



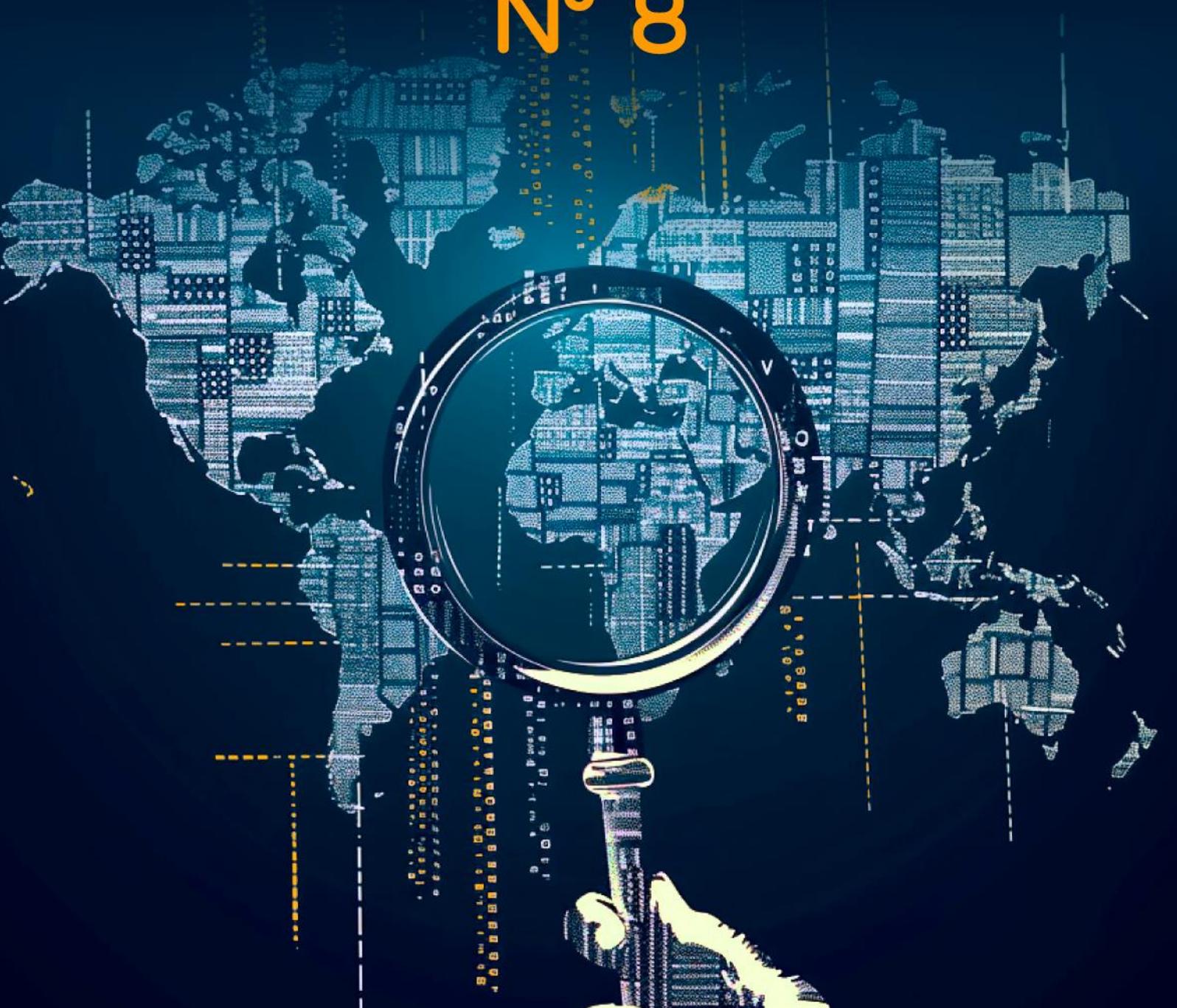
# RCC

The OECD Regional Centre for  
Competition in **Latin America**

Lima - Peru

# NEWSLETTER

## N° 8



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## Foreword

Lima/Paris, December 2023

Dear readers,

The OECD Regional Centre for Competition (RCC) in Latin America, known as “RCC-Lima” in the region, enters its fifth year and have been focusing on capacity building activities for competition officials, regulators and judges from Latin America and the Caribbean.

In September 2023, an excellent news: the Memorandum of Understanding between the OECD and INDECOPI that establishes the RCC was renewed for additional 5 years. The signing ceremony took place in Lima, in the presence of the OECD Secretary-General, the Peruvian Prime-Minister, the Peruvian Minister of Foreign Affairs, and INDECOPI’s President. Their presence sends a strong message of support to the RCC activities and commitment to competition policy in Peru and in the region.



Indeed, the year of 2023 was another excellent year for the RCC and beneficiary countries: in total, the RCC activities benefited **406 participants** from **24 countries** and **3 regional organizations** of **Latin America and the Caribbean**.

As in past editions, this Newsletter is divided into three sections including a summary of the past RCC workshops, updates of the OECD projects in the region (Session I), an exclusive interview with a head of agency from the region (Session II), and contributions of competition experts from the region (Session III).

Please feel free to contact us for any information, suggestions or assistance. Enjoy your reading!

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*This Newsletter benefited from the careful review and assistance from Arturo Chumbe (INDECOPI) and Marcelo Guimarães (OECD).*

## Section I: RCC activities and updates

### RCC activities

#### *Workshop on “Market Studies” (13-14 September 2023)*

The Workshop on “Market Studies” (13-14 September 2023) gathered **37 participants** from **16 jurisdictions** in Latin America and the Caribbean (Barbados, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Paraguay, Peru, Uruguay, Trinidad and Tobago, Andean Community and OECS), mainly competition officials.



Throughout the workshop, competition experts from several jurisdictions shared their experiences on market studies, also in light of the OECD Market Studies Guide for Competition Authorities, concluding that market studies are a versatile tool for competition authorities to analyse whether there are competition problems in a sector, outside the context of a merger review or antitrust investigation. It targeted senior competition officials particularly those leading or involved with market studies (e.g. heads of economics department).

#### *Workshop on “Key Challenges for Merger Control Regime” (15-17 November 2023)*

The Workshop “Key Challenges for Merger Control Regime” (15-17 November 2023) gathered **36 participants** from **17 jurisdictions** in Latin America and the Caribbean (Argentina, Brazil, Chile, Costa Rica, Curacao, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, Andean Community and CARICOM), mainly competition officials.



The workshop explored the key challenges of new merger control regimes including aspects related to notification thresholds, filtering complex and non-complex cases, market definition tools, competition analysis, defence arguments, and remedies. Practical tips and exercises remained at the core of discussions. Participants also had the opportunity to share their experiences and contribute to building knowledge and trust relationship in the region. It targeted senior officials from competition authorities that have recently implemented (or plan to implement) new merger control regimes.

#### *Planning for 2024*

The following events will focus on the following topics and will be hosted by INDECOPi in Lima:

Date		Topic	Audience
1.	13-15 March	<b>Workshop on “Due Process and Procedural Safeguards in Competition Cases”:</b> it will cover due process and procedural safeguards including transparency in competition cases. It will benefit from the recently adopted OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement (2021).	The main audience is senior and mid-level competition enforcers from the region in charge of cartel and abuse of dominance cases.
2.	5-7 June	<b>Workshop on “Enforcement tools and techniques to fight cartels”:</b> it will provide an overview of available enforcement tools and techniques to fight cartels including the use of big data to detect possible infringements and gather evidence.	It targets senior competition enforcers from the region involved in the investigation of cartel cases.
3.	12-13 September	<b>Workshop on “Competition Law for Judges”:</b> it will provide an overview of competition law for judges of the region including main enforcement areas (e.g. merger control, cartels and abuse of dominance) and key challenges of judicial review (e.g. judicial requests for dawn raids, interim measures, and judicial standards to review administrative sanctions).	The main audience is judges involved or interested in competition law enforcement in Latin American jurisdictions.

4.	8-10 October	<b>Heads of Agency Meeting during the Latin American and Caribbean Competition Forum (LACCF):</b> it will gather heads of competition authorities from the region, and serve to present the RCC activities, collect inputs for future topics and promote exchanges at high-level senior officials.	The main target audience is of heads of competition authorities from Latin America and the Caribbean.
5.	20-22 November	<b>Workshop on “Economics of Competition Law”:</b> it will cover both the fundamentals of economics for competition law, in addition to key special topics such as monopsony power, economics of digital platforms, efficiency defences, and quantification of competition benefits.	It targets chief economists and senior economists from competition authorities of the region.

## OECD regional updates

### *Accession countries*

In January 2022, the OECD Council decided to open accession discussions with six candidate countries to the OECD including **Argentina, Brazil** and **Peru** from Latin America. In June 2022, the OECD Council adopted individual Accession Roadmaps for **Brazil** and **Peru**, setting out the terms, conditions and process for accession. Positive discussions continue with **Argentina** on next steps. In September 2022, **Brazil** submitted an Initial Memorandum to the Secretary-General setting out a first self-assessment of the alignment of Brazil’s legislation, policies and practices with each OECD legal instrument in force that applies to all OECD Members. In June 2023, Peru also submitted its Initial Memorandum. The overarching objective of the accession process is to support candidate countries in identifying how they can deliver better results for their people by moving closer to OECD standards, best policies and practices. Throughout the accession process, the OECD will work closely with each of the candidate countries to support the adoption of long-lasting reforms to align with OECD standards, best policies and best practices. Further information including the Accession Roadmaps may be accessed [here](#).

