



Competition Policy in the Mexican Grocery Retail Industry

2019



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Chapter 1. Introduction

The grocery retail industry plays a key role from a consumer welfare perspective, considering that – in developed economies – it is the main channel through which households buy food, beverages and other basic products. This industry is populated by a wide set of actors such as farmers, manufacturers, processors and retailers.

In the last 15 years, competition assessment of the grocery retail market has become a popular topic amongst competition authorities. Several antitrust agencies worldwide have conducted comprehensive market investigations into the groceries retail industry in order to detect potential obstacles to the functioning of the market in the form of barriers to entry and anticompetitive behaviour. In this regard, the Mexican Competition Authority has included the agrifood industry as one of the six priority sectors to be investigated in the strategic plan 2018-2021.¹

Depending on the country, various issues affecting the grocery retail industry have been identified. For instance, the potential buyer power exerted by dominant retailers, the pro-and anti-competitive effects of private labels, the level of concentration at the retail level and the regulatory dispositions distorting competition.

The development of the grocery retail industry differs across countries, depending on several factors on the supply and demand side. With regard to the former, a good level of transport infrastructure and the existence of a legal framework favouring investments are key aspects. On the demand side, socio-economic variables such as the degree of urbanisation, the size of the middle-class and the level of salaries may significantly affect the development of supermarkets. (OECD, 2015^[1])

This report will firstly provide a description of the main characteristics of the grocery retail industry, then focus on the review of the activity of competition authorities around the world and on the analysis of how regulation may affect – positively or negatively – market efficiency. To conclude, it provides a series of policy recommendations to be considered for the Mexican framework.

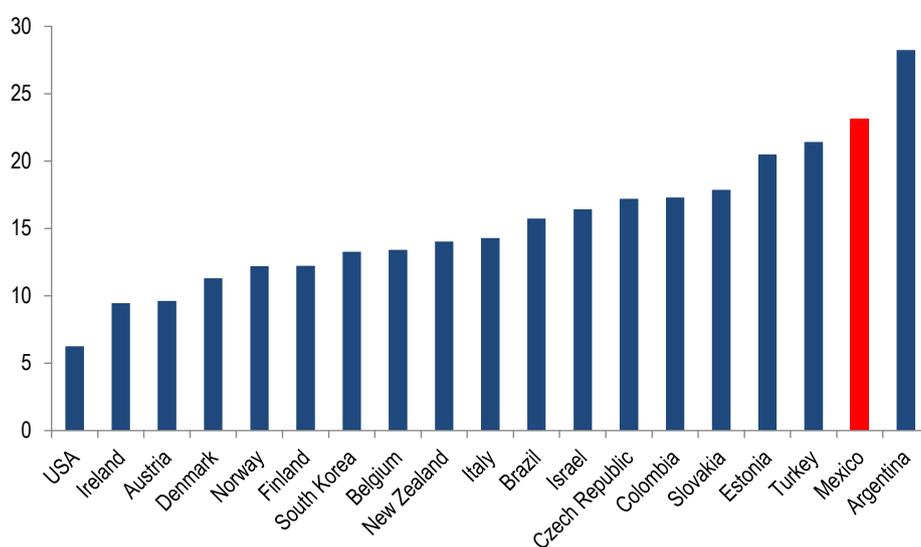
Notes

¹ See COFECE Plan Estratégico 2018-2021 available at www.cofece.mx/wp-content/uploads/2018/02/PE_2018-2021.pdf#pdf.

Chapter 2. The grocery retail market

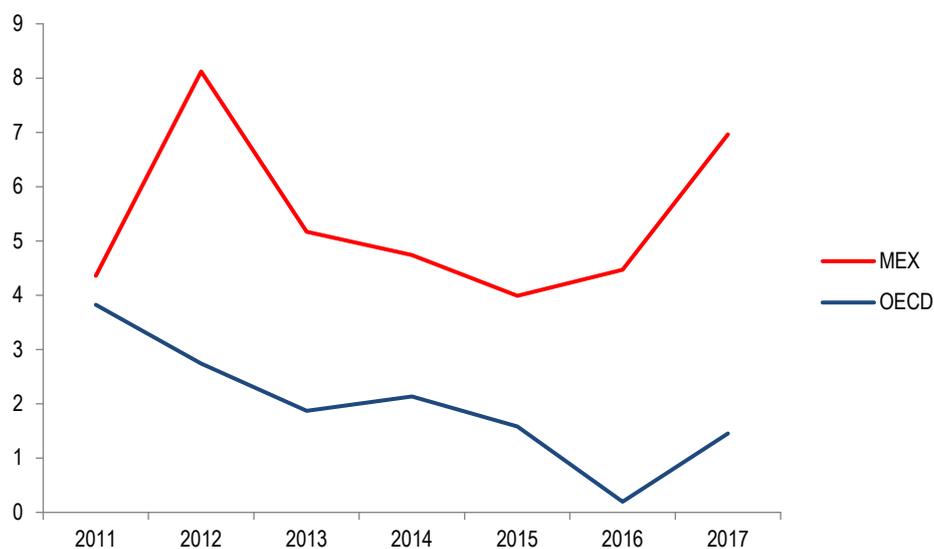
The grocery retail market is a particularly important industry because it captures a significant share of the household budget, particularly for lower income groups (OECD, 2013^[2]). The figure below shows the percentage of consumer expenditure on food. Mexico appears to be one of the countries with the highest share of income spent on grocery of all OECD countries.

Figure 2.1. Percent of consumer expenditures spent on food



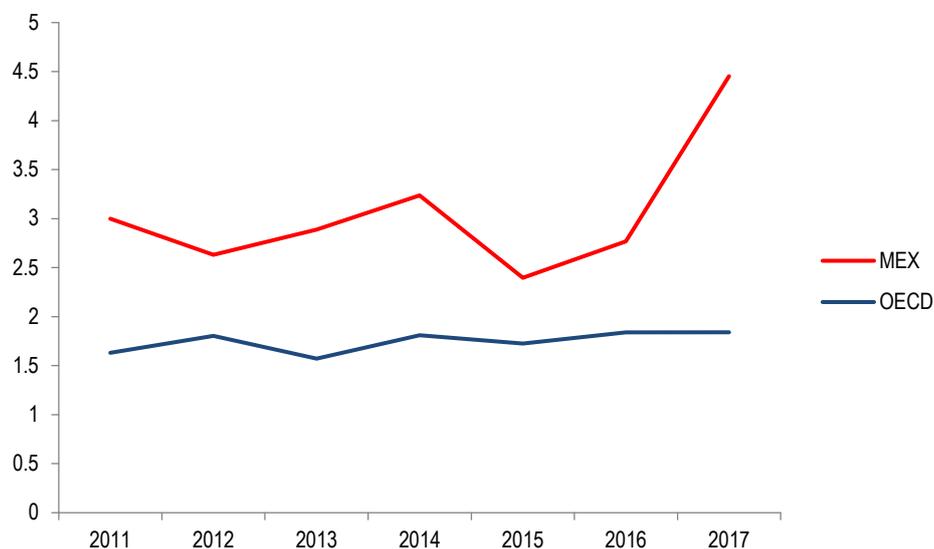
Source: USDA (2016), Economic Research Service, calculations based on annual household expenditure data from Euromonitor International, available at: www.euromonitor.com

Consequently, prices in the grocery retail industry play a key role in the overall economy with significant consequences for consumer welfare. In this regard, over the past few years, the Mexican food inflation rate has increased compared to the OECD countries average, with a cumulative effect of 44% between 2011 and 2017.

Figure 2.2. Food Inflation (%)

Source: OECD (2018), Inflation (CPI) (indicator). doi: 10.1787/eee82e6e-en (Accessed on 15 November 2018).

Similarly to other countries, Mexico reports higher food inflation compared to the rise in prices in the non-food sector which had a cumulative effect between 2011 and 2017 of 23%.

Figure 2.3. Non-Food Inflation (%)

Source: OECD (2018), Inflation (CPI) (indicator). doi: 10.1787/eee82e6e-en (Accessed on 15 November 2018).

It is important to understand whether the price of groceries simply reflects input cost fluctuations or if they are also affected by anti-competitive features of the market. In other words, if changes in input prices are always (upwards and downwards) transmitted to the final prices or not.

2.1. The composition of the grocery retail market

The grocery retail market is composed of different categories of stores which Nielsen (2015^[3]) summarised as hypermarkets, large supermarkets, traditional, convenience, small supermarkets, drug, hard discounter, bar, kiosk, specialty and other. Their definition can vary but is usually based on the size of the store. For instance, according to The Reinvestment Fund (2011^[4]), hypermarkets are large stores, on average over 170 000 square feet (ft) while supermarkets typically range between 20 000 and 65 000ft. In Mexico, the National Institute of Statistics and Geography (INEGI, 2016^[5]) identified the following categories of offline stores: markets, outdoor markets¹, peddlers, grocery stores, specialised stores, supermarkets, department stores, membership stores and convenience stores.

The penetration of different stores differs across countries depending on various region-specific variables. The table below elaborated by Nielsen (2015^[3]) provides a summary of the share of total retail channel trade by regions.

Table 2.1. Regional Share of Trade (%)

	North America	Europe	Latin America	Africa / Middle East	Asia-Pacific
Large Supermarkets	41	25	13	33	11
Hypermarkets	32	24	11	1	18
Traditional	-	8	34	42	38
Convenience	20	6	1	4	7
Small Supermarkets	-	17	18	5	12
Drug	7	4	9	6	5
Hard Discounter	1	11	-	-	-
Bar	-	-	5	4	2
Kiosk	-	1	6	1	1
Specialty	-	1	-	-	-
Other	-	4	4	4	7

Source: Nielsen, “The Future of Grocery: E-Commerce, Digital Technology and Changing Shopper Preferences Around the World”, 2015.

According to Nielsen (2015^[3]), shopping in developing countries is more fragmented compared to developed markets.²

Table 2.2. Share of Trade (%)

	Developed	Developing
Large Supermarkets	35	13
Hypermarkets	30	12
Traditional	1	38
Convenience	15	3
Small Supermarkets	7	14
Drug	5	7
Hard Discounter	5	2
Bar	-	2
Kiosk	-	2
Specialty	-	1
Other	1	6

Source: Nielsen, “The Future of Grocery: E-Commerce, Digital Technology and Changing Shopper Preferences Around the World”, 2015.

In Mexico, the development of the grocery retail sector was mainly fuelled by the wave of trade liberalisations originated with the signature of The North American Free Trade Agreement (FAO, 2009^[6]). In fact, the country experienced the benefits of foreign investments which facilitated the expansion of the retail sector. This expansion is not only taking places in terms of big supermarkets but also in terms of smaller formats. (Izquierdo, 2018^[7])

According to the United States Department of Agriculture (USDA, 2017^[8]), the top national retailers are Wal-Mart and Organización Soriana. The Wal-Mart business is split into Bodega Aurrerá (discounts), Superama (medium size supermarkets), Wal-Mart Supercenters (hypermarkets) and Sam’s Club (warehouse clubs). The four brands offer e-commerce services and they mainly target middle/high income consumers. Soriana also manages a variety of formats, which allow the company to reach different demand segments: Hypermarkets (Hipermercado Soriana/MEGA), supermarkets (Supermercado Soriana/Comercial Mexicana), discounters (Mercado Soriana and Soriana Express/Bodega Comercial Mexicana and Al Precio), convenience stores (Super City) and warehouse stores (City Club). In terms of shops, Wal-Mart counts on 2346 stores while Soriana on 827 and the third biggest player Chedraui on 262.

