGITAL MARKETS FROM A DEVELOPING WORLD'S VIEWPOINT



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## I. INTRODUCTION

“It is a truth universally acknowledged that a single” agency in possession of a good theory of harm must be in search of an anticompetitive problem — this, even where a market has not been fully formed or understood. The contrary can also be true, said single agency may also not be ready to investigate an anticompetitive problem, even when foreclosure is staring it at its face, and is rampantly apparent to all who witness its unravelling right before their very eyes. But, jest aside, Jane Austen will only take us so far in telling a story of recent and future investigations into digital markets from the point of view of less developed countries. We shall, therefore, aim to start at the beginning of our narrative and arrive at our main argument more gradually.

While in the developed world there has been a growing interest in studying, opining, critiquing, and publicly acknowledging their *mea culpa* in a very lax application of agencies’ competition enforcement in digital markets, agencies in developing countries have been trying to play catch up. Both the conversation and an urgency to learn the tools of analysis have led to a growing number of cases that look at actual and potential problems in the digital landscape. Multisided markets, indirect network externalities, critical mass, tipping, multihoming, demand inertia, behavioral biases, algorithmic competition, artificial intelligence and machine learning, big data analysis, privacy issues, etc. have all become household terms by now among the professional intelligentsia, with all of us concerned about their uses and limitations when it comes to antitrust matters.

Without detracting from the need to revisit and more carefully analyze anticompetitive conducts that can occur or may arise from market interactions among firms in a digital landscape, we want to view the problem from the particular lens of an agency in a developing or less developed country (“LDC”). Why? Because certain conditions, present in the developed world, may not yet have a hold in the developing world; and also because even if some other conditions can initially appear to be only relevant to developing countries, they may have important lessons to teach to the developed world when looking at isolated regions, groups of more at-risk, or disadvantaged consumers, or they may simply offer a different and novel way of viewing a problem with a wider lens than those currently being considered.

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## II. SOME ELEMENTS THAT NEED MORE ATTENTION IN DEVELOPING COUNTRIES

Among the key elements that need to be looked at carefully in developing economies and which may or may not be relevant to anticompetitive effects analysis in more developed nations include:

- Connectivity
- Demand-side issues
- Availability of information

We will take each one in turn and illustrate, wherever possible, with recent cases that we have been following, and been party to, in Latin America.

A fundamental pre-requisite to digital market emergence and growth is connectivity. Where connectivity does not exist or has been relegated due to a lack of funding or competition, even the existence of large players in the digital landscape will only affect those few consumers that have access to their services. By 2018, the mobile broadband subscription per 100 inhabitants in Mexico was 71, while for OECD countries the average was 110.<sup>2</sup> This, of course, does not detract from possible exploitative practices that large, dominant players may have on users, potential competitors, and/or firms that rely on their platforms to provide additional services, etc. But with lower connectivity, one needs to study carefully where connectivity exists, whether niche services are possible, and whether these allow for innovation and market growth to prosper. It is, in these instances, geographic regions and types of consumers where antitrust problems can arise and it becomes important to identify where they are to avoid making generalizations in markets where these services are not possible, have not yet grown, or are at best incipient. Needless to say, data to inform this analysis is vital, an element we take on later in this article.<sup>3</sup>

However, connectivity alone does not ensure usage. Supply can only partly foster take-up, but users need to be sufficiently attuned to technology not just to connect, but to use, and to use in a way that adds value to them and moves their market interactions from a “real” world into a “virtual” one. In many developing countries — and for certain consumers in developed nations — digital literacy is scant and take-up is not fast, constant, or easy. For example, 2017 data comparing various countries in their use of internet puts Mexico last in five out of six categories — general use of internet, internet for online purchases, internet for banking, internet for interaction with government, and for information regarding government services — the exception being Mexico coming in ninth in the use of internet for job searches over the last 3 months.<sup>4</sup> Hence, the simple existence of large players in a market does not necessarily imply that they can have a substantial negative effect on consumer surplus even if they do in fact use their dominant position in a market.