### *Country Projects on Public Procurement*

The OECD is committed to supporting governments to design public procurement procedures that promote competition and reduce the risk of rigging bids and training the public sector in detecting bidding cartels. The OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the OECD Recommendation on Fighting Bid Rigging in Public Procurement. In Latin America, **Argentina, Brazil, Mexico** and **Peru** have sought the OECD’s support to improve their procurement practices and step up their fight against bid rigging.

### *Country Projects on Competition Assessment*

**Brazil** has requested the support of the OECD to conduct a competition assessment of the laws and regulations in the transportation sector including ports and civil aviation sub-sectors. The project started in January 2021 and the final report was launched in September 2022, during the week of the LACCF, in Rio de Janeiro, Brazil. The assessment involved the screening of 230 pieces of legislation using the OECD Competition Assessment Toolkit, revealing 550 potential barriers to competition. The report submits 368 recommendations that can mitigate harm to competition. The OECD has also evaluated the impact that the implementation of specific recommendations would have on the economy and a conservative estimate indicates savings between BRL 700 million to BRL 1 billion a year in the benefit of Brazilian consumers. The final report is available [here](#), in English and Portuguese.

**Colombia**, via its National Department of Planning (*Departamento Nacional de Planeación*, DNP) carried out a competition assessment exercise in the beverages sector with the support of the OECD. The project started in August 2021 and ended in November 2022, with the publication of the final report. While DNP led the project, the OECD provided technical support, including advisory calls, feedback on the outputs produced, and capacity-building workshops for DNP and other public bodies. Following the OECD Competition Assessment methodology, DNP assessed 79 pieces of legislation and identified 37 barriers to competition. After finding the policy objectives of those regulations, DNP presented more than 20 recommendations to make the legislation in the beverages sector more pro-competitive. The project also prepared Colombian officials, particularly those of DNP, to conduct competition assessments in other sectors autonomously. The final report is available [here](#), in Spanish.

Similar exercises have been done in **Mexico, Portugal, Iceland** and **Greece**, amongst other countries. For further information [here](#). They review the existing legislation and regulation in the selected sectors, and propose pro-competitive reforms, in line with the [OECD Recommendation on Competition Assessment](#) (2009).

### *Latin America and the Caribbean Competition Forum (LACCF)*

The **LACCF 2023** took place in Quito (Ecuador) on 28-29 September covering three substantive sessions: (i) Competition and Poverty; (ii) Peer Review of Dominican Republic's Competition Law and Policy; and (iii) Competition and Sports. In total, 170 participants attended the LACCF including 61 in person in Ecuador and 109 virtually given the hybrid format adopted for this year, from more than 20 countries. The launch of the Peer Review took place on 22 January 2024 in the Dominican Republic.

The **LACCF 2024** will be held in Santo Domingo (Dominican Republic) and hosted by Pro-Competencia. More information of the LACCF including agendas, OECD background notes and country contributions are available at the LACCF website: <https://www.oecd.org/competition/latinamerica/2023forum>.

## **Section II: Interview with heads of agencies**

*Interview with Mr. Eduardo González, President of CONACOM in Paraguay*

**EDUARDO GONZÁLEZ** was appointed President of the *Comisión Nacional de la Competencia* (CONACOM) on 1 August 2023 for two years. He is an economist by training with a BA in Catholic University in Paraguay, and Master Degree in Economics, Regulation and Competition for the University of Barcelona as well Postgraduate studies in Data Analytics and Artificial Intelligence. He also held senior management positions before joining CONACOM such Director of the Water and Sewerage Services Regulatory Authority (ERSSAN) and the National Telecommunications Commission (CONATEL), as well as President of the Paraguayan Communications Company (COPACO). Finally, he also teaches in the MBA and Government programs at the Universities in Paraguay and Argentina.

**Paulo Burnier:** **First of all, congratulations for your recent appointment. We are delighted to continue to work with CONACOM under your leadership. Paraguay recently underwent a UNCTAD Peer Review on Competition Policy: could you share with us the main conclusions and recommendations?**

**Eduardo González:** Paraguay underwent a Peer Review between 2022 and 2023 coordinated by UNCTAD to undergo a review of competition policy and law in the country, coinciding with the tenth anniversary of the enactment of the first competition defence law in Paraguay.

The peer review recommendations cover normative and institutional operational aspects. In terms of antitrust regulations, the main recommendation is the establishment of a leniency or whistleblower program, currently not provided for in Paraguayan regulations, which could enhance investigations into collusive conduct.

Another recommendation is to no longer assess possible efficiency gains and to prove the effects of practices in cases of hardcore cartels (such as those formed to fix prices, limit production, allocate zones or market shares, or affect the outcome of bidding processes).

Procedural recommendations have also emerged, proposing the elimination of issues such as prior approval from the Board to initiate investigations; the requirement that abusive practices seek to obtain undue advantages and cause harm to others; and the possibility of providing a counter-caution to annul a precautionary measure.

The Peer Review also concluded that the timelines for investigations should be extended, and in cases where using the billing of companies or guilds is not feasible, a penalty mechanism based on units such as minimum wages should be established, in addition to corrective measures.

Regarding regulatory analysis, it has been recommended that regulations stipulate that public acts obstructing competition can be subject to investigations and judicial challenges by CONACOM. It has also been suggested that when a public institution receives legal advice, it should be obligated to report on the measures taken.

In terms of institutional framework, it has been proposed that the alternate member of the Board be part of the institution with exclusive dedication and remuneration, considering that currently, and based on existing regulations, they are not part of it.

The system for appointing members to the CONACOM Board was also observed, indicating that the incompatibility of members of the Qualifications Board, which appoints members, should be analyzed,

stating that they should not have pending cases or investigations before CONACOM, a matter that could be reviewed to strengthen the independence and impartiality of the institution.

**Paulo Burnier: Thank you, this is very interesting and helpful. In this context, could you also share with us what will be the main priorities and key challenges for CONACOM in the coming years?**

**Eduardo González:** One of the main challenges will be promoting the implementation of the Peer Review recommendations. Some issues can be addressed within CONACOM's budgetary possibilities, but some require regulatory modifications that involve actions in other areas of the Paraguayan State. We are aware that this work may require continuous monitoring for several years, but we will do it convinced that the peer review recommendations aim to improve competition conditions in the country.

We are working on developing an artificial intelligence system using machine learning and deep learning techniques to find evidence of possible anticompetitive behavior in public procurement. We believe this could increase efficiency in public spending and benefit from higher levels of competition. We are also planning to enhance international cooperation efforts, continuing exchanges of experiences with competition authorities from the region and the world, either through international forums or through bilateral or multilateral mechanisms. In this regard, I would like to mention that, under the rotating presidency of Mercosur, which corresponds to Paraguay in the first semester of the year, we will continue efforts for the full reactivation of Technical Committee No. 5 "Competition Defense" of the Mercosur Trade Commission, which we hope can meet in person for the first time since the pandemic.

Administratively, it is important to remember that CONACOM remains a young competition authority, so one of our priorities is to continue the institutional consolidation process, for which we plan to carry out activities to improve the institution's information technology infrastructure and continue incorporating key personnel for different areas of the institution.

**Paulo Burnier: CONACOM has had an active participation in OECD activities in recent years, including the training activities of the Regional Center. How can the OECD continue to better support Paraguay's competition policy needs?**

**Eduardo González:** Firstly, we take this opportunity to thank the OECD for providing us with the opportunity to contribute to the dialogues and debates organized on competition matters, as the various topics addressed help us understand international standards alongside those currently shaping competition policies at the regional and global levels.

They have also given us a platform, the Regional Center for Competition (RCC), to learn and share our own experiences that may interest other agencies, leading to enriching our relationships with other competition agencies in the region.

We would appreciate it if the OECD continues with training activities that achieve these two objectives of training institution officials and promoting socialization among agencies.



The OECD can also assist with technical support for CONACOM projects. We are convinced that the organization's support will contribute significantly to the efficient development of projects such as the preparation of guides and instructions, the implementation of artificial intelligence systems, or the design and execution of market studies.

In the institution, we highly value the OECD's experience in competition matters, as evidenced in various internal working products citing OECD documents, and we believe that any collaboration will result in improvements that will allow us to effectively fulfil our institutional mission.

## Section III: Contributions from experts

### **Chile: FNE's Market Study on the Gas Industry: Study, Influence and Lessons**

*by Felipe Castro Altamirano<sup>1</sup>*



#### **Introduction**

From November 2020 to December 2021, the National Economic Prosecutor's Office of Chile (FNE) undertook a market study on the Chilean Gas Industry. This work revealed unique aspects of the sector that dampened competitive intensity among players and suggested a range of recommendations to enhance the market's functioning. The outcomes and proposals of this study have significantly influenced the policy landscape, with key reforms currently under legislative discussion. Beyond its policy impact, this endeavor has provided the Office with valuable insights on how to effectively further its advocacy objectives.

#### **The Study**

The study examined the natural gas (NG) and liquefied petroleum gas (LPG) markets, encompassing the importation, wholesale, and retail distribution phases. To evaluate the hypotheses under consideration, the research team gathered a diverse array of information. This included detailed data capturing the behavior of market participants over a decade, interviews with a variety of stakeholders, like regulators, industry experts, and market agents, as well as a review of the relevant academic literature. In addition, the team analyzed both national and international regulatory frameworks applicable to the gas industry.

#### **Liquefied Petroleum Gas Market**

In the case of the liquefied petroleum gas market, we found a lack of competitive intensity at the wholesale distribution level. Our analysis indicated that vertical restraints (specifically, exclusivity clauses) and vertical integrations between wholesale incumbents and retailers were dampening competition and fostered an environment that had an elevated risk of coordination.