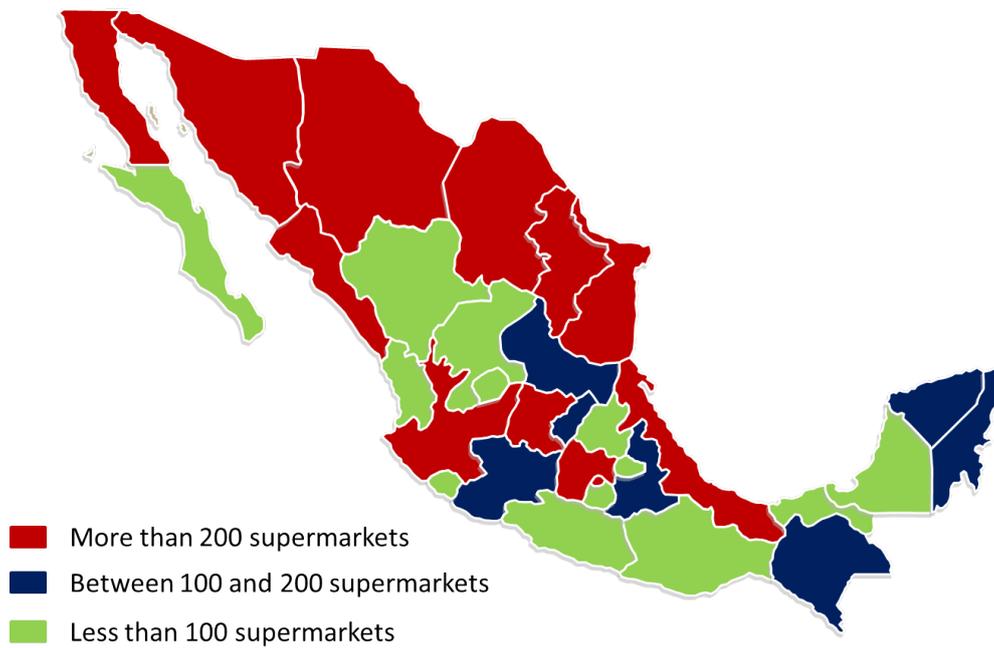
Table 2.3. Total Revenue (MXN millions)

	2013	2014	2015	2016	2017
Wal-Mart	367,731	378,778	410,249	433,025	465,886
Soriana	105,028	101,829	109,380	149,522	153,637
Chedraui	66,364	71,374	78,648	88,529	94,583

Source: www.walmex.mx, www.organizacionsoriana.com, <http://grupochedraui.com.mx>.

Other analysis by the National Association of Food Retail and Department Stores (ANTAD) identified in Mexico 34 supermarket chains with 5 567 stores and 15 million square metres of sales floor. In 2017, the entire industry size was estimated around MXN 872 billion (Mexican pesos) with a growth forecast of 8% during 2018. The map below, based on DENU-INEGI data, shows the number of supermarkets by state.

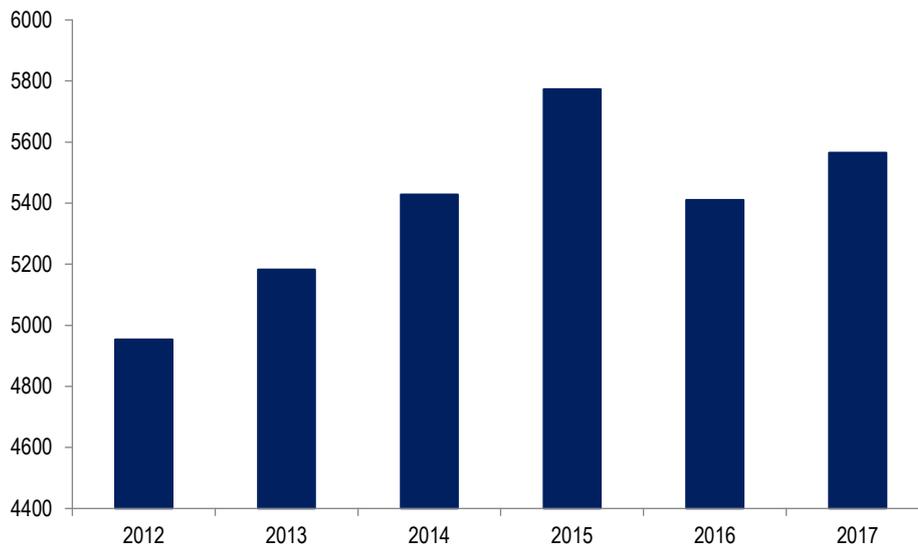
Figure 2.4. Supermarkets by state



Source: Sale&Associates, Mexican Supermarkets & Grocery Stores, Industry Report (July 2018).

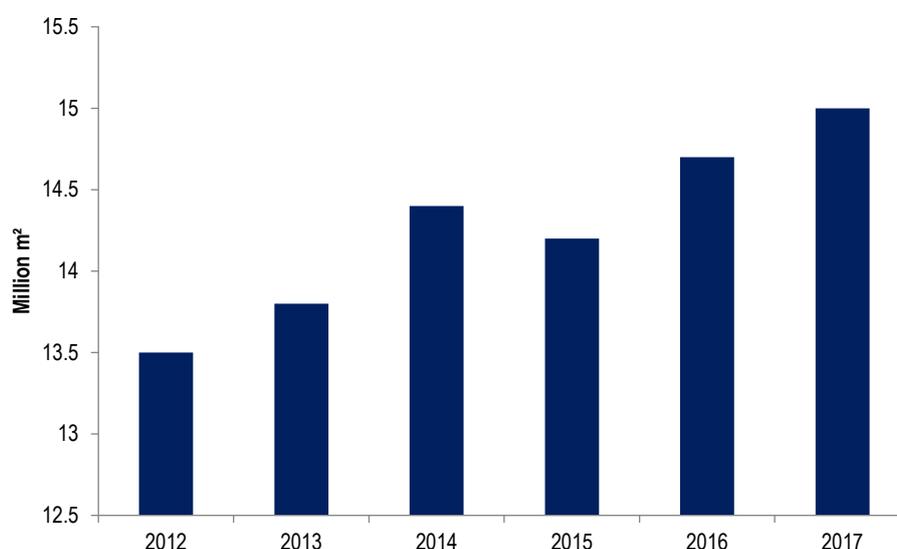
Historical data about the number of stores and the size of sales floors in Mexico also proves the sector's growth. Between 2012 and 2017 the two indicators increased respectively by more than 12% and 11%.

Figure 2.5. Number of stores



Source: ANTAD.

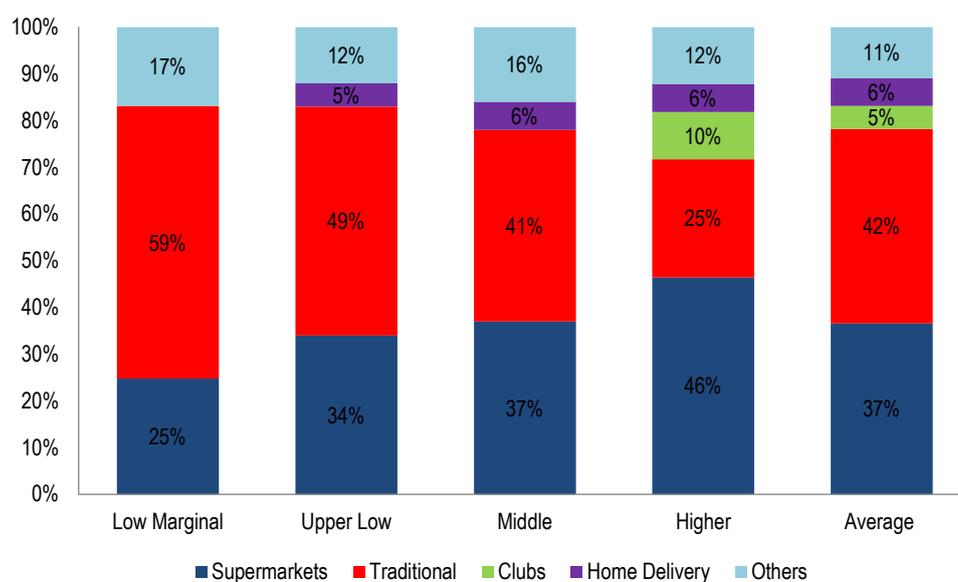
Figure 2.6. Sales floor



Source: ANTAD.

As already mentioned, the expansion of the modern grocery retail model is due to many factors. Usually these stores serve the middle-high class of the population while lower income segments prefer traditional and informal ways of shopping. Data from Mexico seems to confirm this observation. The supermarket is the most favoured channel of food shopping for high income consumers while traditional shops are the most prevalent amongst lower income classes.

Figure 2.7. Share of food expenditure by income class and shop category in Mexico (2013)

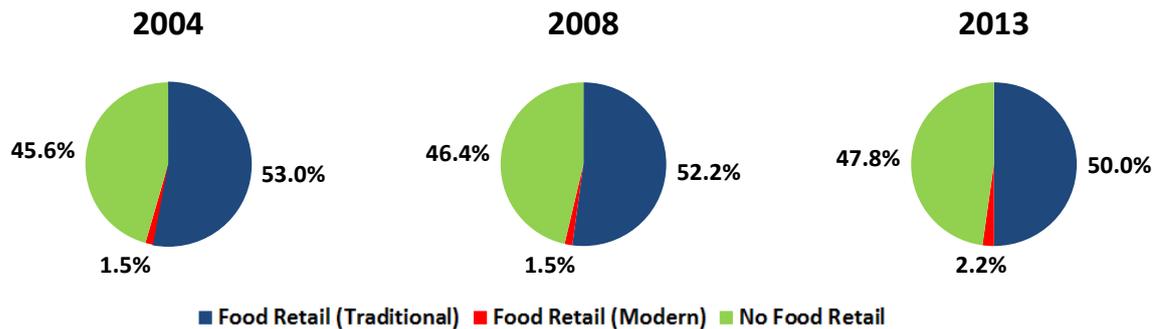


Note: Home Delivery channel may have significantly developed in light of the e-commerce penetration.

Source: (OECD, 2015^[1])

The only official information about the informal sector in Mexico is provided by the National Institute of Statistics and Geography (INEGI). The figures below show how the traditional channel has lost shares in favour of the modern one although in 2013 was still representing the 96% of the options available to consumers. Since then, we can reasonably assume the market followed the described trend. A new updated figure will be available in the INEGI Economic Census of 2019.

Figure 2.8. Economic units by retail channel



Source: COFECE (2015^[9]) based on Delgado et al. (2015^[10]).

In its report about competition in the agrifood sector “*Reporte sobre las condiciones de competencia en el sector agroalimentario*” COFECE described the characteristics of the traditional channel in Mexico. There are almost 950 000 traditional stores consisting of small grocery stores, spots in local/street markets and specialised shops (e.g. bakeries, butcher shops). Typical consumers are low-income households who buy food to be consumed on the same day, do not dispose of any vehicles to carry significant amount of items and mainly pay with cash. Many of the traditional stores are family owned and they are characterised to be close to the consumers, with a limited usage of technology and with an inventory based on the daily needs. COFECE also estimates that 30 000 shops shut down every year. An important aspect is also the regulation of this channel, which mainly relies on local dispositions. Hence, it is difficult to describe a national framework; what seems clear is that – as is often observed – local acts may hide anti-competitive clauses with the aim of protecting the existing players.³ Examples include limits to the tradable products and obstacles for new entrants to obtain authorisations.

Considering the prevalence of traditional channels (in terms of economics unit) it is not surprising to see that only 20.8% of the amount spent on food by households takes place in modern stores.

Table 2.4. Income’s shares spent on food by channels

	2010	2012	2014
Traditional	82.3%	80.8%	79.2%
Modern	17.7%	19.2%	20.8%

Source: COFECE (2015^[9]) based on data from INEGI national inquiry on households’ income and expenditure (ENIGH).

2.2. Definition of the relevant markets

Although the purpose of this paper is not to provide a competition assessment of the Mexican grocery retail industry, the definition of the relevant market is a key concept which competition authorities apply to assess competition between market players. The final objective of a relevant market analysis is to identify those shops which exert competitive pressure on each other. The relevant market is usually defined from a product and geographic perspective.

With regard to the product market, there are several factors authorities may decide to take into account. The competition analysis usually refers to the PQRS variables which imply price, quality, range and service. Firstly the price segment; retailers' offers might differ in terms of the items' value with a consequence on how consumers perceive a store. For instance there are those offering high value products while others prefer to focus on cheaper items (e.g. discount). Secondly, the quality component may refer to both the quality of the items and of the service offered by the store. The range variable describes the amount of different products stocked and finally, with the service, we usually consider the store's location, the accessibility, the convenience and facilities. (OECD, 2015^[1])

All these variables may suggest that two stores selling the same product are not necessarily included in the same relevant markets. For instance, the so-called one-stop-shop supermarkets - stores where consumers can buy all the needed items at one time - may not be included in the same relevant market than convenience stores, usually used by consumers for their "top-up shopping". This example already gives an idea of how important the size of the shop is from a competition perspective. At the same time, shops of a similar size might belong to different relevant markets because they serve different customers' segments. Overall, it is more likely that big supermarkets might be included in several product markets.⁴ (OECD, 2015^[1])

With regard to the geographical dimension of the relevant market, competition authorities usually take into account consumers' willingness to travel to shop around, which can be measured by looking at the physical distance from the store or at the travel time (OECD, 2015^[1]). The two variables may depend on the geographical characteristics of the market itself. For instance, in a crowded city centre where car usage may be limited, physical distance is likely to be the criteria adopted to identify the relevant market. Alternatively, in a country area where consumers shop around with their cars, travel distance will be the criteria to identify the relevant geographic market. However, as the various competition analyses demonstrate, case-by-case analysis is necessary.