Take the recent merger of Cornershop (a grocery delivery service on demand) and Walmart Mexico, recently barred by the Mexican antitrust authority (“COFECE”). Cornershop is a multisided-platform that allows buyers to search and purchase groceries online in different supermarkets and specialty stores and receive them promptly (within 90 minutes) and directly in their homes through services provided by a set of “independent shoppers” who specialize in packaging, transportation, and product selection. The merger was banned by the Authority on concerns, among others, that it would allow Walmart Mexico — a brick-and-mortar company — to harness its market power in physical space into the digital marketplace, either by expelling Walmart’s competing supermarkets from the platform or by blocking entry of other competing

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2 The fixed broadband subscriptions per 100 inhabitants in Mexico was 14.8, while for the OECD countries the average was 30 in 2018. See OECD, Broadband Portal, *Fixed broadband subscriptions per 100 inhabitants, per speed tiers* (Dec. 2018), <https://www.oecd.org/internet/broadband/broadband-statistics/>.

3 See, e.g. Cave & Mariscal, *The Impact of Asymmetrical Regulation on Less Well-Off Mexican Households* (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3251035](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251035). Also see Cave, Guerrero and Mariscal (2018), *Bridging Mexico’s digital divide: an inside-out/outside-in view of competition and regulation*, [http://ceeg.mx/publicaciones/ESTUDIO\\_2\\_2018-Bridging\\_Mexicos\\_digital\\_divide\\_Final\\_2018\\_12\\_20.pdf](http://ceeg.mx/publicaciones/ESTUDIO_2_2018-Bridging_Mexicos_digital_divide_Final_2018_12_20.pdf). We identify that for Mexico connectivity is low not in areas of simply low income, but where there are marginalized populations, far from populations centers as measured by distance to the largest city at the state level. All of this using fairly aggregate public data, a combination of INEGI’s household surveys and the IFT’s coverage maps.

4 OECD.Stat. <https://stats.oecd.org>. The outlier figure could simply be the result of having to use internet to upload or access job search websites, and not necessarily users undertaking their searches online. But without further information we can only speculate about the relevance of this piece of information.

platforms including refusing to participate in other platforms that competed with Cornershop.<sup>5</sup>

Walmart, whose national market participation in the category of supermarket stores is around 60 percent as measured by sales,<sup>6</sup> would appear to be dominant and yet sales in this sector only account for about 20 percent of Mexican households' food expenditure,<sup>7</sup> as most of them continue to make purchases in the traditional *tianguis* or street markets, small grocery stores, and popular markets. Walmart Mexico is essentially an intermediary of a wide range of grocery products. None of these products gives Walmart the ability to block the entry of any competing platform. In fact, as recently as July 31, 2019, Amazon opened its MEX3 Distribution Center in Mexico, its fourth, in the State of Mexico.<sup>8</sup>

Again, if we look at relative size and impact of potential foreclosure, numbers in developing economies are an important reference — they do not, of course, eliminate the possibility of potentially anticompetitive conduct, but rather put this possibility in a measurable context regarding harm. A platform like Cornershop emerges from the interaction of three sides of the market: supermarkets and specialized fresh produce stores, independent shoppers, and buyers interested in acquiring these products at a greater speed than they would purchase directly from the stores' own websites. One of the largest online sellers is Walmart, but these sales represent less than 2.3 percent<sup>9</sup> of its income and are not delivered in a timely fashion (between 4-5 hours, sometimes next day for fresh produce). Cornershop, the target in the merger operation, was considered to be the largest of the three main fresh produce sellers — assuming this is the smallest market being reviewed — but this participation is hardly certain or constant as evidenced by the recent exit, expansion, and entry of various players in the market: March 2019, Mercadoni, perceived to be the number two player in fresh food just-in-time delivery exited one of the largest local markets, Mexico City; April 2019, Rappi, a Colombian company, with the largest food delivery app service in Mexico, which includes restaurant delivery as well as fresh produce, received an influx of 1 billion USD investment to expand its service offering throughout the region;<sup>10</sup> following Walmart's announcement that it would purchase Cornershop, the fourth largest supermarket group, La Comer, abandoned the platform to create its own competing business.<sup>11</sup> Thus, even though Walmart is "big" in retail it is unclear whether this transaction in the online world would have increased the chances of foreclosure in an incipient digital market with a not-as-yet established player, with relatively small sales and where a large portion of the population is excluded. This is especially true given that a large international entrant, Amazon, is making quick headway in Mexico.