The wholesale segment of the Chilean LPG market had several features that signaled a lack of competition intensity and others that made it prone to coordination. The study identified three in the first group. A highly concentrated market structure, dominated by three major firms, each holding approximately one-third of the domestic market; market shares that remained stable, with no

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significant fluctuations throughout the analysis period; and the absence of significant entries or exits during this time. In the second group, enhancing the risk of coordination, the research pointed out that incumbents distributed a homogeneous product and had significant multimarket contact. It also showed that they offered a similar assortment of cylinders, implying a considerable degree of symmetry. Finally, the study observed that the demand faced by these companies was both stable and highly seasonal.

Given these findings, the team explored more in depth the competition intensity of the wholesale segment and its coordination risks. It executed two analyses. One explored the cost pass-through behavior of the wholesalers and the other tested the coordination risks based on the dynamics of the margins—defined as the selling price minus the per unit cost of the main input (the LPG). During our study window, the margins rose sharply in some relevant customer segments. Our cost past-though analysis suggested that this resulted from significant fluctuations across time in the price of the main input, together with the phenomenon of rockets and feathers, in which prices tend to rise like rockets, in the face of an increase in costs, and fall like feathers when there is a fall. While this is a phenomenon that happens in many markets, it is accentuated when competition levels are weak. In Chile, this phenomenon was particularly pronounced, when compared to what has been documented in the literature. As for the coordination risk test, we found that the margin dynamics were inconsistent with a non-cooperative equilibrium.

The study also found that there was a significant level of de facto downstream vertical integration. Although only one of the major companies was integrated, the others required exclusivity from their retail distributors. While ex-ante this is not problematic, given previous findings, the vertical integration could have been increasing coordination risks and lowering competition intensity of the wholesale segment.

Consistently, we recommended separating the wholesale from retail distribution of LPG. With this, we hoped to boost the competitive level of the market by facilitating wholesale entry and reducing the risk of coordination by increasing the bargaining power of retailers. We estimated that this reform could generate aggregate savings of over US\$ 181 million annually.

### **Natural Gas market**

In the natural gas market, the study arrived at two significant conclusions, addressing both the transport and distribution segments. Regarding transport, it was observed that relevant sections of the pipelines were underutilized, with market participants expressing challenges in gaining access. Notably, a lawsuit, currently under consideration by the Supreme Court, involves a dispute between a terminal and a transport company. Furthermore, an examination of the regulatory framework revealed an inadequacy in the details of the access regime. While it mandated concessionaires to provide pipeline access to third parties, it lacked clarity on the operationalization of this requirement. At the distribution level, we detected a legal loophole in the transitory regime of the Law N°20.999, enacted in 2017, that introduced a methodology to calculate a maximum profitability rate for NG retailers and imposed sanctions for exceeding it. This gap allowed a retail company to bypass the regulation by separating into two firms: one that imported and marketed NG in Chile (a supplier) and another that distributed it at the retail level. Although this separation should not have been problematic, since the regulation obliged the retailer to openly tender gas supply contracts, the transitory regime allowed the main supply contract to be assigned to the related company. This agreement, which runs until 2030, was designed to artificially raise the costs of the retailer by re-contracting the natural gas supply at a higher price, thereby diverting profitability to the supplier. This maneuver resulted in a significant cost increase compared to other gas distribution companies,

demonstrating a strategic exploitation of the transitional provision to bypass the profitability regulation.

As for our recommendations, at the transport level, we proposed a series of measures that sought to better operationalize the current access regulation. These included specifying when it is appropriate to grant access and when it is not, the interconnection procedure, and a pricing method. In addition, we recommended empowering the sectoral regulator to intervene in a request for access and proposed a dispute resolution mechanism. At the distribution level, we recommend repealing the items that allowed the company to be supplied through a related company, without prior bidding. Besides, we recommended that the profitability calculation should consider all the stages, in the case of a NG conglomerate. We estimated that this second measure could reduce the prices paid by retail consumers by more than 10%, which in the aggregated would amount to US\$ 78 million annually.

### **Influence and Lessons**

The study's final report was published in December 2021. Following this, in January 2022, the administration presented a bill to Congress, integrating our recommendations for the LPG and NG markets. However, the succeeding government decided to withdraw this bill, favoring a separate approach for processing the LPG and NG projects. Presently, the legislative landscape comprises three proposals, an expert report, and there exist two legal actions. Pertaining to the NG market, there are two legislative initiatives. One involves a minor amendment in the calculation of profitability, aligned with our suggestions. The other, anticipated to be proposed in 2024 and guided by the expert report, aims for a significant overhaul of the NG distribution framework. Regarding LPG, it was not until June of this year that a bill featuring our recommended reforms was introduced. This bill is currently under review by a technical committee and is expected to be voted on in 2024. Lastly, there are ongoing legal proceedings initiated by consumer associations against a company identified in our report circumventing profitability regulations.

Our experience yielded several insights as well. One we would like to highlight is that forging a robust connection with sectoral regulators is crucial to increase the chance of significantly influencing public policy. This collaboration not only aids in crafting more refined hypotheses at the study's outset but also increases the probability of realizing administrative level reforms. Further, it offers essential support during legal reform processes. For instance, during the policy debate that followed our study publication, a frequent industry tactic involved alleging discrepancies between the study's calculations and those of the regulator. A close rapport with the sectoral authority proved instrumental in effectively countering such tactics.

## Ecuador: The Superintendence of Economic Competition and its Market Studies

by Ricardo Freire Granja<sup>2</sup>



### Introduction

Writing, for the first time, about the attribution of the Superintendence of Economic Competition (SCE—for its Spanish acronym)<sup>3</sup> to carry out market studies is to refer to a tool that has been improved during the last five years. The vision of Superintendent Danilo Sylva has been, from its inception until now, to strengthen advocacy activities to promote economic competition in the different Ecuadorian markets and, above all, guide the entities responsible for generating public policy and regulation in the enforcement of the principles established in the Ecuadorian Competition Law –Organic Law on Regulation and Control of Market Power (LORCPM<sup>4</sup>—for its Spanish acronym).

The path of improvement starts when as an institution we were evaluated with the Peer Review in 2019, held by the Organisation for Economic Cooperation and Development (OECD) and the Inter-American Development Bank (IDB), and its conclusions and recommendations at the beginning of 2021.

This examination has made several recommendations to Ecuador and its competition authority, which are important to remember to frame the topic that has been analyzed:

- **Establish and publish the criteria used to select the markets subject to study.**

*The effective selection of markets to study allows competition authorities to focus on the sectors that most require their attention. Currently, the SCE does not have criteria to guide the selection of markets. You must decide and publish those market research selection criteria with the purpose of identifying markets whose characteristics may indicate competition problems or regulatory inefficiencies or that have greater importance for the economy. The publication of these criteria*

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<sup>3</sup> Through the LORCPM reform of May 2023, done by the Ecuadorian National Assembly, the name of the competition authority was changed from the Superintendence of Market Power Control (SCPM) to the Superintendence of Economic Competition (SCE).

<sup>4</sup> Law approved by the Ecuadorian National Assembly at the end of 2011, for observation and immediate enforcement throughout the national territory.

would increase the transparency and predictability of the SCE. The SCE should continue to be allowed to investigate markets that do not meet the criteria, as long as it justifies its decision.

- **Continue improving the quality of market studies.**

*Most of the SCE's previous studies and reports were not dedicated to substantive economic or legal sectoral analysis. Newer market studies are better and more sophisticated: they identify their objectives, contain regulatory and economic analysis, reach useful conclusions, and provide recommendations. However, the SCE has made some recommendations that appear unusual from a competitive perspective and is encouraged to continue improving its market studies.*

## SCE Market Studies

Prior to and during the preparation of the peer review, the SCE identified the need to determine any possible competition or regulatory problems in two sectors, both related to farming and agriculture. The first study was called "Market Study of the Dairy Sector" (2019), and the other was "Market Study of the Sugar Sector" (2019). Both studies in 2020 generated recommendations from the Superintendent of Economic Competition to the different political, sectoral, and regulatory authorities to improve these markets with a vision of economic competition.

The studies primarily highlighted the lack of information among the different sectoral institutions and governing and regulating entities, which leads to errors when it comes to establishing public policy or assessing the need for regulation and its effectiveness. Furthermore, there is an inadequate legal application of the provisions established in the LORCPM for price regulation, i.e., there are no corresponding executive decrees, nor is there an exceptional or temporary price policy.

In Article 32, the LORCPM states that: *"It corresponds to the Executive Function<sup>5</sup>, on an exceptional and temporary basis, by means of Executive Decree<sup>6</sup>, the definition of price policies necessary for the benefit of popular consumption, as well as for the protection of national production and its sustainability. In the agro-food sector, mechanisms for the determination of reference prices may be established. The Superintendence of Economic Competition shall permanently examine the effects of the pricing policies authorized under this article. (...)"*.

It is important to highlight that, at that time, **we had already identified that one of the main factors distorting elements of market dynamics in Ecuador was the existing regulation<sup>7</sup>**. In general, the institutions with public policy issuing attributions or with sectoral regulatory competences have not considered the provisions of the LORCPM's "Fourth General Provision" regarding "Sectoral Regulation", nor the "Guidelines for Regulation and Principles for Enforcement" contained in Article 4 of the same Ecuadorian Competition Law.