The common tool implemented in the relevant market analysis is the Small but Significant Non Transitory Increase in Price (SSNIP) which consists in identifying the narrowest market with all the products such that a 5-10% price increase (non-transitory) by a hypothetical monopolist would be profitable. If this is not the case, it probably means that other products are exerting competitive pressure on the subset of products originally identified as the relevant market. Then, the test needs to be repeated adding new products to the candidate market.

Competition authorities around the world have already focused on the grocery retail industry, sometimes providing an analysis of the relevant market.

For instance, the UK Competition Commission (2008^[11]) implemented the SSNIP test to define the relevant market in its assessment of the groceries' supply industry. Recognising the significant impact of the price of groceries on consumer expenditure, the UK authority

applied to the SSNIP test a lower level of the usual 5% increase. Moreover, the outcome of the test was also assessed through the evidence of consumer behaviour and the elasticity of demand. The investigation identified three main product markets: larger grocery stores (e.g. stores larger than 1 000 to 2 000 sq metres), mid-sized stores (e.g. all stores larger than 280 sq metres) and convenience stores (e.g. all categories are in the same product market). However, the Commission remarks on the fact that thresholds may vary between different local markets.

Relevant markets have also been defined in competition cases. In 2011 the Austrian Federal Competition Authority (BWB) assessed a merger in the cash and carry segment where Pfeiffer wanted to take control of Nussbaumer. The analysis revealed how there were two different markets for the cash and carry segment: pick up wholesale for smaller retailers and delivery wholesale for bigger retailers. Moreover, the geographical market was identified in a 30km radius from the store for pick up market and 100km for the delivery market.⁵

Another case concerning the merger of two food retailers was the proposed acquisition of shares of Daiei by AEON which was assessed by the Japan Fair Trade Commission in 2013. In this case, relevant markets were also distinguished in terms of service range (e.g. categories of stores competing between each other) and of geographic range. (OECD, 2013_[2])

To conclude, the key aspect in the relevant market analysis is to understand how consumers shop around and their perceived degree of substitutability between all the available retailers. Stores selling the same item are not necessarily part of the same relevant market, in fact consumers may have different needs (e.g. one-stop shopping) or the stores offer different services. On the geographic side, relevant markets are usually defined at a local level, always taking into account several variables such as natural barriers, road condition, etc. (OECD, 2013_[2]). From the wide antitrust experience around the world we can assume that the traditional tools to identify the relevant market can also be applied to the grocery retail industry although the analysis may present a significant level of complexity.

2.3. Concentration and buyer power in the industry

Concentration in the grocery retail industry is one of the biggest issues from an antitrust perspective. A high degree of concentration may create concerns about the market power held by the grocery retailers with a potential effect on food prices. The consolidation in the food industry is a topic which has been addressed by authorities, institutions and academia.

In 2014, the European Commission published a report on the economic impact of modern retail on choice and innovation in the EU food sector (European Commission, 2014_[12]). The study highlighted how since 2000 the European market of grocery retail has been shifting from traditional retailing towards a model of modern retailing which includes hypermarkets, supermarkets and discount stores. The growth of modern retailers has also had an impact on the level of concentration of the food market. The table below compares the top 10 grocery retailers' market shares in the European Union between 2000 and 2011.

Table 2.5. Market share (in edible grocery sales) of the top 10 retailers in the European Union (2000 - 2011)

Company	Top 10 in 2000		Top 10 in 2011	
	% EU Market Share	Company	% EU Market Share	Company
Carrefour	5.2	Schwarz Group	4.7	
ITM (Intermarché)	3.2	Carrefour	4.5	
Rewe Group	2.6	Tesco	3.8	
Tesco	2.7	Edeka	3.4	
Edeka	2.5	Aldi	3.1	
Aldi	2.5	Rewe Group	3.0	
Ahold	1.9	Auchan	2.2	
Schwarz Group	1.8	ITM (Intermarché)	2.1	
Auchan	1.8	Leclerc	2.1	
Leclerc	1.7	Ahold	1.9	
TOTAL	26.0	TOTAL	30.7	

Source: (European Commission, 2014^[12])

A similar trend can be observed in the United States where between 1992 and 2009 the top five retailers' market shares more than doubled.

Table 2.6. Market Shares of the top five largest US food retailers (1992, 2001, 2009)

Company	1992	2001	2009
	% of Census Bureau Grocery Retail Sales	% of Census Bureau Grocery Retail Sales	% of Census Bureau Grocery Retail Sales
Kroger	7.7	11.1	30.0
American Stores	6.6	7.5	12.2
Safeway	5.3	7.2	6.8
A&P	3.7	6.3	6.1
Winn-Dixie	3.6	5.8	4.7
TOTAL	26.9	37.9	59.8

Source: (Wood, 2013^[13])

The process of consolidation in the grocery retail industry is not just a trend in developed economies. As already pointed out by Reardon *et al.* (2003^[14]) developing markets experienced an increased penetration of modern grocery retail shops replicating the process of consolidation of more mature markets. For instance, data from Latin America reveals a high level of concentration with Mexico reporting a C3 around 90% in 2015.

Table 2.7. Grocery Retail Industry Concentration in Latin America (2015)

	Mexico	Argentina	Brazil	Columbia	Chile	Honduras	Peru
Brand	Wal-Mart	Carrefour	Casino (CBD)	Casino (Éxito)	Wal-Mart	Wal-Mart	Cencosud (Wong)
	Soriana	Cencosud (Jumbo)	Carrefour	Cencosud (Jumbo)	Cencosud (Sta. Isabel)	La Colonia	Iberbank
	Chedraui	Wal-Mart	Wal-Mart	Olimpica	Falabella (Tottus)	Price Smart	Falabella
			Cencosud (Gbarbosa)		SMU (Unimarc)		
C3	>90%	>80%	>60%(C4)	>70%	>90%	>95%	>95%

Source: (OECD, 2015^[1]).

A high concentration at retail level may lead to the scenario where the biggest market players acquire buyer power in commercial relationships with the suppliers, distorting their contractual negotiations. However, it is important to point out that there is not a unique effect on consumers' welfare, as lower supply prices obtained by the supermarkets may – or may not – be passed on to consumers through final retail prices.

The main concern relating to retailers' buyer power is the effect it may have on the suppliers, who may experience unfavourable trading terms. This issue may become even more significant when buyer power is exerted for anticompetitive purposes, or when it affects small suppliers such as farmers (although the latter may not be a competition issue as such). Again, the mere existence of buyer power does not imply anticompetitive behaviour or negative effects on consumers' welfare. Potentially, lower prices resulting from buyer power may be passed on to final consumers' prices. In this framework, downstream competition plays an important role as it theoretically decreases the retailer's buyer power; in fact suppliers could sell their products to other retailers. Another factor which may impact buyer power is the level of information and the co-ordination among suppliers (Australian Competition & Consumer Commission, 2008^[15]).

The OECD (1998^[16]) defines buyer power as “the ability of a buyer to influence the terms and conditions on which it purchases goods”. Chen (2003^[17]) further developed the concept identifying buyer power as “the ability of a buyer to reduce the price profitably below a supplier's normal selling price, or more generally the ability to obtain trade terms more favourable than a supplier's normal trade terms”.

From an analytical perspective, buyer power could be applied in two different frameworks: buyer power as monopsony power and buyer power held in bilateral negotiations. As observed in the inquiry by the Australian Competition & Consumer Commission (ACCC) (2008^[15]), the second setting seems to fit well within the dynamics of the grocery retail industry. Retailers' buyer power could take place through a reduction of prices paid to the suppliers, favourable contract terms, retailers' monetary requests to provide access to the stores' shelves etc. (OECD, 2013^[2]). Moreover, a high retailers' buyer power may lead to sudden unilateral contracts' changes decreasing suppliers' benefit from the deal.

An important variable to take into account during the assessment of buyer power is the presence and the significance of outside options. The greater is the amount of alternative options for suppliers, the lower is the buyer power held by retailers and vice versa. For instance, if retailers have the option to contact alternative suppliers in the domestic or foreign market, their bargaining position improves compared to a scenario where there is only a single supplier. The same argument can be applied from a supplier perspective as

those producers of very popular branded products may have countervailing buyer power. For instance, the ACCC (2008^[15]) mentioned in its inquiry how ALDI, a retailer mainly offering its own branded products, offered a small range of items produced by well-known brands (e.g. Vegemite produced by Kraft). The Authority identified the reason behind this strategy as the fact that the absence of certain products from the shelves may give incentives to some consumers to switch to other retailers.

Having said that, other factors may affect the buyer power of a retailer. The size of the buyer definitely impact its bargaining power; however, it seems that what it counts more is the value/size of the other buyers (Ellison, 2010^[18]). Another aspect which could influence retailers' buyer power is their ability to produce and sell the item under their own private label. Naturally, this latter point is strictly linked to consumers' preferences; in other words the private label products have to be seen as substitutes of the items object of the negotiation.

Competition authorities have investigated this matter trying to analyse first the level of concentration in the industry to then dig into the existence of buyer power relying on the framework provided by the academic literature. For instance, in 2006 the UK Competition Commission launched a market investigation on the supply of groceries (Competition Commission^[11]) finding that the industry was delivering overall a good outcome to the consumers. However some issues were found such as the strong position of several players in some local markets and the potential risks of certain supply chain practices. With regards to buyer power, it was recognised that the largest retailers were able to obtain lower prices from suppliers than wholesalers. In any case, these lower prices were not considered having an adverse effect on competition mainly for reasons linked to the significance of barriers of entry and expansion.

The ACCC launched in 2008 an inquiry into the competitiveness of retail prices for standard groceries. The commission reached the conclusion that the main supermarket chains have significant buyer power in packaged groceries because the lack of outside options for the suppliers. At the same time, the amount of options for sellers of fresh products and meat limit the supermarkets' buyer power. However, the inquiry did not prove that the buyer power was "exercised in an anti-competitive or unconscionable manner" (Australian Competition & Consumer Commission, 2008^[15]). Anyway, the issue of buyer power held by supermarkets chains came up again few years later and in 2012 the ACCC launched an investigation to clarify if the two main players, Coles and Woolworths, were abusing of their market power in the relationship with suppliers (see section 3.3.1).

In 2014 the Bundeskartellamt published a sector inquiry into the food retail sector (Bundeskartellamt^[19]). The objective of the report was to provide an analysis of the industry and of the results of the negotiations between the various parties in order to gain insights for future antitrust cases. The German authority followed a two-stage approach; firstly investigating the market structure and the procurement shares of individual retailers with regards to large product categories and to seven specific segments. The second stage, more analytical, involved the analysis of 250 items to examine the presence (if any), the extent and the effects of retailers' buyer power. The conclusion of the inquiry highlighted how the German market is dominated by four groups of retailers: Edeka, Rewe, the Schwarz Group and Aldi. These companies were found to hold a strong bargaining position than their suppliers and their smaller retail competitors. However, the authority highlighted how a case-by-case approach is needed to determine the effects of buyer power. For instance, evidences showed that manufacturers of strong brands may be in a stronger position

compared to the buyer because of the expected losses if the retailer does not offer that specific item.

Market inquiries focusing on the grocery retail industries were also launched by few African competition authorities. For instance, the South African competition commission initiated in 2015 a market inquiry which still has to be published and no updates are available at the moment.⁶ Another example is Botswana, where the local competition authority launched a “Competitive analysis of the retail and wholesale sector in Botswana (With specific focus on food and groceries)” (2013_[20]). The study highlights how the industry grew in the years prior to 2013 and in particular the increase experienced in the modern segments. To conclude, also the Kenyan competition authority launched a market inquiry into the retail food sector, which similarly to the South African, will also focus on the bargaining power between retailers and suppliers.⁷

Notes

¹ Tianguis.

² Developed countries included in the study are: Austria, Belgium, Canada, Czech Republic, France, Germany, Greece, Ireland, Italy, Korea, Norway, Portugal, Slovakia, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Developing countries: Argentina, Brazil, China, Colombia, Egypt, Hungary, India, Indonesia, Israel, Malaysia, Mexico, Pakistan, Philippines, Poland, Russia, Saudi Arabia, South Africa, Taiwan, Thailand, Turkey, the United Arab Emirates and Venezuela.

³ See chapter 4 for further details on Mexican regulation.

⁴ Large general retailers usually might also offer non-food products like electrical appliances, toys, etc. In this case, they may compete with other grocery stores on the food products and with other specialist retailers for non-food items.