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5 On November 5, 2018, Walmart notified the acquisition of Cornershop by its parent company Walmart, Inc. that would subsequently pass on to the Mexican subsidiary Walmex. The merger was notified in both Mexico and Chile, where Cornershop also operates. The operation was approved by the competition authorities in Chile on January 11, 2018 and was not approved by Mexico's authority in its resolution CNT-161-2018 of May 27, 2019. See Fiscalía Nacional Económica, *Adquisición de control sobre Delivery Technologies SpA por parte de Walmart Chile Rol FNE F161-2018* (January 11, 2019), <https://www.fne.gob.cl/wp-content/uploads/2019/01/Informe-de-aprobaci%C3%B3n-F-161-2018-censurado.pdf>; Cofece, *Versión pública de la resolución del expediente CNT-161-2018*, <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6008/9/4845885.pdf>. Cornershop is an online platform that sells fresh produce from supermarkets and specialty stores as a premium service. It has trained a group of highly specialized shoppers who contact consumers to verify orders, modify products chosen according to availability and deliver produce within 90 minutes (sometimes 30 minutes) of the order being placed. In addition to the shoppers, Cornershop displays the products in its platform and charges a percentage (between 10 and 20 percent) on products sold through its platform by firms that are not members, in addition to delivery charges; for those firms that enroll as members, Cornershop only charges for delivery — these can be waived depending on the size and speed of delivery.

6 This number is an estimate based on Mexico's market study for agroindustry, using the 2014 information and imputing the growth rates it estimates for the 5 supermarket chains listed there (Walmart, Soriana, Chedraui, La Comer and OXXO). See Cofece, *Reporte sobre las condiciones de competencia en el sector agroalimentario*, at 360, [https://www.cofece.mx/cofece/images/Estudios/COFECE\\_reporte\\_final-ok\\_SIN\\_RESUMEN\\_baja\\_RES-7enero.pdf](https://www.cofece.mx/cofece/images/Estudios/COFECE_reporte_final-ok_SIN_RESUMEN_baja_RES-7enero.pdf). We are coauthors to the study informing the supermarket portion of Cofece's study, Delgado, Mariscal & Elbittar (2015).

7 This number comes from Cofece's study, which estimates that in 2014 only 18 percent of households made their food and fresh produce purchases in the modern distribution channel (supermarkets and convenience stores). See Cofece, *supra* note 6, at 349-50.

8 Ximena Leyva, *Amazon inaugura su centro de distribución en México*, EXPANSION.MX (July 31, 2019), <https://expansion.mx/tecnologia/2019/07/31/amazon-inaugura-su-centro-de-distribucion-en-mexico>.

9 See *Online Grocery in Mexico*, EUROMONITOR INTERNATIONAL (July 2018); see also Nathan Lustig, *An Overview of Latin America's Food Delivery Industry*, NATHANLUSTIG.COM (January 3, 2019), <https://www.nathanlustig.com/an-overview-of-latin-americas-food-delivery-industry/>, although some of its information is no longer accurate, as the industry has changed since the article was written January 2019.

10 The investment was made by SoftBank Group, which will be used to expand the presence of Rappi in the markets in which it currently has a presence as well as to expand to others. See Carolina Mandl, *Japan's SoftBank invests \$1 billion in delivery app Rappi*, REUTERS (April 30, 2019), <https://www.reuters.com/article/us-softbank-investment-rappi/japans-softbank-to-announce-1-billion-investment-in-delivery-app-rappi-on-tuesday-report-idUSKCN1S619Y>.

11 According to the Director of Marketing and Communication of La Comer, its strategy is to encourage the use of his own application and stop using the services of third parties. See Rosalía Lara, *LA COMER ROMPE CON CORNERSHOP Y ACELERA EN SU PROPIO CANAL DE E-COMMERCE*, EXPANSION.MX (October 10, 2018), <https://expansion.mx/empresas/2018/10/10/la-comer-rompe-cornershop-y-acelera-en-su-canal-e-commerce>.