During 2020, considering the COVID-19 health emergency, Ecuador recognized that public procurement policy was deficient in terms of implementation, monitoring, and sanctioning. In this context, the SCE determined the modification of the study plan to be developed. The new approach defined was the development of the "Market Study of the National Public Procurement System"

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<sup>5</sup> Presidency of the Republic and related institutions

<sup>6</sup> Only the President of the Republic can deliver executive decrees

<sup>7</sup> The SCE, through the Competition Advocacy Intendency, with the support of INDECOPi, was developing the "Methodology for the Identification, Review and Elimination of Regulatory Barriers", published in October 2020. <https://www.sce.gob.ec/sitio/metodologia-para-la-identificacion-revision-y-eliminacion-de-barreras-normativas/>

(2020) that would allow Ecuador to identify whether there are regulatory problems that affect the principles of economic and regulatory competition established in the LORCPM.

The "Market Study of the National Public Procurement System"<sup>8</sup> also provided the basis for the recommendations addressed by the Competition Superintendent in 2021 to the governing, regulating, and controlling body of public procurement, the National Public Procurement Service (SERCOP), which includes, among other fundamental recommendations, the following:

*"3. Design and implement methodologies and technological tools in public procurement processes that serve for the exercise of internal and concurrent control by SERCOP and that assist in the early identification of potentially anti-competitive or collusive practices, such as shareholding links, direction in processes, or subcontracting; first bid winners, false bids, or market sharing; and the creation of companies that obey simulated structures to distort competition. These methodologies and tools should be appropriately shared with the different contracting entities through training issued by SERCOP for their implementation and use in the contracting procedures they carry out".*

The SCE considered this recommendation as fundamental for a structural change to improve the execution of public procurement processes, observe the parameters established in the LORCPM, foster competition in the different markets, and above all, to guide public institutions' decision-making based on the analysis of public data<sup>9</sup>. The last point is highlighted in the following recommendations to SERCOP:

*"9. (...) the construction of an open data system with complete and updated information from the different sectors should be promoted, generated with the cooperation and participation of all actors (public or private) from the different sectors, and that allows for the articulation of all possible information in order to serve as input for the contracting entities in the preparation of the market studies that are carried out in the public procurement processes. SERCOP, for its part, should encourage, support, and control that the different contracting entities carry out the actions set out (especially) in the pre-contractual phase with greater rigor and compliance, without prejudice to the controls in the other phases of planning and contracting".*

The work conducted by SCE, up to that time, for market studies and for the application of other tools, showed that most state institutions with the capacity to generate public policy or issue sectoral regulations did not substantiate their decisions on concrete data or did not have up-to-date information. In addition, it is important to highlight the need for controls by the various sectoral regulatory and control agencies. The SCE requested information from public institutions that did not have the information, did not know how to process it, or had outdated information.

Therefore, in 2021, ARCOTEL, which is the institution responsible for the regulation and control of telecommunications, began the process of renewing the concession contracts of telecommunications operators that provide advanced mobile services, as well as mobile internet and other convergent services. Because of the importance of such processes for the national economy and the need to

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<sup>8</sup> This market study also led to the issuance of the "Guide to good practices for the prevention of collusive agreements between bidders in public procurement processes", issued in 2022 by SCE and sent to SERCOP for socialization with all contracting entities. <https://www.sce.gob.ec/sitio/guias-sce/>

<sup>9</sup> It should be noted that SERCOP is the administrator of the online portal in which all contracting entities are registered, and all public procurement processes are carried out at the national level.



encourage adequate connectivity in the country, the SCE conducted an analysis titled "Market Study on the Telecommunications Sector in the Country"<sup>10</sup> (2021).

This "Market Study on the Telecommunications Sector in the Country" also generated recommendations from the Superintendent of Competition addressed to the Telecommunications Regulation and Control Agency (ARCOTEL) and to the Ministry of Telecommunications, including:

*"1) Regarding the renewal of the concession contracts that are expected to be executed in 2023 with (...) through the renewal of the enabling title under the 'Regulations for Granting Enabling Titles for Services of the General Telecommunications and Radio Spectrum Frequencies Regime'.) through the renewal of the enabling title under the 'Regulations for Granting Enabling Titles for Services of the General Telecommunications and Radio Spectrum Frequencies Regime', that these processes be sufficiently open, so that there may be clear knowledge of the terms of negotiation thereof, so that society may verify that the granting of possible new concessions are carried out with the proper objectives and technical criteria, and under principles of transparency, honesty, integrity and healthy competition, in prevalence of national interests over private interests, and in order that the results of the negotiations derive in the maximization of the general welfare, mainly of the people, who according to Article 16 of the Constitution of the Republic of Ecuador have the right to:*

*Additionally, the terms to be agreed upon in the renewal processes may achieve, on the one hand, that the state will get important resources that will allow it to operate actions for the development of the country under the National Telecommunications and Information Technology Plan of Ecuador, and that because of the regulations to which sectors such as telecommunications are subject (and which could be part of the negotiations), citizens may have more adequate access to information and communication technologies of better quality, with greater coverage, and at more affordable prices.*

*All of which will enable Ecuador to make the technological progress necessary to reduce the digital gap, adequately promote connectivity, implement more and better digital processing and control systems, provide adequate access to open data and accountability to citizens, implement processes that will provide greater transparency in the various public actions of the state, and also enable adequate access to the various digital markets that are developing in the country, thus promoting their development and the innovation processes that contribute to strengthening the general welfare of citizens, users, and consumers in the country."<sup>11</sup>*

*"(2) Expedite the preparation and delivery of the Market Regulation, which, according to Article 31 of the Organic Telecommunications Law, the Agency must approve in order to, among other purposes, determine the relevant markets related to telecommunications services or network for establishing whether such markets are developing in an environment of effective competition, the characteristics of which may give rise to imposing obligations on providers with market power or preponderance and their related companies.*

*International best practices dictate that in order to determine whether an economic operator has a dominant position (or market power, as it is understood in Ecuador), it is necessary to first define the relevant market, since effective competition can only be evaluated based on this definition. Likewise, because of such a definition, the regulator may implement policies that, among other aspects, seek effective competition in the markets and establish technical, tariff, supply and use regulations, and service quality maintenance.*

<sup>10</sup> <https://www.scpm.gob.ec/sitio/no-026-la-scpm-presenta-el-estudio-de-mercado-del-sector-telecomunicaciones-y-emite-recomendaciones-a-arcotel-y-su-directorio/>

<sup>11</sup> Until November 2023, the renewal processes are suspended and the concession contracts have been extended.



*It should be noted that ARCOTEL is aware of this issue, given that in its Technical Report on the presentation of the draft regulation 'Market Regulation', it states that, for ex ante regulation, the definition of the wholesale or upstream markets is relevant, since in this way the authority may establish remedies or preventive and less burdensome measures aimed at avoiding any competition problem in the telecommunications sector.*

*Finally, in relation to the first recommendation, it should be considered that the Market Regulation could provide favorable references on the terms under which the renewals of the aforementioned licenses should be negotiated (...), especially considering that, under different criteria, they are the main economic operators in their line of business".*

*"3) Under the results developed under recommendation 1) and the analyses to be done with the preparation and issuance of the Market Regulations under recommendation 2), it will be important to review, reevaluate, and implement public competitive bidding processes (contests) for the granting of new radio spectrum frequency licenses to enable greater technical, social, and economic efficiency within the different related markets and to promote adequate and healthy competition in the different relevant markets identified."*

The referred study and its recommendations, besides seeking to understand the functioning of the telecommunications sector under the parameters established in the LORCPM, also seek to encourage renewal negotiations to be carried out under the parameters of transparency and, above all, to promote competition so that citizens receive more and better services at more convenient prices. But it also evidences and clarifies the diverse attributions that the regulatory and control body has, which have not been used for the benefit of the citizens; it clearly establishes that the adequate knowledge of the functioning of the different relevant markets entails the analysis of data to understand if the regulation generates barriers or encourages healthy competition and how the regulation must be evaluated to understand if it fulfills its objectives or if it must be modified and improved.

The latest study published by SCE is the "Market Study on Agrifood Chains" (2022). The study was developed in response to the social protests that took place in Ecuador in 2022. During these protests, state institutions and social organizations took part in working tables. The SCE was invited to two of these tables: the productive promotion and price control.

In the course of both roundtables, we again identified that the different sectoral public institutions, mainly those of the agricultural sector, did not have sufficient and updated information that would allow them to support technically the decisions necessary to issue public policy or sectoral regulation and even more worryingly, that there is confusion regarding the attributions and responsibilities of the different functions of the state and its institutions<sup>12</sup>. We also identified that the lack of activity of the regulatory and sectoral control agencies to enforce the existing regulation is one of the causes of the distortions that exist in the markets.

In summary, the following are some of the conclusions regarding this study:

- *The information about the producers, production, costs, prices, and location of primary sector actors that have AGROCALIDAD and MAG is incomplete and, sometimes, not available. It has been particularly aggregated so that it does not allow the identification of relevant variables such as those mentioned above.*
- *The country's last agricultural census was in 2000. The lack of information in all areas could have repercussions on the formulation and implementation of public policies, and such regulations would be designed and enforced based on insufficient market information.*

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<sup>12</sup> According to the Republic Constitution, the Superintendency of Competition, a supervisory entity, belongs to the Transparency and Social Control Function.