⁵ BWB/Z-1387.

⁶ www.compcom.co.za/retail-market-inquiry/

⁷ <https://africanantitrust.com/2017/02/07/kenya-cak-formally-initiates-a-market-inquiry-into-the-retail-sector/>

Chapter 3. Competition authorities' activity in the grocery retail industry

The previous chapters described the activity of competition authorities in the grocery retail industry, mainly referring to market inquiries which sought to shed light on the sector, report issues (if any), but not to prevent or punish any anti-competitive behaviour. In this section we review relevant work in the merger and abuse of dominance area. However, we do not aim to provide a full and exhaustive review of competition cases around the globe. The main objective is to look at how competition authorities have dealt with increased concentration and buyer power in the industry.

3.1. Merger

The increased level of consolidation in the grocery retail market is the consequence of a wave of mergers in several countries that involved various levels of the distribution chain (e.g. wholesale and retail). This section will focus predominantly on the mergers that directly impacted concentration at the retail level.

The European Union has assessed various mergers in the industry, including REWE/Delvita, Tesco/Carrefour and REWE/ADEG. The first one refers to a proposed acquisition in 2007 of Delvita by REWE (a German company). Delvita, a Czech subsidiary of Delhaize was a company mainly active in the food retailing segment while REWE was active in food and non-food wholesale and retail segments. The Commission did not find any particular anti-competitive effects of the transaction, mainly due to the presence of various competitors in the Czech market.¹ The Tesco/Carrefour deal interested the Czech and Slovakian market. In 2005 the two companies signed an agreement under which Tesco would have bought from Carrefour 11 retail stores in the Czech Republic and 4 stores in Slovakia, resulting in a total takeover of Carrefour's business in both countries. The competition analysis carried out by the Commission did not raise any anti-competitive issues, mostly because the combined market shares of the two parties in Czech Republic (where the companies' operations overlapped) would be below 15%; hence, the deal was approved. Finally, another deal which involved was the proposed takeover in 2008 of ADEG (an Austrian company). Both players were active in the retail and wholesale of daily consumer goods. The Commission initially raised some concerns about the risk of the merger resulting in higher prices in the Austrian market. To mitigate these, REWE offered to divest all the ADEG shops in the most concentrated Austrian districts so the merger was approved.²

The UK competition authority (CMA) is currently scrutinising a proposed merger between the second (Sainsbury's) and the third (Asda) largest grocery retail in the country. The CMA has referred the deal for an in-depth phase 2 investigation "because there is a realistic prospect that the Merger would lead to a substantial lessening of competition (SLC) in the retail supply of groceries in-store".³ The theory of harm highlighted by the authority is "the potential loss of competition as a result of horizontal unilateral effects in the retail supply of groceries in-store" at a local and national level. Although the parties' combined market shares are just over 30%, the CMA noted that after the merger the two biggest players'

(Tesco, which is currently the largest in the market, and the merged entity) market shares would be almost 60%. For these reasons, and others, the merger has been referred for a Phase 2 investigation where the merging entities, third parties and the authority will develop further the analysis. Comments in the media also mentioned the risks the deal may create not only for consumers but also for suppliers.⁴ The decision of carrying out a more in-depth investigation was also justified by the CMA on the basis of previous cases and inquiries concerning the grocery retail industry.⁵ Another famous merger which took place in the UK market in 2004 is the acquisition of Safeway stores by Somerfield. In its decision⁶ the Office of Fair Trading (OFT, one of the CMA's predecessor authorities) described how competition in the grocery retail industry takes place both at a national and local level. With regards to the former, the OFT focused on the supply side as "centralised buying enable[ing] supermarkets to utilise better buying terms from suppliers". The importance of these supply networks contributed to the conclusion that the market exhibits high barriers to entry. The merger was then referred to the Competition Commission, which approved the merger with remedies; in particular Somerfield was required to sell 12 stores to its competitors.

Germany is another country where the grocery retail industry has been on the radar of the local competition authority in recent years due to increased consolidation. In 2010 the Bundeskartellamt cleared the acquisition of Trinkgut by EDEKA group.⁷ The deal concerned the market for the sale of beverages with the risk, according to the authority, of "creating or strengthening a dominant position for EDEKA in ten regional markets". The merger was authorised subject to remedies such as the sale of 30 outlets in 10 different markets and of Maxxum, a beverage logistic provider. EDEKA was also involved in another proposed merger which was prohibited by the Bundeskartellamt. In this case, the German retailer wanted to buy approximately 450 Kaiser's Tengelmann outlets.⁸ The authority did not allow the acquisition as it would have reduced consumers' choice and had potential negative effects on prices. Another reason for the prohibition was the impact the transaction could have had on upstream (supply) markets. During the process the Bundeskartellamt proposed the clearing of the merger subject to the sale of a large part of Kaiser's Tengelmann's three regional networks to one or two independent competitors. However, the parties did not accept these conditions. The parties appealed to the Düsseldorf Higher Regional Court, which rejected the appeal confirming the decision of the Bundeskartellamt. However, both decisions were overruled by a decision of the Economic Minister which allowed the merger "on the public interest grounds of "job preservation and job security" as well as "maintenance of workers' rights" after the parties had implemented the acquisition of the Kaiser's und Tengelmann outlets."⁹

In France, in January 2013 Monoprix SA (hereinafter Monoprix) notified to the French competition authority the intention to acquire the entirety of Casino Guichard Perrachon (hereinafter Casino). After a first assessment, in March 2013 the authority decided to open an in-depth investigation. The authority was particularly concerned by the market shares of the merged entity in 47 catchment areas in Paris. Both enterprises committed to divest retail outlets in the concerned areas in order to "restore balanced competition conditions". Subject to this condition, the merger was cleared in July 2013.¹⁰ Another merger case involving the French market was referred in September 2015 by the European Commission to the local authority. The deal involved the fifth and sixth largest players in the grocery retail industry; Auchan and Système U.¹¹ After a first assessment, in May 2016 the authority referred the case for a phase 2 in-depth examination "considering its effects, both upstream markets of supply of everyday consumer products and downstream at the distribution stage".¹² As with other examples noted above, these cases involved the

examination of consequences on both upstream and downstream markets. In June 2016 the parties decided not to proceed with the proposed transaction due to the complexity of the operation.

The United States also offers various examples of mergers between grocery retailers. A recent one involves two supermarket operators; Albertson and Safeway. The two companies competed “in the retail sale of food and other grocery products in supermarkets”.¹³ Similar to other cases, the geographic market was identified at a local level. The FTC’s analysis revealed how the merger would have increased significantly the concentration in all of the 130 relevant local markets. Particularly, competitors would have diminished from 2 to 1 in 13 markets, 3 to 2 in 42 markets and 4 to 3 in the 75 remaining areas. In order to get the merger cleared, the parties agreed to sell 168 supermarkets to a set of different competitors. The FTC also imposed a strict timeline on the asset divestiture and appointed a monitor to oversee the entire operation. Another example is the acquisition by Bi-Lo Holdings, LLC (“Bi-Lo”) of certain assets of Delhaize America, LLC (“Delhaize America”). The FTC identified competition concerns from the proposed deal in markets across Florida, Georgia and South Carolina. Hence, the Commission ordered the sale of 12 Delhaize’s stores to specific buyers. One of these, Rowe’s IGA, did not proceed with the acquisition and as a consequence, Bi-Lo was obligated to find an alternative buyer without success. In January 2015, the Commission changed the original settlement substituting the sale to Rowe’s IGA with the divestment of a store in Wauchula to Sunripe Market.¹⁴

Mexico also has examples of mergers between grocery retailers. In 2007 Soriana notified to the local competition authority (COFECE) the intention to buy Gigante.¹⁵ The analysis focused on the market of grocery retail involving supermarkets, hypermarkets and “bodegas” bigger than 1 000 square metres. From a geographic perspective, 68 local markets were identified; in 24 of those Soriana was not present, in 19 the level of concentration did not raise any issues and in the remaining 25, although concentration indexes may indicate potential anticompetitive consequences, the authority concluded that these were unlikely to take place. With regard to local markets where Soriana and Gigante overlapped, COFECE highlighted the presence of several competitors and relatively low barriers to entry. The supply side of the grocery retail market was also analysed with a focus on the buyer power of the merged entity. In this case the authority did not find any competition issues in a market whose geographical dimension was considered national. Considering these points, the merger was cleared.

Years later, in 2015, Soriana notified to COFECE the intention to buy another competitor, Controladora Comercial Mexicana (CCM).¹⁶ The analysis identified 159 local markets where the parties overlapped and in 27 found that the deal would have significantly reduced competition. According to COFECE’s analysis, in these 27 areas, the deal would have increased final prices up to 5.26%. The merger was cleared subject to the conditions that Soriana would not acquire (or would divest) the CCM’s retail locations in markets raising competitive concerns. The social welfare generated by the conditions imposed to the merger was estimated by the authority to be MXN 343 million.¹⁷ In March 2017 COFECE partially rejected the merger between Soriana and Chedraui clearing only a part of the deal. This business operation was in part linked to the merger between Soriana and CCM. In fact, Soriana, in order to comply with the commitment imposed by the commission, wanted to divest six stores to Chedraui with a lease of property for those owned by Soriana. COFECE did not accept this divesting scheme as it would have created a link between the two competing companies.¹⁸

To conclude, another recent attempted merger in Mexico was between Soriana and WalMart. In this case WalMart sought to purchase some Soriana self-service stores located in the states of Campeche, State of Mexico, Guanajuato, Guerrero and Jalisco. This operation was also part of the Soriana's strategy to comply with the remedies established by COFECE on the merger with CCM. Once again, the merger was not authorised by the authority as it would have jeopardised competition.¹⁹

3.2. Horizontal and Vertical Agreements

Horizontal and vertical agreements can take place in different segments of the entire grocery industry, with many of them happening on the supply side. For example, the Italian competition authority condemned the Consortium to Protect Grana Padano for the practice of facilitating the establishment of quota production in order to keep the overall supply below a certain level with an effect on wholesale prices.²⁰

However, for the purpose of this paper, we will review cases on the retail side of the grocery industry. Horizontal and vertical agreements do not seem to be common in the grocery retail market, with few high level infractions. For instance, in Finland, in 2009, the Market Court fined a number of grocery retailers that were part of the K Group for prohibited horizontal price fixing.²¹ In this case, the objective of the agreement was to fix maximum prices for certain items. Another relevant case took place in Bulgaria, where the Commission for the Protection of Competition (CPC), following suppliers' complaints, launched an investigation against some grocery retailers.²² In particular, the potential anticompetitive issues were related to the application of agreement clauses such as most-favoured customers (MFC), product promotion exclusivity (PPE) and others which, according to the allegation, would have favoured information exchange and price fixing. The case was closed without any fines as the retailers offered voluntarily to remove the controversial clauses. However, the entire investigation raised several criticisms on the theory of harm applied and the conclusion of the case. (Kobel, 2015^[21]).

Horizontal and vertical agreements can also happen at a local level since, as noted above, the relevant geographical market in the grocery retail industry is usually local rather than national. In this case, the enforcement action of competition authorities may be limited due to *de minimis* rules contained in the legal framework. Although hard-core cartels are usually punished independently from the companies' turnovers or market shares, anti-competitive agreement enforcement may be subject to firms' size.

Authorities around the world have also investigated the wide exchange of information practices in the food industry. For instance, the Finnish competition and consumer authority investigated the relationship between three major retailers and the research company AC Nielsen. In particular, the latter collected and provided aggregated and more granular data to the retailers such as figures on product groups, segments and producers, which were available at a national and store level. In this case, a case was not brought to the Market Court because during the FCCA's investigation the parties stopped the exchange of information.²³

Other controversial agreements in the sector are those including resale price maintenance (RPM) and recommended resale prices (RRP) clauses. Reviewing the legal framework of several countries, the most followed approach seems to allow RPM clauses only if these are not combined with incentives or other schemes which convert the recommended price into the actual retail price. For instance, in 2016 the Germany competition authority fined various retailers (A. Kempf Getraenkegroßhandel, METRO, NETTO and subsidiaries of

Edeka) for EUR 90.5 million (euros) because they applied RPM clauses in their agreements with a beer producer, Anheuser-Busch InBev Germany (AB InBev). In particular, retailers aligned their prices to follow AB InBev price increases; the alignment only happened if the change was implemented by all the other retailers. To provide incentives to follow the scheme, the beer producer offered discounts and rebates. The beer producer and another retailer REWE were not fined because of their collaboration in the investigation.²⁴ This case followed other probes in the retail industry about price agreements which also ended up with the retailers being fined by the authority.²⁵ Again in Germany, other relevant cases are those related to the markets of confectionary, coffee, pet food and body care products. The Bundeskartellamt fined several retailers and producers for the practice of illegal resale price maintenance.²⁶

Box 3.1. Investigation on joint purchasing agreements in the French food retail market

The article L.462.10 of the French commercial code establishes that “any agreement between companies managing one or more retail stores of general merchandise or acting in the distribution sector as centralised purchasing and listing offices and which aim to jointly negotiate the purchasing or listing of products or the sale of services to suppliers - when certain turnovers are reached (see article R.462-5 of the French Commercial Code) - must be communicated to the competition authority at least two months before implementation”.²⁷

Considering the above, in July 2018 the French competition authority opened an investigation into the impact of two purchasing alliances: one between Auchan/Casino/Metro/Shiever and the other between Carrefour/Système U.