Other objections mentioned by the authority and which would raise concerns, included the use of competitor data in a marketplace owned by the largest player as well as privacy issues relating to users' information. Both of these concerns are similar to more general theories of harm posed in digital markets everywhere in the world, for example, the very recent antitrust probes into Amazon's relationship as a marketplace with sellers that have come under scrutiny by German and Austrian competition authorities and is now settled.<sup>12</sup> Similar concerns have now been taken up by DG Comp.<sup>13</sup> For these theories of harm, there is little to be gained in making a distinction between a developed and a developing economy: the potential antitrust harm needs to be carefully studied and controlled if it is considered a problem.

A final note in this section, how analysis is undertaken in developing jurisdictions does require careful access and use of more detailed information about the distinct populations, users, clients, advertisers, and general economic agents at risk from a transaction. Trying to gauge harm from general, aggregated, and average statistics, especially when there is more inequality, may not only paint an inaccurate picture of the dynamics underlying the different markets, but may in fact ignore anticompetitive effects that do harm certain users or firms and which require speedier and stronger intervention. The probability of harming distinct populations by basing policy decisions on information that treats them all as equal and working with averages is greater the more unequally distributed is income, ethnicity, opportunities, access to markets, education, etc. elements that tend to characterize developing countries. This situation points to the importance of more microlevel data gathering efforts in developing countries, not just by government agencies but by private parties as well.

We tend to associate the growth of digital markets with increases in volumes of data generated that result from more virtual interactions, and all of this data being carefully organized and analyzed using artificial intelligence and sophisticated algorithms. Again, while this is the case in more mature, sophisticated markets, when few users participate in the online world to undertake "real world" transactions — purchases, banking, government services, etc. — and where businesses are focusing their efforts and investments in having an online presence and not necessarily in gathering online intelligence to grow, data gathering efforts appear to be low in their lists of priorities.

### III. CONCLUSION

As competition authorities in less mature economies become more demanding in their data requirements for economic agents participating in digital markets, there should be a greater need to more carefully gather, clean, structure, and analyze information. Of course, the existence of publicly available information that is sufficiently disaggregated, recent enough to be useful, internally consistent and that can be comparable with past information in order to ascertain trends will be increasingly important. Public information provides a crucial, detailed context from which a reasonable narrative can be built and verified with private parties' information.

Furthermore, a lack of information, particularly in the context of digital markets, means that there is no scope for empirically testing theories of harm advanced by authorities or by parties, and many of these theories of harm tend to be forward-looking and difficult to measure. Lack of detailed information also limits the possibility of justifying broad or narrow relevant markets using empirical evidence or determining whether broadening the scope of analysis, for example, is important when there is reason to believe linkages may result in harm to adjacent markets or reduction in the pace of innovation.

Reasonable economic arguments can, of course, be used in place of data when it is not available — but they cannot be tested. This is hardly the evidentiary standard we should be striving for in any market, let alone digital markets where our ability to look forward into the future can lead us to any possible outcome, including science fiction.

12 In November 2018, the Bundeskartellamt initiated abuse of dominance proceedings against Amazon to examine its terms of business and practices towards sellers on its German marketplace amazon.de. On July 2019, the Bundeskartellamt announced the end of the proceeding, as result, "Amazon will adjust its terms of business for sellers active on its marketplace for the German marketplace amazon.de, for all European marketplaces and marketplaces worldwide including those in North America and Asia (...). The amendments address the numerous complaints about Amazon that the Bundeskartellamt received from sellers. They concern the unilateral exclusion of liability to Amazon's benefit, the termination and blocking of sellers' accounts, the court of jurisdiction in case of a dispute, the handling of product information and many other issues." Bundeskartellamt, Press Release, *Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces* (July 17 2019), [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/17\\_07\\_2019\\_Amazon.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/17_07_2019_Amazon.pdf?__blob=publicationFile&v=4).

13 In July 2019, the European Commission opened an antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules. See EU Commission, Press Release, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon* (July 17, 2019), [https://europa.eu/rapid/press-release\\_IP-19-4291\\_en.htm](https://europa.eu/rapid/press-release_IP-19-4291_en.htm).



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