- *Some pricing policies related to the sector have been granted mostly by Ministerial Agreements, in breach of Article 32 of the LORCPM, which determines that they must be carried out through Executive Decree.*
- *Likewise, it was identified that these policies (whether implemented by Executive Decree or Ministerial Agreement) were not issued on an exceptional and temporary basis, as mandated by law.*
- *The issuance policies (without ignoring the importance of the objectives they pursue) could have negative effects on competition: (i) in some cases they would lead to excessive price transparency, which could contribute to the creation of coordination mechanisms between competitors; and (ii) the mechanisms for their establishment would have the possibility of fostering spaces that would potentially facilitate the exchange of information on production costs or on price fixing between economic operators.*
- *It was found that, in several cases, the authority did not have reports or documents that would have served as technical support for issuing the mentioned pricing policies.*
- *There is a broad regulatory framework that would allow state entities to grant public aid in the agri-food sector; likewise, it was evidenced both from the information submitted and from public information sources that programs, subsidies, and other forms of public policy that would fall into the category of public aid as determined in Article 29 of the LORCPM would be managed; however, none of this aid has been notified to the SCE to proceed, in accordance with its duties, with the evaluation of the same.*
- *In the country, the use of seed of the common category (which has not received any genetic treatment) prevails and, in exceptions, the improved one; the least used is certified seed, despite being the one that would guarantee an increase in yields. On the other hand, the basic seed or seed registered for multiplication was distributed among a small number of economic operators, which resulted in the concentration of this relevant production input.*
- *During the period 2017-2022, the total loans granted by BanEcuador to actors in the agricultural sector decreased (depending on the sector analyzed) substantially between 50% and more than 90%, even reaching 0 for some activities by the end of the period. On the other hand, with respect to loans channeled through second-tier banks, it was observed that the value of the interest rates that private banks and credit unions charged their customers compared to those that the CFN lent to these financial institutions was between 60% and 280% higher. This could reduce producers' access to credit.*
- *This study, as well as all those mentioned above, also generated recommendations from the Superintendent of Economic Competition to the various institutions related to the agricultural sector, including the Ministry of Agriculture and Livestock and the Presidency of the Republic<sup>13</sup>.*

## Conclusion

To sum up, regarding the two main recommendations made by the OECD in the peer review:

- It has been identified that Ecuador has several structural problems that can be summarized in the lack of adequate public policy (general and sectorial), and this has generated the existing regulation, which, in most cases, is part of or causes the distortions that exist in the different markets, preventing the development of competitive dynamics; therefore, it affects its

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<sup>13</sup>Study: <https://www.sce.gob.ec/sitio/wp-content/uploads/2023/10/Estudio-de-mercado-de-las-cadenas-agroalimentarias-del-Ecuador-SCPM-IGT-INAC-003-2022.pdf>.

Recommendations: <https://www.sce.gob.ec/sitio/wp-content/uploads/2023/10/RECOMENDACION-SCE-DS-2023-02.pdf>

efficiency. This means that the planning of our market research is currently focused on regulated markets that should improve the quality of life for citizens.

- The improvement of public policy in the agricultural sector, efficiency in public procurement, and connectivity have been considered fundamental by the SCE for improving the quality of life for citizens:
  - The agricultural sector is not only the source of food for citizens but also generates income for a large number of the population. It's the starting point of the agri-food chain.
  - Efficiency in public procurement, austerity, and quality purchasing mean that the limited resources of the state could be enough to cover more basic needs.
  - Connectivity entails the exercise of several rights, but it also encourages the development of new markets and leads to the improvement of others. The analysis of the data that is generated would also make it possible for public policy makers to offer better decisions, which can be evaluated constantly.
  - The SCE works in accordance with international best practices with the support of international organizations and peer institutions, looking for constant improvement.

## Mexico (IFT): Investigation in mobile operating systems market

by Mariana Palacios Díaz<sup>14</sup>



### Introduction

This paper addresses the main aspects of the investigation held by the Investigative Authority of the Federal Telecommunications Institute<sup>15</sup> (IFT, the acronym in Spanish of “*Instituto Federal de Telecomunicaciones*”), related to the mobile operating systems (Mobile OS) market. As a result of the investigation, the Investigative Authority of the IFT<sup>16</sup> issued the preliminary statement by which it concluded, among other facts, that there are elements to determine: (i) the nonexistence of effective competition conditions, as far as Mexico is concerned, in the relevant market of licensed Mobile OS, and (ii) that there are barriers to competition and free market access that generate anticompetitive effects, as far as Mexico is concerned, in such relevant market. Consequently, the Investigative Authority of the IFT proposed corrective measures to eliminate those barriers to competition and free market access and, thereby, eliminate restrictions on the efficient functioning of the relevant market of licensed Mobile OS

### Background

In Mexico, according to the Federal Economic Competition Law (LFCE, by the acronym in Spanish of “*Ley Federal de Competencia Económica*”), there is a special investigation proceeding to determine the existence or absence of effective competition conditions in a market, to establish the existence of barriers to competition and free market access or essential facilities that may generate anticompetitive effects in the market.

In this investigation proceeding, the authority must conduct an analysis to determine: (i) the existence or absence of effective competition conditions in a market, as stipulated in Article 59 of the LFCE, which mandates considering the criteria established by Article 58 of the LFCE, and (ii) the existence of barriers to competition and free market access, or essential facilities that generate anticompetitive effects in the relevant market.

In this context, in October 2020, the Investigative Authority of the IFT initiated a special investigation proceeding in terms of Article 94 of the LFCE, to determine the possible existence of barriers to competition and free market access that generate anticompetitive effects. The market matter of

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<sup>15</sup> According to the fifteenth and sixteenth paragraphs of article 28 of the Mexican Constitution, in Mexico, the IFT is the authority in matters of economic competition in the telecommunications and broadcasting sectors in the national territory.

<sup>16</sup> The Investigative Authority is the IFT’s body in charge of conducting the investigation stage and is a party to the trial-like procedure. In the exercise of its powers, the Investigative Authority shall be vested with technical and administrative autonomy to decide on its operation and resolutions.

investigation was Mobile OS. This investigation proceeding concluded in 2022, and in June 2023 the Investigative Authority of the IFT issued a preliminary statement by which it determined, among other facts, that there are elements to determine, as far as Mexico is concerned: (i) the nonexistence of effective competition conditions in the relevant market of licensed Mobile OS, and (ii) that there are barriers to competition and free market access that generate anticompetitive effects in the competition conditions in the relevant market of licensed Mobile OS.<sup>17</sup>

### **Elements of Analysis of the Investigative Authority of the IFT**

The main considerations by which the Investigative Authority of the IFT based its statement, were as follows.

Mobile OS is a system program designed to work with mobile devices and is a fundamental component for these devices to fulfill their functions; in addition, it serves as the link between the device and the final user. The provision of Mobile OS is part of the mobile ecosystem which also includes other markets such as the provision of smart mobile devices, mobile applications, app stores, the Application Programming Interface (API), and the Software Development Kit (SDK).

The provision of Mobile OS can be made through two methods: (i) Mobile OS offered to manufacturers of smart mobile devices under a license that allows them to preinstall the Mobile OS on the devices they produce, distribute and sell (such as Mobile OS “Android”), and (ii) Mobile OS preinstalled as an integrated complement in smart mobile devices developed by vertically integrated manufacturers of smart mobile devices that do not need a license (such as Mobile OS “iOS”). In this regard, only licensed Mobile OS is an option for the manufacturers of smart mobile devices that do not develop their own Mobile OS. Therefore, for the relevant market definition in the product market, the Investigative Authority of the IFT considered it appropriate that the focal product consisted only of the provision of licensed Mobile OS for smart mobile phones.

Given the above, following the provisions of Article 58 of the LFCE, the Investigative Authority of the IFT determined that the relevant market is the provision of licensed mobile operating systems for smart mobile phones and electronic tablets on a global geographic dimension, excluding China.

Regarding the product market, the substitution analysis led the Investigative Authority of the IFT to conclude that: (i) fixed devices operating systems are not substitutes for Mobile OS for smart mobile phones; (ii) Mobile OS for mobile phones with basic functions are not substitutes for Mobile OS for smart mobile phones; (iii) Mobile OS for electronic tablets are substitutes for Mobile OS for smart mobile phones, placing them in the same relevant market, and (iv) unlicensed Mobile OS are not substitutes for licensed Mobile OS.

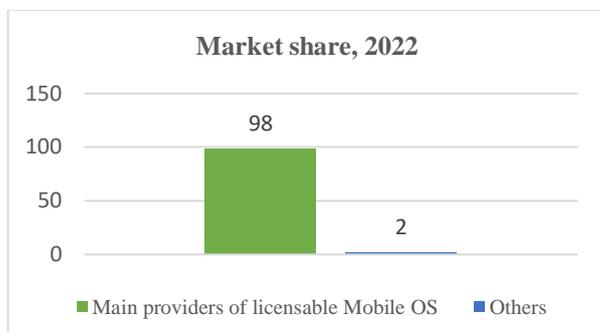
Concerning the relevant geographic market, the Investigative Authority of the IFT determined that the relevant market of Mobile OS provision has a global geographical dimension, excluding China, as the competitive conditions of licensed Mobile OS in that country differ from those observed in the rest of the world.

Once the relevant market was defined, the Investigative Authority of the IFT proceeded to analyze whether there were effective competition conditions in that market, according to Article 59 of the LFCE. As a result, the Investigative Authority of the IFT determined the absence of competition conditions in the relevant market of licensed Mobile OS in Mexico.

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<sup>17</sup> Currently, the procedure is in the trial-like procedure stage before the IFT’s Board of Commissioners issues their resolution.

Regarding the market share and the ability to fix prices or restrict supply in the relevant market, the Investigative Authority of the IFT observed that the main provider of licensed Mobile OS held a market share that represented almost the entire market:



IHH → ~10,000

Note: market share was calculated based on the number of active smart mobile devices, in the relevant market, from January to October 2022.

Source: own elaboration based on public information from OMDIA.

Likewise, the Investigative Authority of the IFT observed that: (i) licensed Mobile OS providers participating in the relevant market are relatively rare, and that (ii) regardless of the free nature of the main licensed Mobile OS, the main provider of this Mobile OS has been able to influence in variables on which it competes and has restricted the supply of licensed Mobile OS.