The investigation has the declared objective “to assess the competitive impact of these purchasing partnerships on the concerned markets, both upstream for the suppliers, and downstream for the consumers”.

This example shows how competition authorities keep a significant level of activity on the retail industry with a particular focus on the impact that agreements may have on both upstream and downstream markets. Moreover, this allows a better understanding of the relevant markets.

3.3. Abuse of dominance

According to the number of competition cases related to the grocery retail industry, abuse of dominance does not seem to be a common issue. This is probably due to the fact that in the majority of the markets there is rarely a single dominant firm in the relevant markets.

Reselling below cost is usually considered a potential abuse in the grocery retailing industry (Kobel, 2015^[21]). However, the legal framework to tackle this conduct varies amongst jurisdictions. The Austrian competition law considers an abuse of dominance “selling goods below cost price without any objective justification”.²⁸ In other countries such as France or Hungary, reselling below cost is prohibited *per se*, independently of the retailer’s dominant position (Kobel, 2015^[21]). Predatory pricing in Mexico is considered a monopolistic practice and it is punished when carried out by one or more economic agents individually or jointly exerting substantial market power.²⁹ Art. 56 sec. VII of the Federal Economic Competition Law (FECL) describes the practice as “selling below the average variable cost or below the average total cost but over its average variable cost, if there are elements to presume that the Economic Agent could recoup its losses through future price increases”.³⁰

Another example of exclusionary practices implemented by retailers could be the case of an Italian chain, Coop Estense, which was found guilty by the Italian competition authority of interfering with the business expansion of a competitor, Esselunga. In particular, Coop Estense, succeeding in blocking the opening of two new stores by Esselunga. In its decision³¹, the Authority firstly recognised the dominant position held by Coop Estense and then considered its behaviour as obstructionist and not supported by economic reasons (e.g. the incumbent bought some land paying a price above the market level and without using it for any commercial purposes). In judicial proceedings, Coop Estense was found guilty and required to pay a fine of EUR 4.6 million.

3.3.1. Abuse of buying power

The legal treatment of abuse of buying power depends on how the different jurisdictions categorise the conduct. A first set of countries (United Kingdom, Belgium, Sweden, Netherlands, Finland and Romania) consider this practice an abuse of dominance, to the extent such dominance exists on buyer or seller side. A second group of countries (Australia, Germany, Austria and Bulgaria) have a more flexible concept of dominance and the legal framework allows investigating the conduct of firms holding a strong position. In France and Japan, the retailer's dominant position is not a necessary condition as these jurisdictions deal with the abuse of buying power outside of the abuse of dominance framework (Kobel, 2015^[21]).

Kenya is the first country in Africa to include the abuse of buyer power in the legal competition framework. The Art. 24 of the Kenyan Competition Act³² prohibits the abuse of dominant positions and buyer power. Section 2B of the same article establishes that to determine the existence of buyer power "the Authority shall take into consideration a) the nature and determination of contract terms; b) the payment requested for access [to] infrastructure; and c) the price paid to suppliers". The Competition Act also defines the concept of buyer power as "the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to obtain from a supplier more favourable terms, or to impose a long term opportunity cost including harm or withheld benefit which, if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking or group of undertakings". The introduction of the concept of buyer power in the legal framework was considered by the competition authority as a consequence of concerns in the retail sector about the ability of suppliers to negotiate with buyers.³³ Kenya has one of the largest retail markets of the East Africa, as highlighted by a report from Deloitte (2015^[22]), with a size of USD 23.7 billion (United States dollars). Press articles from 2015 and 2016 have reported that supermarkets chains owed suppliers KES 40 billion³⁴ (Kenyan shilling), apparently due to payments delayed without justification.³⁵ The Kenyan example will provide insights about this particular enforcement route for emerging economies.

Box 3.2. The Mexican framework

In Mexico the abuse of buying power is not explicitly contemplated by the federal competition law. However, the current framework allows the investigation of potential abuses under Chapter III which is about relative monopolistic practices (abuse of dominance).

Art. 54 establishes that “relative monopolistic practices consist of any act, contract, agreement, procedure or combination, which:

- i) Correspond to any of the criteria referred to in article 56 of this Law;
- ii) Are carried out by one or more Economic Agents that individually or jointly exert substantial market power in the same relevant market in which the practice is executed, and
- iii) Has or may have as its purpose or effect, in the relevant market or a related market thereof, that of unduly displacing other Economic Agents, substantially impeding their access or establishing exclusive advantages in favour of one or several Economic Agents.”

According to Art. 55, these practices are allowed only if their pro-competitive effects counterbalance the anti-competitive ones.

Art. 56 provides a list of relative monopolistic practices, and some of them could be observed in the context of abuse of buying power; for instance:

- ii) Imposing prices or other conditions that a distributor or supplier must observe in supplying, marketing or distributing goods and services;
- v) Unilaterally refusing to sell, market or supply certain individuals or undertakings, available goods or services which are ordinarily offered to third parties;

To conclude, the current Mexican competition legal framework seems to provide the right tools to tackle abuse of buying powers in the grocery retail industry.

Although the debate about the abuse of buyer power in the grocery retail industry has existed for some time, the amount of competition cases concerning this theory of harm is very limited. The examples below represent a non-exhaustive list of the main competition cases around the world. At this stage it is important to remark that not all the competition authorities explicitly mention the abuse of buyer power as the object of an investigation as other expressions may be used.

For instance, in Japan the Anti-Monopoly Act (AMA) prohibits “dealing with the counterparty by making use of one’s superior bargaining position unjustly”.³⁶ On 2008, the Japan Fair Trade Commission (JFT) issued a cease and desist order against Maruyko Corporation (hereinafter Maruyko) due to unfair trade practices. The violation consisted of several conditions the retailer imposed to its suppliers. In particular, Maruyko would return goods to the supplier before the items’ ‘best before’ date, basing the decision on its own ‘sell-by’ date which was unilaterally set. Other practices included the return of items without contractual justification, and the utilisation of suppliers’ employees for some Maruyko’s business operations.³⁷

Also in 2008, the JFT issued another cease and desist order against Eco’s (a retailer) because of coerced discounts on specific items, utilisation of suppliers’ employees for its own business practices and the request of monetary contributions to the suppliers upon the opening of new stores.³⁸

To conclude, similar cease and desist orders were imposed in 2009 and 2011 against 7-Eleven Japan³⁹ and Sanyo Marunaka⁴⁰.

In 2005, the retailer CoopForte was investigated by the Swiss competition authority for its practice of unilaterally imposing a 0.5% discount to the amount due to its suppliers. Although the authority recognised a fair amount of competition at the retail level, it also found that some suppliers were dependent on CoopForte. In particular, dependency was assessed looking at the role of CoopForte in selling certain items and the range of outside options for suppliers. In the final settlement the retailer agreed to verify all the agreements in place with the option to repay the discount in case the supplier demonstrated the absence of any benefits on its side⁴¹. Another case concerning potential abuse of buying power was the alleged pressure of CoopForte on some manufacturers to block the provision of certain brands to Lidl. The Authority did not find any causal link between the non-supply of Lidl and CoopForte's conduct.⁴²

The Australian watchdog sued Coles for forcing supplier rebates, alleging that the retailer had a target of AUD 16 million (Australian dollars) to be collected from this practice⁴³ with the threat of commercial retaliation in case of refusal. Coles rejected the accusation of "unconscionable conduct" against its suppliers, although they admitted the existence of commercial consequences if the suppliers would have refused to pay additional rebates.⁴⁴ Another lawsuit was filed by the ACCC against Coles as the authority claimed that the retailer "took advantage of its superior bargaining position by demanding money from suppliers that it was not lawfully entitled to, and was, in all the circumstances, unconscionable".⁴⁵ In December 2014, Coles was ordered to pay a fine of AUD 10 million in a settlement of the two lawsuits brought by the ACCC. Moreover, the court imposed on Coles an obligation "to establish a formal process to provide options for redress for over 200 suppliers referred to in the proceedings".⁴⁶ A similar lawsuit was filed by the ACCC against Woolworths, another supermarkets chain. Also in this case, the retailer was accused to have engaged in "unconscionable conduct" in dealings with its suppliers. In particular, the watchdog was concerned about the Woolworths programme "Mind the Gap" which had the objective of reducing profit shortfalls by requiring payments from a set of suppliers. The authority alleged that these requests involved leveraging the retailer's bargaining position and generated approximately AUD 18 million.⁴⁷ In December 2016, the Australian Federal Court dismissed the proceeding because Woolworths business practices were not "unconscionable within the meaning of the Australian Consumer Law".⁴⁸

In Mexico there are no cases involving abuses of buying power. However, as in many other countries, the presence of various issues in the commercial relationships between retailers and suppliers has led to the signature of a voluntary agreement of good commercial practices (see chapter 4.1). Meetings with various stakeholders, and in particular with producers' associations, have raised various issues about retailers' behaviour in negotiations with producers. Some of the practices highlighted by the providers are similar to those found in other countries. For instance, unilateral discounts imposed by the retailers seems to be a common practice in the Mexican grocery industry. At the same time, various producers' associations claimed that if a supplier is not able to satisfy an order completely then it may have to pay a fine based on the amount of products which have not been delivered (the so-called fill rate).⁴⁹ Others practices mentioned were the imposition of certain costs by retailers on suppliers. This generally involves logistics costs (e.g. petrol) that are imposed without negotiation. Smaller suppliers struggle to internalise higher costs and at the same time cannot increase their prices as their products would become more expensive compared to bigger competitors. Another issue mentioned in several meetings was the role played by promoters in the stores. Producer promoters are hired to ensure that the producer's products are not misplaced in stores, but they may also engage in conduct such as hiding competitor products or locate other products in less visible places on the

shelves. However, it is not clear what role retailers should play, since in theory they will wish to organise their shelves according to a their plan to maximise sales. A final issue raised by produces is related to logistics and delivery systems. In particular, suppliers complained about the fact that delivery times are often not respected, with drivers waiting several hours at the distribution centres before they are allowed to unload the products. Costs related to the delay are fully borne by the producers.

The same points discussed with the producers were also part of the conversation with ANTAD, the national association of supermarkets and department stores. ANTAD recognised the role played by the agreement on good commercial practices in helping the various parties to solve business issues such as unilateral discounts, which, according to the association, nowadays is disappearing from the business landscape. With regards to the fill rate, ANTAD said that these agreements are usually part of the contract established by the parties. Further, it emphasised that retailers do not de-list products if their conditions are not accepted. With regards to the imposition unilateral costs increase linked to external factors (e.g. oil prices), the association observed that logistics service is a separate service offered by the chains, and contracts are voluntarily agreed between the parties. Finally, it also recognised the existence of issues in the products' delivery, suggesting that a higher degree of coordination would be welcomed.

At this stage it is important to remark that all these practices were presented as anecdotes; however, we believe it is important to investigate further these areas considering the impact they may have on the industry's efficiency.

Notes

¹ http://europa.eu/rapid/press-release_IP-07-574_en.htm

² http://europa.eu/rapid/press-release_IP-08-995_en.htm

³ See CMA Reference Decision, available at https://assets.publishing.service.gov.uk/media/5baba899ed915d25999f1bc3/sainsbury_s_asda_decision.pdf

⁴ See www.ft.com/content/d643b1ca-4b8e-11e8-97e4-13afc22d86d4

⁵ At the moment the merger is still under review.

⁶ See OFT, https://assets.publishing.service.gov.uk/media/555de40aed915d7ae20000e7/somerfield_morrisonsdecision.pdf

⁷ See www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/29_10_2010_Edeka_Trinkgut.html;jsessionid=A761D8C5D6549BC158935B29DF751446.1_cid378?nn=3589760

- 8 See www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/01_04_2015_Edeka_Untersagung.html;jsessionid=A761D8C5D6549BC158935B29DF751446.1_cid378?nn=3589760
- 9 See www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/25_08_2017_EDEKA_KT_Urteil_OLG.html
- 10 www.autoritedelaconurrence.fr/user/standard.php?id_rub=482&id_article=2122&lang=fr
- 11 See www.autoritedelaconurrence.fr/user/standard.php?id_rub=606&id_article=2603
- 12 See www.autoritedelaconurrence.fr/user/standard.php?id_rub=630&id_article=2779
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- 15 See www.cofece.mx/CFCResoluciones/docs/Concentraciones/V269/493/1065923.pdf
- 16 See www.cofece.mx/CFCResoluciones/docs/Concentraciones/V1730/0/2289112.pdf
- 17 See www.cofece.mx/cofece/images/Promocion/Historias/COMER-SORIANA-ACTUALIZADO-AGO-16.pdf
- 18 See www.cofece.mx/wp-content/uploads/2018/02/COFECE-011-2017.pdf
- 19 See www.cofece.mx/CFCResoluciones/docs/Concentraciones/V5874/1/4210141.pdf
- 20 See case 1569, Italian Competition Authority.
- 21 See Market Court, 132/05/KR.
- 22 See CPC decision no. 833/2012 on case no. 404/2009.
- 23 See FCCA 154/61/2007.
- 24 See www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/09_05_2016_Bier.html.
- 25 See for instance Bundeskartellamt B10-50/14.
- 26 See www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/18_06_2015_Vertikalfall.html
- 27 See www.autoritedelaconurrence.fr/user/standard.php?id_rub=684&id_article=3226&lang=en
- 28 See art. 5 of Federal Cartel Act 2005, as amended on 21 September 2017.
- 29 See art. 54 of FECL.
- 30 www.cofece.mx/cofece/images/Documentos_Micrositios/Federal_Economic_Competition_Law.pdf
- 31 See www.agcm.it/dotcmsDOC/allegati-news/A437_avv.pdf.
- 32 See www.cak.go.ke/images/Competition_Act_No.12_of_2010.pdf
- 33 See Competition Authority of Kenya, Newsletter Issue No.1 (2016) available at www.cak.go.ke/images/docs/Competition%20Authority%20of%20Kenya%20News%20Bulletin.pdf
- 34 See J Kariuki, Suppliers Say Sh40bn Supermarkets Debt Driving them out of Business (Nairobi: Business Daily, 5 October 2016); O. Guguyu, Suppliers Seek Sh40b and New Law over Delayed Supermarket Payments (Nairobi: The Standard, 6 October 2016), et al.
- 35 See also (Nzomo, 2017^[33]).
- 36 See art. 9 of AMA.

- 37 See www.jftc.go.jp/en/pressreleases/yearly-2008/may/individual_000254.html
- 38 See www.jftc.go.jp/en/pressreleases/yearly-2008/oct/individual_000075.html
- 39 See www.jftc.go.jp/en/pressreleases/yearly-2009/jun/individual-000052.html
- 40 Decision (in Japanese) available here: www.concurrences.com/en/bulletin/news-issues/june-2011/The-JFTC-issues-a-cease-and-desist-72370
- 41 See RPW 2005/1.
- 42 See Annual Report 2009 of the Competition Commission to the Federal Council.
- 43 See <https://app.parr-global.com/intelligence/view/1105939>
- 44 See <https://app.parr-global.com/intelligence/view/1130198>
- 45 See www.accc.gov.au/media-release/accc-takes-further-action-against-coles-for-alleged-unconscionable-conduct-towards-its-suppliers
- 46 See www.accc.gov.au/media-release/court-finds-coles-engaged-in-unconscionable-conduct-and-orders-coles-pay-10-million-penalties
- 47 See www.accc.gov.au/media-release/accc-takes-action-against-woolworths-for-alleged-unconscionable-conduct-towards-supermarket-suppliers
- 48 See www.accc.gov.au/media-release/woolworths%E2%80%99-%E2%80%9Cmind-the-gap%E2%80%9D-scheme-not-unconscionable
- 49 According to producers' associations fines are calculated on the basis of the margins the retailers would have gained on the goods which have not been delivered. Alternatively, they may be based on the opportunity cost of the logistic (e.g. space not occupied on the truck).

Chapter 4. How regulation can affect the grocery retail industry

There are various categories of rules and laws affecting the grocery retail industry. Some of them may be voluntary (e.g. codes of conduct) while others are mandatory. They pursue different policy objectives, such as consumer safety and market competitiveness. In this section we will focus on those regulatory instruments which may affect competition in the market, reserving particular attention to the codes of conduct.

4.1. Codes of conduct

As we have seen, the grocery retail industry presents some competition issues which require continual monitoring and have potential significant effects on suppliers and consumer welfare. In addition to competition law enforcement, alternative measures may be used for preventative purposes, or where the issues are not necessarily competition law infringements. One such measure identified by competition authorities and governments is the establishment of industry codes of conduct.

A well-known example is the Grocery Supply Code of Practice (GSCOP) established by the UK Competition Commission as a remedy at the end of the market investigation on the supply of groceries in the United Kingdom (2008^[11]). The code was based on the existing Supermarkets Code of Practice (SCOP). The GSCOP introduced some new rules specifying the players subjected to the code as “all firms which are active in the supply of groceries at a retail level in the United Kingdom and which are controlled by corporate groups with, or which themselves have, annual UK retail groceries turnover £1 billion or more”, (GBP 1 billion (British pounds)). The Code prohibits specific retailer behaviours such as “making retrospective adjustments to terms of supply” among others.

The UK competition authority also proposed the establishment of an ombudsman to monitor and enforce compliance with the code. In August 2009 the GSCOP was completed but no agreement on the ombudsman was reached. After a political debate, in 2010 the government coalition proposed the creation of a Groceries Code Adjudicator (GCA) within the Office of Fair Trading (OFT). The GCA was established with the objective of working in the long term interest of consumers to monitor, encourage compliance with, and enforce the Code. After extensive political debate¹, the Adjudicator began its operations in June 2013. It is important to underline that GCA’s arbitration awards are binding and may also include compensation. As part of its activity, the GCA also publishes annual reports on the status of the sector providing a summary of its activities.

Box 4.1. The Asda Case Study in the United Kingdom

In September 2017 the GCA published a case study about the variation of supply agreements – contrary to the overarching principle of fair dealing – implemented by Asda Stores Limited (Asda) in order to obtain cost savings and range reductions.

Between March and July 2016 the GCA received complaints from suppliers about Asda asking for a financial contribution – up to 25% of the annual turnover of the stock keeping unit – in order to retain their business with the retailer. Suppliers were given a short time to decide on these changes with the potential, in case of a negative answer, of delisting in non-negotiable periods varying between 4 and 8 weeks.

The GCA raised the issue with Asda, which launched an extensive internal review. In the meantime, the retailer rectified the agreements concerned and updated any inappropriate notice period for de-listing decisions. The investigation revealed these practices were related to a Project Renewal strategy designed by third party consultants. Apparently, the consultants’ bonuses were linked to the amount of savings generated to Asda, creating incentives to go beyond the practices established by the GSCOP. The GCA survey in 2017 also showed the retailer’s relatively low performance with respect to Code-related issues.

The GCA inquiry reached the conclusion that Asda appeared to have breached paragraph 3 of the Code, “Variation of Supply Agreements and terms of supply”. In particular, many of the changes imposed by the retailer were unilateral and others were made without reasonable notice. Asda accepted the GCA’s opinion that the Project Renewal “was not conducted in a wholly Code-compliant way”.

Source: www.gov.uk/government/case-studies/code-clarification-variation-of-supply-agreements

Another country which implemented a code of conduct for the grocery retail industry is Australia. In the previous chapters we have seen how the ACCC dedicated particular attention to the competitive issues in the grocery industry, focusing particularly on the potential abuse of bargaining power by the main retailers against their suppliers. The Food and Grocery Code of Conduct² is a voluntary code which regulates some conduct of retailers and wholesalers with their suppliers. Being a voluntary code, only the companies who signed it – About Life Pty Ltd, ALDI, Coles Supermarket Australia, Woolworths Limited – are bound by its rules. In summary, it:

- “sets out minimum obligations for retailers and wholesalers relating to the making of grocery supply agreements
- requires retailers and wholesalers to act lawfully and in good faith
- prohibits retailers from threatening suppliers with business disruption or termination without reasonable grounds
- establishes minimum standards of conduct by a retailer when dealing with suppliers, such as payment, de-listing, standards and specifications for fresh produce, and the allocation of shelf space
- requires retailers and wholesalers to provide annual training to employees whose role includes direct involvement in buying grocery products, and their managers, on the requirements of the Code.”³

The code also includes more details on various circumstances such as the change of an agreement, conditions of payments, supplier funded promotions, fresh produce standards, labelling requirements, supply chain changes, product ranging and shelf space allocation,

intellectual property and confidential information, threatening business disruption or termination, etc.

In this framework the ACCC is the responsible body for regulating compliance and enforcing the code. There are no pecuniary fines in case of breaches of the Code, although there are other remedies such as monetary compensation for losses or damages derived by the conduct and court-ordered injunctions. Nonetheless, if the conduct breaching the code is also against the Australian Consumer Law (e.g. unconscionable conduct) then fines might be imposed.

Mexico has a tool similar to the codes of conduct implemented in the United Kingdom and Australia: a voluntary agreement in place between the key actors of the grocery industry with the aim of encouraging good commercial practices (hereinafter the “Agreement”).⁴ The parties who subscribed the Agreement are: the Confederation of Industrial Chambers of the United Mexican States (CONCAMIN), the National association of self-service and departmental stores (ANTAD), the Mexican Council of the Consumer Products Industry (CONMÉXICO), the National Agricultural Council (CNA), the Office of the Federal Prosecutor for the Consumer (PROFECO) and the Mexican Institute of Industrial Property (IMPI).

Chapter 1 of the agreement establishes its objectives which are:

- a) Establish and improve a code of competitive commercial practices;
- b) Ensure the application of the code;
- c) Settle disputes;
- d) Monitor and evaluate the fulfilment of the agreement; and
- e) Encourage the integration of small and medium enterprises.

Amongst the specific purposes of the agreement, there is a clear reference to potential abuses of buying power; in fact the document aims to address disparate bargaining power between retailers and suppliers. Chapter 1 also mentions the main principles inspiring the *convenio* and one of them is free competition. Chapter 2 of the Agreement describes the bodies which have the role of promoting its application; the Permanent Executive Committee (CEP), Subcommittees and a Group of Legal Consultation (GCN). The following chapters, 3, 4 and 5 describe the Code of Competitive Commercial Practices, the mechanisms for adherence to the agreement, the evaluation process of any controversial practices and a resolution procedure. Finally, chapter 6 and 7 establish the fines and other general dispositions.

Box 4.2. The Permanent Executive Committee (CEP)

The CEP is the body in Mexico which promotes the enforcement of the agreement for the continuous improvement of competitive commercial practices.

It is constituted by representatives of the suppliers (4), retailers (4) and of the Ministry of the Economy (1); in particular CONCAMIN, the National Chamber of the Transformation Industry (CANACINTRA), CNA, CONMEXICO, ANTAD and three of its associates. A technical secretary is appointed by the General Directorate of Innovation, Services and Internal Commerce but without the right to vote on CEP's decisions.

Annex B of the agreement provide in details the CEP's powers:

- promote the development, interpretation, enrichment and precision of the commercial practices established by the Code
- ensure the accomplishment of the agreement
- find complementary adhesion's mechanisms
- create and delegate functions to the subcommittees
- analyse and issue opinions on commercial practices
- promote the development of mechanisms of settlements
- issue sanctions
- promote the annual report
- issue criteria and processes to ensure objectivity in the members' conduct and decisions and to avoid conflicts of interest
- others determined by the agreement.

There are two standard sessions per year, one every six months, and additional special sessions may be proposed by the Technical Secretariat. Final decisions must be voted on by the majority of the attendees although *consensus* is required to modify the Agreement.

This legal instrument is voluntary but becomes mandatory when a party decides to adhere to it. The Ministry of Economy plays a key role in making sure the *convenio* is enforced and respected by all the parties. In case of litigations, there are three potential mechanisms available: settlement, arbitration and non-compliance.