Regarding the existence of barriers to entry in the relevant market, the Investigative Authority of the IFT observed the existence of (i) high costs related to software development tools and the development of distribution channels; (ii) significant amounts and recovery periods for investments, (iii) intellectual property usage rights, (iv) the necessity for significant investments in advertising to position the brand or trade name of a Mobile OS, the mobile application store associated with the Mobile OS and even the brand of smart mobile devices on which the Mobile OS is preinstalled, and (v) various facts or acts by economic agents into the relevant market and in related markets that limit the entry of licensed Mobile OS into the relevant market.

In terms of the existence of barriers to competition and free market access that generate anticompetitive effects in the competition conditions in the relevant market, as far as Mexico is concerned, under the provisions of Articles 3, section IV, and 94 of the LFCE, the Investigative Authority of the IFT considered that there are facts or acts of an economic agent with the object or effect of preventing the access of competitors or to limiting their ability to compete in the relevant market, which also prevent or distort the competition and the free market access process. These facts or acts are grouped as follows:

- i. Barrier 1: contractual conditions that restrict the distribution channels of Mobile OS in the relevant market.
- ii. Barrier 2: contractual conditions that limit the ability of alternative Mobile OS providers to exploit the economies of scale and network effects that characterize the relevant market.
- iii. Barrier 3: contractual conditions that increase the switching costs for manufacturers of smart mobile devices in the relevant market.

The Investigative Authority of the IFT observed that the above is due to the contractual scheme designed to license the Mobile OS and to enforce various compatibility obligations of this Mobile OS.

Consequently, and following Article 94 of the LFCE, the Investigative Authority of the IFT proposed corrective measures to eliminate the barriers to competition and free market access that unduly affect the competition and free market access process and, thereby, eliminate restrictions on the efficient functioning of the relevant market of licensed Mobile OS.<sup>18</sup>

The Investigative Authority of the IFT considered that with the adoption of the proposed measures the identified barriers to competition and free market access can be eliminated, which could facilitate the entry of new suppliers or the expansion of competitors that already participate in the relevant market, particularly in the national territory. Likewise, the Investigative Authority of the IFT considered that these measures comply with the principles of effectiveness, efficiency, and minimum restriction.

### **Investigation Status**

By the time this paper was written, the investigation was in the trial-like procedure stage after the preliminary statement was rendered. This stage consists, among others, of the procedural opportunity given to the economic agents holding a legal right in the matter to state arguments and evidence deemed pertinent. Once this stage has been completed, the IFT's Board of Commissioners will issue its resolution. If the IFT's Board of Commissioners determines the absence of effective competition conditions in the relevant market of licensed Mobile OS, and the existence of barriers to competition and free market access that generate anticompetitive effects in that market, it may include in its resolution the corrective measures proposed by the Investigative Authority of the IFT to eliminate these barriers and their anticompetitive effects.

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<sup>18</sup> These measures will have applicability in the territory of Mexico. Due to the above and taking into consideration the principle of sovereignty and independence of the States, the scope and mandatory nature of the proposed measures can only be limited to the national jurisdiction of the IFT.

## Mexico (COFECE): Market investigations

by Jorge Guadarrama Gamboa<sup>19</sup>



### Introduction

This paper addresses market investigations in Mexico.<sup>20</sup> It is organised as follow: First, the paper describes the origin and nature of the procedure. Second, it analyses the concept of effective competition. Third, it explores some possible theories of harm that fit the procedure and possible corrective and preventive measures. Finally, the paper shows an example related to the aviation fuel market in Mexico.

### Barriers to competition

Article 28 of the Mexican Constitution states that “[...] COFECE shall have the necessary powers to effectively fulfil its objective, which shall include ordering measures to eliminate barriers to competition; regulating access to essential facilities; and ordering the divestiture of assets of economic agents to the extent necessary to eliminate anticompetitive effects”. The procedure for identifying and ordering measures to eliminate barriers to competition is implemented by Article 94 of the Federal Economic Competition Law.

The essence of this procedure is that it allows COFECE to provide an assessment of the effective competition conditions in a market; to identify the existence of barriers to competition, and the formulation of measures that could improve its market performance or prevent a greater anticompetitive effect, by removing these barriers. The nature of this procedure is investigative, preventive and corrective, but not accusatory. Therefore, the identification of competition problems or the imposition of remedies does not imply that the market participants have violated the law.

Article 3 of the Federal Economic Competition Law defines barriers to competition as: any structural feature of the market or conduct of economic agents, other than unlawful conducts, that have the purpose or effect of preventing competitors from entering the market or restricting their ability to compete in the market; or any legal provision that unreasonably hinder or affect the competition process in the markets. It is necessary to assess whether the barrier to competition leads to a lack of effective competition in the relevant markets.

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<sup>20</sup> Under Mexican law, this is known as the procedure to determine the existence of barriers to competition.

## Effective competition conditions

It can be interpreted as the greatest possible competition scenario in imperfect markets. This is because it is the most desirable form of competition among those that are possible in practice, within the limits set by unavoidable conditions.

The criteria for assessing the existence of effective competition conditions are set out in Article 59 of the Federal Economic Competition Law. These criteria include aspects such as market shares, concentration indices, the existence of entry barriers, the power of competitors, and other relevant factors. The key point is not to demonstrate that a single economic agent has significant market power, but that the market is not as competitive as it could be. In microeconomic theory, this is equivalent to the degree to which an industry has a high degree of market power, but not the degree to which a single firm exercises market power.

## Possible theories of harm

As mentioned above, barriers to competition have been interpreted as structural, behavioural or regulatory. In industrial organization theory, the performance of a market could be altered if there are barriers to competition in the market structure, in the behaviour of the participants or in government regulation. Here are shown some examples of issues that could be barriers to competition, mainly based on economic theory.

**Structural barriers:** There are some structural characteristics of markets that can act as barriers to competition, such as market concentration, vertical integration, barriers to entry and expansion, switching costs and cross-ownership and links between competitors. In this case, the imposed measures must change the market structure in order to allow competition.

**Behavioural barriers:** There is not a list of conducts. However, it may be possible to investigate either *i)* anti-competitive conducts that are not included in the list of unlawful abuse of dominance practices; *ii)* anti-competitive conducts not included in the list of unlawful collusive practices, and *iii)* anti-competitive conducts done by several agents who do not have significant market power but operate in a market where there is not effective competition.

**Regulatory barriers:** Government actions can alter market structures or influence the behaviour of the economic agents participating in them, often driven by the goal of protecting or promoting certain public policy objectives or goods, such as health, safety, the environment or other social or economic objectives. This is the reason why any such restriction must be unreasonable. Examples of such unreasonableness include: *i)* limiting the number or size of competitors; *ii)* limiting the ability of agents to compete; *iii)* reducing agents' incentives to compete, and *iv)* limiting the choices and information available to consumers.

## Measures

After identification of the barriers to competition and their effects in the relevant markets, the Investigative Authority will propose remedies that can remove the barriers to competition to allow effective competition and avoid major anti-competitive impact. These measures may include recommendations to public authorities to modify the law, orders to economic agents to change their behaviour, and measures to adjust the market structure, for example by divesting assets.

Following a procedure in which economic agents can make their views known, the Board of Commissioners of COFECE adopts the definitive measures. Sectoral regulators may also be consulted, and economic agents may even have their own proposals for measures.

The corrective measures to be imposed must comply with the following requirements:<sup>21</sup> *i)* effectiveness: the proposed measures must be effective in removing and preventing the anti-competitive effects, restrictions on the efficient functioning of markets or conditions of access to the essential input; *ii)* efficiency: they must lead to efficiency gains; *iii)* least restrictive: they must be the least burdensome or restrictive of the effective measures, and *iv)* proportionality: they must be proportionate to the competition problem identified.

### **Case: Barriers to competition in the aviation fuel market in Mexico<sup>22</sup>**

In March 2023, COFECE identified the existence of barriers to competition leading to the absence of effective competition conditions in several relevant markets of the aviation fuel value chain. The identified barriers to competition were:

1. The existence of legal provisions of the import licensing regime that limit the entry and permanence of economic agents in the market.
2. The scarcity and lack of access to external storage infrastructure for aviation fuel.
3. Most of the external storage capacity in the country is contracted to the state-owned company Pemex Transformación Industrial (Pemex TRI) and there are no limits on its reserve capacity, which restricts the entry of competitors.
4. Aeropuertos y Servicios Auxiliares (ASA) is vertically integrated in secondary commercialization and in into-plane service, and has not completed its functional, operational and accounting separation.
5. Some concession titles for the operation and management of airports contain exclusivity clauses in favour of ASA for the provision of internal storage and distribution services.

Consequently, COFECE issued recommendations to the Energy Regulatory Commission, the Ministry of Economy, the Ministry of Energy, the Ministry of Infrastructure, Communications and Transport, the Ministry of Finance and Public Credit and the Ministry of Public Function; and ordered to ASA to take measures to restore conditions of effective competition in these markets.

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<sup>21</sup> In accordance with article 94, section III and the last paragraph of the LFCE and article 12 of the regulatory provisions.

<sup>22</sup> The extract of the preliminary opinion can be found at <https://www.cofece.mx/wp-content/uploads/2022/03/DOF-30marzo2022-01.pdf>



## Future implications

This tool was introduced into the Mexican legal framework 10 years ago. Therefore, it can be said that COFECE's experience in using this tool is still evolving. Currently, three investigations are underway in the markets of retail e-commerce,<sup>23</sup> intercity bus passenger transport<sup>24</sup> and corn flour production and distribution.<sup>25</sup> I personally believe that these investigations will incorporate the experience gained over these 10 years and will make a significant contribution to the improvement of social welfare in Mexico in the coming years.