Annex D explains in detail the competitive commercial practices which the agreement aims to promote. Firstly, it establishes that payments must be processed according to the relative terms agreed between the parties. It also tackles the practice of unilateral discounts, which seems to be a common issue in the grocery industry across various countries. In particular, it states that no discounts can take place if not agreed previously by the parties. Similar rationale is applied to products' return and refusal to collect; both practices are not deemed justified if not previously established by contracts. Another practice included in the section is selling below cost, for which the agreement makes a direct referral to the competition law. In addition, suppliers have to communicate with at least seven or 30 days advance notice any changes in prices for fresh or non-fresh products, respectively. The annex also describes how suppliers are responsible for providing products with the agreed quality and other practices such as product delivery and retailer brands.

Different types of sanctions are established by the agreement in the case of:

- Failure to respect of the agreement’s clauses;
- Failure to comply with the information sharing obligations;
- Failing to accept a revision required by the CEP or the Ministry of Economy; and
- Not acting in accordance to the recommendations or resolutions established by the CEP or the Ministry of Economy.

Sanctions are: warnings, recommendations to change conduct, social sanctions and legal and administrative sanctions. Meetings with several stakeholders highlighted the fact that no monetary sanctions are established by the agreement.

According to the Mexican Ministry of Economy, the main objective of the agreement is not to impose fines or other sanctions, but to serve as a deterrent for potential abuses and at the same time to provide an impartial forum to discuss and solve business issues. The relatively few formal cases raised, discussed and formally resolved by the agreement, seems to suggest that this objective may have been in part reached. This impression was also confirmed by some stakeholders. The table below reports the number of commercial disputes resolved – in the agreement framework – solely by the parties or with the involvement of the Ministry of Economy.

Table 4.1. Business cases discussed in the agreement framework

	2015	2016	2017	2018
Market Players	0	8	3	0
Mexican Ministry of Economy	0	1	1	0

Source: Mexican Ministry of Economy.

Codes of conduct can be considered regulatory tools implemented to prevent and deter specific business practises and behaviours which could have a negative impact on specific market players but also on the consumers’ welfare. Naturally, setting these codes require a significant effort from regulators, competition authorities and governments. Simply establishing a set of rules is not enough, as the code should also establish an enforcement body able to monitor the market, make decisions on litigation and eventually issue sanctions for misconduct.

4.2. Other regulations

Codes of conduct are not the only instruments which aim to regulate the grocery retail industry. Although sometimes there are no sector-specific rules, a wide set of other laws and regulations affect various aspect of this industry. In particular, the latter mainly concern pricing, opening hours and permission to open/build stores.

In the “Estructura de Mercado, Crecimiento y Competencia en el Sector de los Supermercados en Latinoamérica” report the OECD (2015_[1]) identified a set of regulations which might jeopardise competition:

- Foreign direct investment (FDI) and foreign ownership restrictions: these can restrict access to foreign investment with a negative effect on competition and

consumer welfare. For instance, foreign companies may bring innovations improving market's efficiency or they can introduce new products increasing consumer choice.

- Planning, zoning and license restrictions: they could impose restrictions on the establishment of grocery stores with the effect of preventing entry and limiting competition.⁵
- Opening hours restrictions: they usually seek to protect workers' rights on the amount/distribution of working hours; however their application may distort competition if they only impact a certain type of retailers.⁶
- Price restrictions: they may make sure that consumers face the same price wherever they shop. Further, restrictions on discounting may seek to increase competition on other aspects such as service and quality. However, they can also protect inefficient market players, discouraging efficiencies and leading to higher prices.⁷
- Economic dependency laws and supplier protection regulations: these regulations, if not well designed, may soften supplier competition and as a consequence lead to higher retail prices.

Pricing regulations can target predatory pricing by large retailers,⁸ while others may have the objective to allow suppliers to fix maximum resale prices to improve their bargaining power⁹. Other jurisdictions as the United States apply other tools (e.g. subsidies) to protect supplier profits. (Kobel, 2015_[21]). In Mexico, the Art. 28 of the Constitution and the Art. 9 of the Federal Competition Law allow the imposition of maximum prices “on the products and services deemed essential for the domestic economy or for basic consumption”.

Opening hours is another feature of the industry which has historically attracted the attention of policy makers, mainly with the objective of protecting small stores from the competition of larger chains. There is a broad global trend in removing restrictions and allowing flexibility in opening hours and days. For instance, in Italy various decrees have deregulated the shops' opening hours¹⁰ although a debate about the closure of shops on Sunday has recently gained popularity.¹¹ In Mexico, opening hours are usually established at the council level.

The third main category applies to the set of laws and regulations (most of the time local rather than national) which establish rules on the establishment of new stores. These usually focus on large retailers and take into account various aspects such as environmental impact. In Mexico, councils are the main actors imposing restrictions and issuing authorisations to open new shops.

Box 4.3. The Spanish case on planning, zoning and license restrictions

The Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market aimed to remove and review regulatory barriers “for service activities which is vital in order to achieve a genuine internal market for services by 2010.” This Directive was adopted by the Spanish legal framework through the Act 17/2009 known as the *Umbrella Law*. With regards to retailing, a separate Act was established: Act 1/2010 of 1 March 2010, reforming Act 7/1996 of 15 January 1996 regulating the retail sector.

The Act 1/2010 eliminated the requirements on large retail establishment, imposed by the Act 7/1996, which *de facto* created a dual licensing system consisting of a regional license and a municipal authorisation. However, the new rules gave the option to regional governments to impose authorisation schemes in case of projects affecting the public interest such as the urban environment, and conservation of historical and artistic heritage. This measure did not contemplate economic tests.

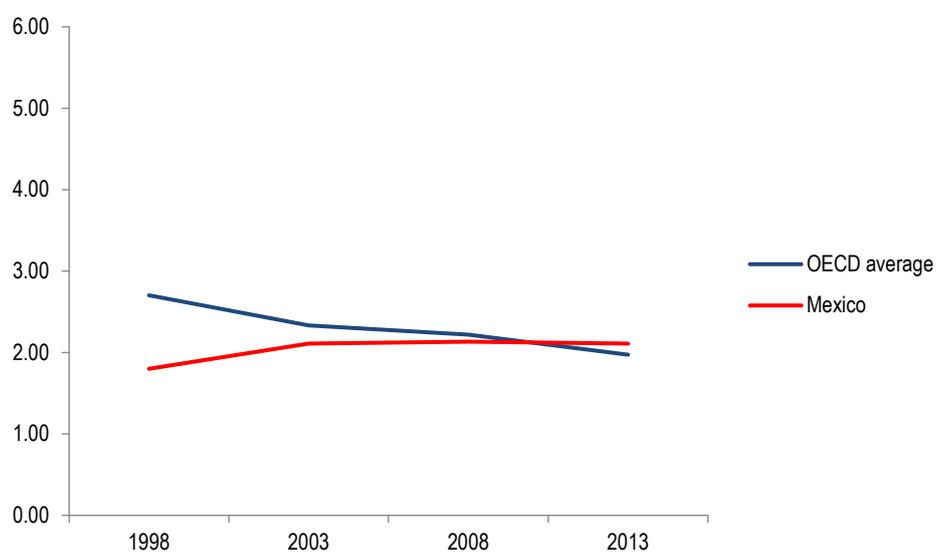
The Spanish competition authority (CNMC) criticised this rule, claiming that “[...] the option chosen may imply that a not insignificant number of Autonomous Communities, if not all of them, may choose to establish these authorisation schemes, using inappropriate grounds to justify the existence of the authorisation, or smuggling in criteria of economic evaluation in the very scope of application of the authorisation scheme [...] which cause disproportionate harm to free enterprise in relation to the public interest they seek to protect”.

Moreover, the authority highlighted how this regulatory measure contributed to reducing entry reinforcing the market power of the existing operators with a negative effect on consumers’ welfare.

In the “Report on the relations between manufacturers and retailers in the food sector” the CNMC strongly advised to remove definitely this dual licensing system and particularly to eliminate the power of regional authorities “to require commercial licences for establishing and operating large retail facilities”.

Source: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Report on the relations between manufacturers and retailers in the food sector (Comisión Nacional de la Competencia, 2011^[23]).

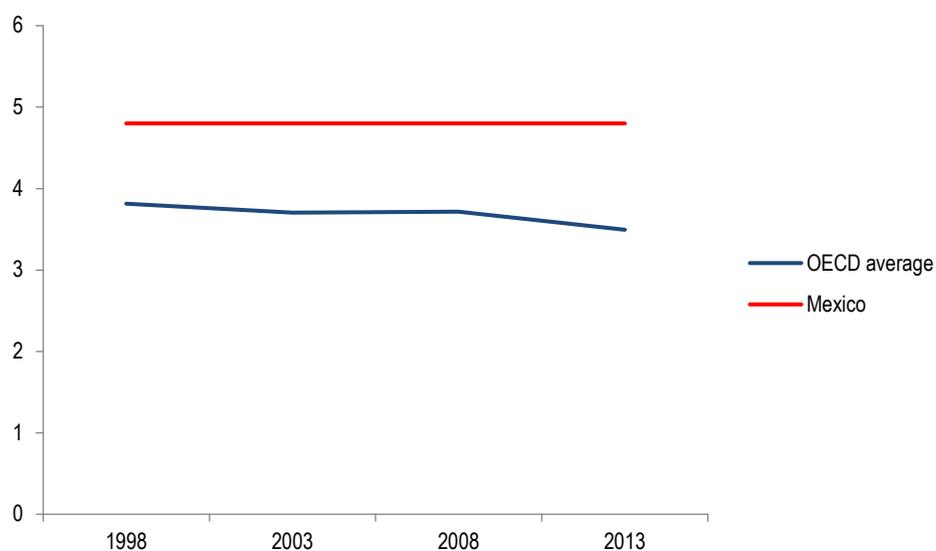
According to the OECD retail distribution indicator¹², retail regulation in Mexico is in line with the OECD average. The retail indicator is an average of six other indexes; registration and licensing, special regulation of large outlets, protection of existing firms, regulation of shop opening hours, price controls and promotions/discounts.

Figure 4.1. OECD Retail Trade Indicator

Note: Index scale 0 to 6 from least to most restrictive.

Source: OECD.

A more detailed analysis of each component of the retail indicator may help to identify areas to be improved. For instance, in terms of licenses and permits required to start a commercial activity, Mexico seems to have a more restrictive regulation compared to the OECD average. Naturally, this does not imply that the existing regulation is *per se* problematic, but if the restrictions are unjustified or are more restrictive than needed to achieve their objective, they may need to be addressed.

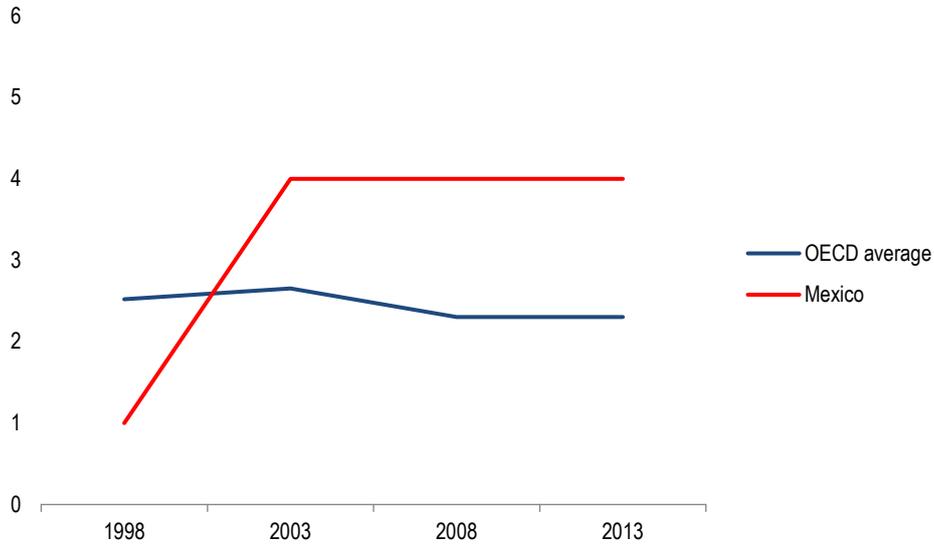
Figure 4.2. Licences or permits needed to engage in commercial activity

Note: Index scale 0 to 6 from least to most restrictive.

Source: OECD.