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<sup>23</sup> The extract from the opening of an investigation is available at <https://www.cofece.mx/wp-content/uploads/2022/03/DOF-31marzo2022-01.pdf>

<sup>24</sup> The extract from the opening of an investigation is available at <https://www.cofece.mx/wp-content/uploads/2022/06/23.06.22-IEBC-003-2022-AINI-extracto.pdf>

<sup>25</sup> The extract from to the opening of an investigation is available at <https://www.cofece.mx/wp-content/uploads/2022/11/DOF-23noviembre2022-01.pdf>

## Competition and Poverty: What Advocacy Can Competition Authorities Undertake?

by Taimoon Stewart (University of West Indies)<sup>26</sup>



In this paper, I interrogate the given thinking on how competition authorities could intervene through advocacy to address poverty. My focus is on mitigating the impacts of extreme poverty as distinct from poverty reduction, the former being improving conditions of those living in extreme poverty (in which basic needs cannot be met) while the latter addresses a percentage reduction in the numbers who are poor. I acknowledge that both are inter-related and important interventions in the fight against poverty. I propose from the outset that one cannot discuss poverty without a discussion of the informal sector, because this is where the dire poor scratch out a meagre living.<sup>27</sup>

### A Snapshot of Poverty in Latin America and the Caribbean (LAC)

Chart 1 below provides a snapshot of the size of the informal sector in LAC.

**Chart 1: Employment in the informal Sector as a percentage of total employment**



<sup>26</sup> Honorary Research Fellow, University of West Indies. This contribution was presented at the Latin American and Caribbean Competition Forum (LACCF) in September 2023 in Quito, Ecuador.

<sup>27</sup> I wish to thank Judith Wedderburn, an academic and activist who works closely with the marginalized communities in Jamaica, and David Miller and Kevin Harriott of the Jamaica Fair Trading Commission for information and insights on poverty and the informal sector in Jamaica. Thanks to Troy Waterman of the Barbados Fair Trading Commission, and to Winthrop and Rosina Wiltshire for their comments.

## Observations

It is of note that the countries with the largest numbers of informal workers (as illustrated in Chart 1 above) are also the countries with the most volatile political situations. For instance, Costa Rica has the lowest poverty rate in LA of 23% of which 17.7% are poor while 5.7% are in extreme poverty<sup>28</sup> while its neighbour, Nicaragua has a poverty rate of 81.8%.<sup>29</sup> Both are enforcing competition law. But Costa Rica has a high level of political stability, good governance, and rule of law while Nicaragua is burdened by instability. Therefore, the discussion on poverty should not be limited to an evaluation of competition and an economic approach to solutions. There should be a recognition that political stability, rule of law, good governance, and distributive justice are integral components to successful interventions to achieve poverty reduction and poverty alleviation.

It is also observed that there is a strong co-relation between poverty/extreme poverty and ethnicity and race in LAC. According to ECLAC's statistics gathered in 18 countries 1990-2021, 46.3% of indigenous persons live in poverty and 18.5% live in extreme poverty. Amongst Afro descendants, 30% live in poverty and 10.4% in extreme poverty. By contrast, in the non-indigenous and non-Afro population, 21.4 % live in poverty and 7.2 percent in extreme poverty.<sup>30</sup> The level of poverty amongst indigenous people and those of Afro descent in Latin America derives from structures and institutions inherited from the colonial experience and which are entrenched through racial divides that deprive the poor of economic opportunities.

In the Caribbean, the poor are largely the descendants of slaves and indentured labourers from the colonial period while owners of the powerful businesses are descendants of the colonial commercial class who had economic opportunities to establish businesses in the late 19<sup>th</sup> century at a time when the rest of the population was largely excluded from economic opportunities. In Jamaica, 11% of the population lives in extreme poverty, while 17% live in poverty. St Vincent & the Grenadines reports the highest poverty rate among the CARICOM countries studied at 45% while Grenada follows closely behind with a poverty rate of 37%. It is important to note that Jamaica has the highest rate of people living in extreme poverty (11%), while Dominica, Grenada, St Lucia and St Vincent & the Grenadines report between 2% and 3% of its population living as extremely poor, and Antigua & Barbuda and Barbados have between 4% and 5% of its people being considered as extremely poor.<sup>31</sup>

As a result, the poor in LAC do not have access to the fundamentals of enterprise, not least of which is access to financing from the formal banking sector. Structural barriers prevent upward movement from so far down the social ladder.<sup>32</sup> Strategies to address poverty and extreme poverty therefore

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<sup>28</sup> The ILO defines poverty as living at US\$1.90 per day in purchasing power parity (PPP) while extreme poverty is living on less than US\$1.90 per day, and characterized by acute deprivation, hunger, premature death, and suffering, deprivation of human dignity and other human rights. The World Bank updated the Global Poverty Line in September 2022. The new extreme poverty line is \$2.15 per person per day which replaces the \$1.90 poverty line, and is based on the 2017 PPP.

<sup>29</sup> ILO Country Profiles, Informality, 2023. Contribution of Costa Rica to LACCF conference, 2023, DAF/COMP/LACCF(2023)8: p.18.

<sup>30</sup> Economic Commission for Latin America and the Caribbean (ECLAC), *Social Panorama of Latin America and the Caribbean, 2022. Executive summary*: accessible format (LC/PUB.2023/6), Santiago, 2023, p. 23.

<sup>31</sup> ECLAC 2023. Brief Overview of Caribbean Countries based on Standardized Household Survey. ECLAC Statistical Briefings No. 8, May: p. 10.

<sup>32</sup> Comment of the Barbados Fair Trading Commission

must be multifaceted, spanning political, social, economic spheres and addressing racial and gender discrimination.

There is a cycle of poverty that economic growth without equitable distribution of surplus and targeted intervention would not break:

... chronic hunger and malnutrition are results of poverty, but they also weaken immune systems, undermine maternal health, encourage an unsustainable approach to resource extraction, and reduce school attendance and the ability of students to learn. Saddled with a constellation of problems such as this, an individual or community faces an extremely arduous climb out of poverty. **"The Economic and Human Dimensions of Poverty."** *Gale Essential Overviews: Scholarly*, Gale, 2016. (<https://www.gale.com/open-access/poverty>)

In 2021 hunger affected 59.7 million people in the region: 52.7 million in Latin America and 7.0 million in the Caribbean.<sup>33</sup> Sixty million persons in LAC suffer from malnutrition<sup>34</sup>. Hunger in children under 2 years can permanently damage their brains and ability to learn, condemning them to their poverty status. Therefore, access to nutritious food and having food security are fundamental areas for intervention to reduce and alleviate poverty. FAO statistics are that 71.3 % of the Caribbean population are affected by food insecurity, and 38.7% in Latin America.<sup>35</sup>

#### The Given Thinking on Approaches to Dealing with Poverty

It is widely held that the approach to dealing with poverty is to promote and protect competition which in turn would stimulate innovation, economic growth with accompanying job creation, thereby pulling persons out of poverty. This would give them better working conditions, social protection coverage, access to health care, and basic income security (Background paper to LACCF panel on Competition and Poverty). Competition Authorities (CAs) could advocate for breaking down barriers to entry into the formal sector and encourage those in the informal sector to register and become part of the formal sector. Countries differ in how their laws are constructed which determine how CAs could respond to the informal sector, including in some cases making it illegal to operate in the informal sector and punishable by fines. Yet, according to the background paper for this panel, despite increased enforcement in competition law over the last decade, poverty has increased.

#### Response to this approach

It is proven that in many instances, increased growth result in job creation that would create opportunities for the poor to be lifted out of poverty. However, this would happen only in that fringe

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<sup>33</sup> FAO, IFAD, UNICEF, WFP and WHO. 2021. *The State of Food Security and Nutrition in the World 2021*.

*Transforming food systems for food security, improved nutrition and affordable healthy diets for all*. Rome, FAO.  
<https://doi.org/10.4060/cb4474en> p. 12

<sup>34</sup> Ibid, p. xv

<sup>35</sup> Ibid. p. 17. The high level of food insecurity in the Caribbean can be explained by the economic model developed in colonial times and which persists today of export orientation, whereby most of what is produced is exported and most of consumables are imported. Over 85% of food consumed in the Caribbean is imported from extra regional sources, dependent on foreign reserves to pay for imports, and therefore, dependent on stable export demand and prices. The Caribbean is exposed to extreme vulnerability to the vagaries of international economic demand and prices for their export earnings, which impacts on their ability to pay for food imports.

that are just below the formal worker line and so the majority of poor are not helped. Other research showed that growth without a pro-poor social policy that included a robust re-distributive policy and a social safety net do not lead to poverty reduction.<sup>36</sup> Most countries in LAC do not have the fiscal space to provide adequate social safety nets.

In situations of extreme poverty, there are several obstacles affecting movement from the informal sector to the formal sector. For the firms operating on the margins of the formal sector, and whose businesses are in some cases, operating in competition with the formal sector with competitive advantages derived from their informality, there is a good case to encourage them to move into the formal sector. However, there must be obvious advantages to be had from such a move that the firms can see clearly before they are willing to make such a move. According to the Jamaica Fair Trade Commission (JFTC), such advantages are not obvious, and so the JFTC is hard-pressed to find a basis upon which to advocate for such movement. It is very costly and cumbersome to register in the formal sector. Jamaica has a ranking of 71 (out of 190 countries) on the Ease of Doing Business Index, indicating the need to improve business registration procedures. According to the JFTC, there is no data to show that there has been any success in formalizing Small and Medium Sized Enterprises (SMSEs). The argument that SMSEs could get access to contracts through public procurement may be true for a handful of firms who are operating on the margins of formality. Even so, for the most part, these firms are too small to compete with the large firms for contracts and are more than likely to not qualify based on selection criteria.

For the micro firms operating in communities such as corner shops and parlours (out of homes), there are many issues barring such a move. Most of the participants are illiterate. This means that they must pay someone to assist them in navigating the many forms and procedures and filling out and submitting the relevant documents. Registering in the formal sector in Jamaica requires two picture IDs and most persons in this sector do not have both. Most do not drive and therefore do not have a driver's license which also provides the person's tax registration number (TRN). They do not travel abroad and so have no passports, and most have a deep distrust of government, and so many refuse to get voter ID cards. They do not have bank accounts because, again, two picture IDs and a tax registration number are required. This sector operates on a cash only basis. Moreover, they are not considered by banks to be viable customers to finance, and so these communities have developed their own informal financial institutions providing short-term micro financing with a quick turnover time. They are essentially excluded from the formal sector because of a perception that they are unreliable and undeserving. These are insurmountable obstacles to convincing them to register in the formal sector.<sup>37</sup>

#### Are benefits that accompany formal employment actually realized in the lowest strata of work?

The given thinking is that moving to employment in the formal sector would lead to better working conditions, social protection coverage, access to health care, and basic income security (Background paper to Panel on Competition and Poverty). These assumptions presume that such benefits are

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<sup>36</sup> Jude Okechukwu Chukwu (2023) *New Estimates of Poverty-Reducing Efficiency of Growth Using Household Survey Data*, *Journal of Poverty*, DOI: [10.1080/10875549.2023.2235320](https://doi.org/10.1080/10875549.2023.2235320)

<sup>37</sup> Note, however, that the poorest persons in the micro sector, not employed or working only occasionally, faced difficulties when they tried to access the government cash grants awarded during the COVID19 crisis. After this experience, many more of these persons now have the voter ID cards, although they often indicate that they do not intend to vote. This experience has taught the value of having a voter ID which carries a voter ID number and one's photo, and a driver's license which has both their TRN and a photo ID.

available to all workers in the formal sector. And there are certainly jobs in the formal sector that provide those benefits. However, when we talk about employing the poor, realistically, it is for unskilled workers with little or no literacy who would be either daily or weekly paid, and with no benefits, such as social protection, access to health care etc. and there is no guarantee of better working conditions than what exists in the informal sector. Firms who employ such labourers evade all possible responsibility for their workers' wellbeing while keeping the power to dismiss them at any moment.

For example, security guards operating in Jamaica are traditionally hired as consultants on contract and provided with no benefits. There is little job security for such poor workers and therefore, no basic income security. However, in a recent case, security guards employed by one of the largest security companies in Jamaica challenged their "consultants' status", in court and won. It was ruled that security guards, given the nature and conditions of their work, could not be treated as "contract workers" who traditionally receive no benefits. This legal decision was read as being relevant to all security companies in the sector, which were given time to make the necessary adjustments, or face possible legal action for not adhering to the Court decision. At least one year later, it is unclear which of the main security companies have made the required changes, and whether the expected benefits are now available to these workers in the formal sector. It is noted that it has taken the determination of this group of workers in the formal sector to take their case to court, to secure the better working conditions expected in this sector. Workers in the informal sector, living in poverty, unskilled and without the necessary resources are unlikely to be able to achieve such improvements in their work and life experiences if they moved to the formal sector. Interestingly, the government of Jamaica is reported to be the largest employer of guards from a range of private security companies, utilizing the "traditional consultant/contract worker approach".<sup>38</sup>

### Is this a competition issue?

The level of poverty existing in the informal sector in Jamaica is such that many persons are unable to buy a loaf of bread. Corner shops offer credit to those in their communities, break packaging and sell by the piece. For instance, they would sell one or two slices of bread, or one sausage out of a tin of six, or one or two female sanitary pads, or a squeeze of toothpaste (yes, a squeeze of toothpaste!) because the customer cannot afford to buy a tube of toothpaste. These customers of the micro community shops do not shop in the formal sector. In this sector of society, most households are female headed, increasing the problem given the lower wages earned by women and reduced opportunities for employment because of gender discrimination. In the face of such dire poverty, what role can a competition authority play within the mandate they have?

The mandate of competition authorities is to monitor the market, identify where there are competition problems, discipline firms that infringe the law, and advocate for breaking down barriers to market entry thereby opening up markets for entrepreneurial entry. According to the JFTC, there is no competition problem in relation to the informal sector that they can target. The micro firms in the informal sector do not operate in the 'market'. They do not compete with the firms in the formal sector, do not serve the same customers; they serve the communities in which they are geographically located. They are technically outside the purview of the JFTC since they do not operate in 'the market'. In the view of the JFTC, these micro firms are serving their communities well, are innovative in their strategies to meet the needs of their customers and operate in self-contained communities. The Barbados Fair Trading Commission questioned how can a Commission force an entity to register, much less penalize same for not registering? You first must establish that there is an entity participating in

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<sup>38</sup> Case example provided by Judith Wedderburn



economic activity that can be classified. This will require a complete re-definition of the market and the units of measurement for say, establishing market share. If you achieve registration, how do you monitor activity and verify same?

### Programmes to Reduce and/or Alleviate Poverty

The telecommunications sector is excluded from the application of the Trinidad and Tobago Fair Trading Act, and is responsible for promoting and protecting competition in that sector. The Telecommunications Authority Trinidad and Tobago (TATT) has an outreach programme to provide connectivity in rural areas and to the underprivileged. In doing so, they have engaged in advocacy with key government institutions in an effort to provide free internet access in community centres. This will enable the Ministry of Education to provide self-tutoring and adult education programmes, as well as secondary school courses in subjects like English, Mathematics, Social Studies and Science to impoverished communities. The Authority plans to play a strong supporting role in such initiatives with the aim of improving opportunities for getting an education and developing skills.

The Jamaican government provides several programmes to assist the poor. There is no consumer tax on basic foods and this list is published every year. The National Health Fund is used to subsidize drugs for the more prevalent diseases. Subsidized drugs are available to all Jamaicans. The process of choosing the pharmacies who would sell the subsidized drugs is done through a transparent tender process.

Poor students are provided with vouchers that they could submit to the school canteen to purchase lunch. Students pay a lower price for public transport. Yet, there are expenses that cannot be avoided that hinder the education of poor children. School books are provided by the government to all schools, students are provided with books for the school year and return them at the end of the year for use by other students. However, schools still charge registration/entry fees and sometimes fees to access the schoolbooks which are available for rental. Many books on reading lists are not available for rental. So, parents have to purchase these books from bookshops in the private sector. All schools require their students to wear the uniform of the school. Parents must therefore buy school uniforms, and this is purchased in retail stores from a list provided by the schools. Paying these costs can be out of their reach financially.

In regard to subsidized drugs, a complaint was brought to the JFTC by a pharmacy claiming that the government was engaged in predatory pricing which was forcing out private pharmacies. The JFTC investigated the matter and found that the persons who accessed subsidized drugs could not afford to purchase from private sources, and so there was no trade diversion away from pharmacies which were not part of the subsidized drug programme. They found that the poor would line up for hours to purchase the subsidized drugs, while those with means would go to the private sector because it was more convenient. It turned out that the programme achieved its objectives of giving the poor access to cheaper medicines while there was no free riding problem because those who could afford it turned to the private sector. The issue was not pursued by the JFTC because the customers of the subsidized programme were in a separate market, and there was no loss of competition. It was fortuitous that the economic analysis aligned with a pro-poor policy.

### Recommendations

The JFTC recommended that a more useful intervention to alleviate poverty is to target development of entrepreneurship *within* the informal sector, rather than push for bringing firms into the formal

sector. Such programmes will have to be undertaken by a range of government institutions such as those responsible for social services, education, and agriculture amongst others.

For instance, food security is vital for providing adequate nutrition which in turn impacts positively on health, ability to attend school and attain an education, and generally function at the optimum level. Policy that gives the poor in rural areas access to the factors needed for producing food could be a big step in poverty alleviation in those areas. Advancement into more well-paying productive undertakings, whether it be entrepreneurial activities or employment in more skilled areas with all the accompanying benefits depends on access to good nutrition, health care, education, and shelter. The question is, can the competition authority advocate for such social programmes for alleviating poverty, given the parameters within which they are required to operate which are limited to promoting and protecting competition in markets so as to ensure that consumers are given access to goods and services at the best prices and best quality. This is important and does serve the poor who access basic needs with limited disposable income. But competition can only play a partial role in targeting the necessary interventions that would reduce and alleviate poverty and generate opportunities for economic advancement. Competition does not seem to be the answer for resolving many of the complex problems that are associated with poverty, and extreme poverty.

It is worth it for LAC countries to consider introducing provisions into the goals of their competition laws that directly target the poor, as does South Africa's competition law. This would give more room for pro-poor choices in investigations, in determinations, and in advocacy. Another way to create avenues for advocacy is to develop MOUs with the Ministries and Institutions that can make interventions to alleviate poverty, and so be able to give input to discussions and policy development. The example of the strategy used by the Department of Justice and the Federal Trade Commission to have MOUs with the National Labor Relations Board is illustrative, in developing a partnership to coordinate their interventions in the labor market by having a whole government approach.<sup>39</sup>

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<sup>39</sup> Contribution of the United States to the LACCF 2023, DAF/COMP/LACCF(2023)24: p.6



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