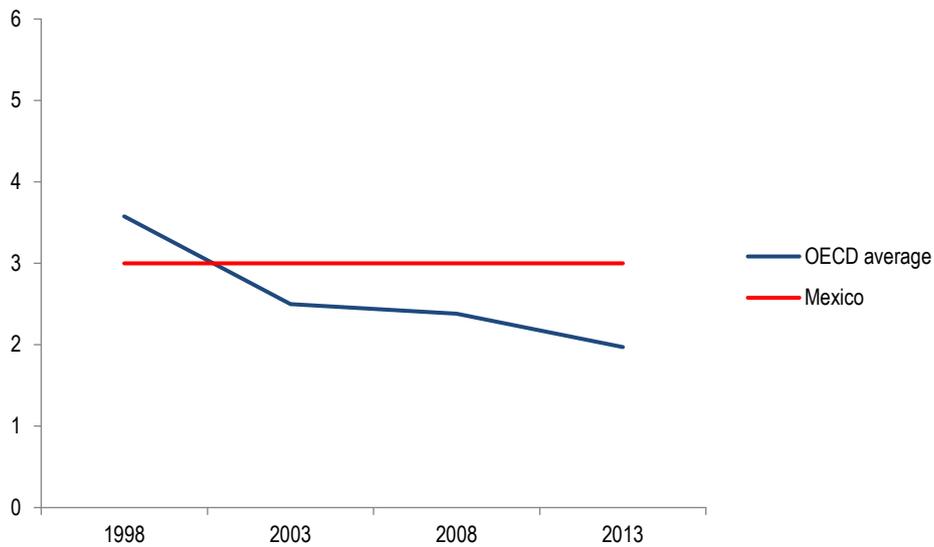
According to the OECD indicator, other areas where Mexican regulation seems to be stricter than the OECD average are the specific rules applied to large outlets and the protection of existing firms. However, Mexico performs better than the average on other aspects such as price control (see figure 4.4), regulation of shopping hours and promotion and discounts.

Figure 4.3. Specific regulation of large outlet



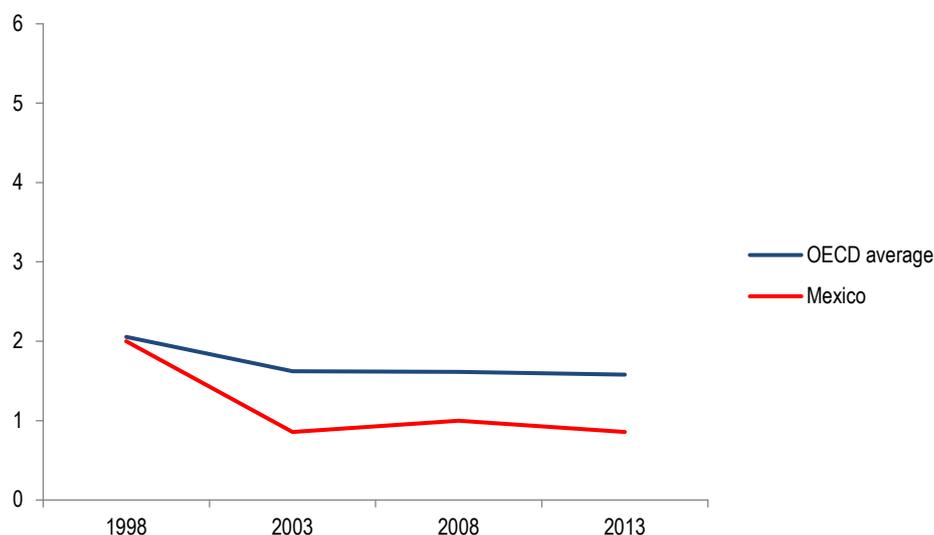
Note: Index scale 0 to 6 from least to most restrictive.
Source: OECD.

Figure 4.4. Protection of existing firms



Note: Index scale 0 to 6 from least to most restrictive.
Source: OECD.

Figure 4.5. Price controls



Note: Index scale 0 to 6 from least to most restrictive.

Source: OECD.

Considering the importance of the traditional retail channel in Mexico, the analysis of the regulation should focus on both national and local dispositions. In particular, the latter tend to oversee local markets and other street vendors (e.g. *tianguis*). A complete review of all local regulations in Mexico goes beyond the scope of this paper; however it is important to highlight a few examples which show how consumers' welfare may be negatively affected.

For instance, the regulation¹³ of markets and *tianguis* in Tapachula (Chiapas) establishes rules for the establishment and organisation of traditional retail shops. The art.10 states that to obtain authorisation to open a commercial activity it is necessary to demonstrate the benefits consumers would obtain from such shop. Having in place rules like this increases the degree of uncertainty and may potentially discourage entry. In fact, it is not clear on which criteria the potential consumers' benefits would be assessed. Another potentially harmful rule is set by art.19 subsection III, which prohibits the sale of imported products. This ban seems to be in contrast with the principle of consumers' benefits established by art.10 as it reduces the variety of products available in the market.

Another example is the regulation of local markets in Guanajato¹⁴ which links the authorisation to open a new commercial spot to the established retailers' association. This rule may raise some issues from a competitive perspective, as existing sellers may not have any incentives to authorise potential competitors to enter their markets.

The COFECE plays an important role in issuing opinions about regulations that could impede competition. For instance, in October 2017 the Authority assessed the act released by the Council of Uruapan (Michoacan), which set criteria for obtaining licences and permits to open a shop in the historical centre of the town. The act 173/20 12/48S0 prohibited the establishment of new shops in a delimited area of Uruapan, raising, according to COFECE, a barrier to entry that provided an advantage to incumbents in the market. In this case the Authority recommended eliminating the regulation in order to preserve and improve competition in the area.

Regulation does not always negatively affect the market, as there are also measures that aim to promote competition; for instance those enforcing consumer protection and rights. Procompetitive regulations include those that prohibit misleading advertising and require accurate labelling. (OECD, 2015^[1])

Box 4.4. Misleading and deceptive price promotions in United Kingdom

On April 2015, the CMA responded to a complaint raised by Which?, a consumer association, about misleading and opaque pricing practices in the UK grocery market.

In its submission to the competition authority Which? highlighted 4 main concerns:

- “confusing and misleading special offers that make extensive use of price framing, including reference pricing, volume offers and free offers;
- a lack of easily comparable prices because of the limitations of unit pricing;
- reductions in pack sizes without any corresponding price change; and
- price-matching schemes operated by particular retailers which may falsely lead consumers to believe they have the best deal or do not shop around.”

With regard to the first point, the consumer association was concerned about how prices of special offers were displayed, potentially distorting consumer choices. Such practices include the implementation of reference pricing (was/now), increases in product prices before their inclusion in multi-buy offers, and inaccurate claims about the better value of larger pack. The CMA found some of these claims to be true, although relatively limited.

The issue of unit pricing is related to the difficulties consumers may face in comparing prices. The authority’s investigation revealed complexities and inconsistencies in unit pricing which may potentially distort consumers’ choice. According to the CMA, these inconsistencies were originated by “the absence of clear guidance and/or relevant case law”. In this case, it recommended to the Department of Business, Innovation and Skills (BIS) to develop best practice guidelines to increase clarity regarding the requirements contained in the Price Marking Order (PMO). Recommendations were also made to the retailers about identifying the source of compliance issues and considering the opportunity to run ex-ante / ex-post controls.

The third concern was about the products whose size was decreased but not the price. The analysis revealed how the size of a product could change because of many factors which are not all linked to the objective of a price increase. Moreover, the retailers’ behaviour in case of size changes was in line with the legal requirement, as products’ labels displayed the actual size.

The last issue was about the pricing-match schemes run by retailers. The CMA did not find any evidence of this practice causing consumer harm. Although the information provided to the consumers was considered relatively clear, evidence gathered through a survey showed a low level of understanding of these practices by the consumers. The authority indicated that self-regulation could play a role in addressing these kinds of issues.

Source: https://assets.publishing.service.gov.uk/media/55a6c83540f0b61562000005/Groceries_Pricing_Super-Complaint_response.pdf

Notes

- ¹ For a summary see (Seely, 2015^[24]).
- ² See www.legislation.gov.au/Details/F2015L00242
- ³ See www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct
- ⁴ See Convenio de Concertación para la Mejora Continua de Practicas Comerciales Competitivas, 2012.
- ⁵ The impact of these regulations has been analysed in different countries by a variety of studies. For Uruguay see Borraz et al. (2014^[25]), for Australia see ACCC (2008^[15]) and Australian Government (2011^[26]), for the United Kingdom see CC (2008^[11]), (2000^[27]) and (Haskel, 2009^[28]), for France (Bertrand, 2002^[29]) and for Italy (Schivardi F., 2011^[30]).
- ⁶ See for instance (Boylaud, 2001^[31]).
- ⁷ See for instance (Biscourp, 2013^[32]).
- ⁸ See for instance the French Commercial Code.
- ⁹ See for instance the Sweden Price Regulation Act (SFS 1989:978).
- ¹⁰ See Law Decree no. 98 of 6 July 2011 and Law Decree no. 138 of 13 August 2011.
- ¹¹ See for instance www.ilsole24ore.com/art/notizie/2018-09-07/negozi-chiusi-domenica-mondo-commercio-si-divide-mentre-vola-l-e-commerce-110727.shtml?uuiid=AEjyF1IF
- ¹² See www.oecd.org/eco/growth/indicatorsofproductmarketregulationhomepage.htm.
- ¹³ Publicacion No. 361-A-2000 available at www.ordenjuridico.gob.mx/Estatal/CHIAPAS/Municipios/Tapachula/TAPReg7.pdf.
- ¹⁴ Reglamento de mercados publicos y uso de la via pública para el ejercicio de la actividad comercial en el municipio de León, número 119 available at [http://normatividadestatalymunicipal.guanajuato.gob.mx/normatividadn/descarga_file.php?nombre=Reglamento%20de%20Mercados%20P%C3%BAblicos%20y%20Uso%20de%20la%20V%C3%ADa%20P%C3%ABlica%20para%20el%20Ejercicio%20de%20la%20Actividad%20Comercial%20en%20el%20Municipio%20de%20Le%C3%B3n%20\(ene%202017\).pdf&archivo=fd45c64e026040dbcb83395829d2aea5.pdf&id_archivo=5986](http://normatividadestatalymunicipal.guanajuato.gob.mx/normatividadn/descarga_file.php?nombre=Reglamento%20de%20Mercados%20P%C3%BAblicos%20y%20Uso%20de%20la%20V%C3%ADa%20P%C3%ABlica%20para%20el%20Ejercicio%20de%20la%20Actividad%20Comercial%20en%20el%20Municipio%20de%20Le%C3%B3n%20(ene%202017).pdf&archivo=fd45c64e026040dbcb83395829d2aea5.pdf&id_archivo=5986).

Chapter 5. Conclusions

This report has provided a description of the grocery retail industry in Mexico, reporting a wide set of international experiences. We have observed common trends and behaviours across the world, suggesting that countries can learn from previous experiences in other jurisdictions.

Focusing our conclusions and recommendations on the Mexican market, it seems clear that the entire grocery retail industry is shifting towards a more developed and business model, although the traditional and informal market still represents a significant channel for a large segment of population. It is important at this stage that the country has in place the optimal legal and regulatory framework to support healthy growth in the sector.

The Agreement on good commercial practices is a tool for promoting consumer welfare and efficiency in the sector. Similar to the codes of conduct adopted in other countries, it has improved the business landscape of the industry by solving some issues which historically affected the relationship between retailers and producers. The various stakeholders we met recognised its positive effects on the industry, although they highlighted some potential areas of improvement, and expressed concerns that the agreement is not always respected.

Our analysis has observed some issues that mainly affect the commercial negotiations between retailers and providers. On a more detailed note, the so-called “fill rate” seems to be a controversial topic on which the parties do not always agree. In addition, the matter related to unilateral cost increases has been mentioned by suppliers’ associations in various meetings. In both cases, the mechanisms provided by the Agreement constitute a transparent way to solve these disputes.

Greater communication between retailers and suppliers is also required in order to improve the logistic system. Several producers have expressed concerns about shortfalls in the distribution system, and the fact that they bear the associated costs. In this case, we would recommend to the various stakeholders such as producers and retailers’ associations and the Mexican Ministry of Economy to improve the dialogue about the topic in order to reach efficient solutions. Particularly, all the parties could replicate how the most developed markets deal with similar issues, for instance adopting new technologies to make the entire process more efficient. COFECE could be consulted to prevent any arrangements that involve a risk of anticompetitive conduct.

With regard to the role of promoters, it appears that they can have a significant role in the location of items on store shelves, which may in turn represent an issue for small producers. As discussed in the paper, not all the market players have the financial power to maintain a well-established network of promoters around the various stores. In this context, alternative business models on the retail level which do not involve the presence of promoters in the stores could be considered.

Another issue to highlight is the type of sanctions established by the Agreement. The current framework is not as strong as in other jurisdictions, and so the parties may review the available measures and consider the option of introducing new ones such as monetary fines.

Overall, the agreement is well structured and its content is in line with the other codes of conduct established around the world. However, the various issues between retailers and producers reported in the paper could merit review, in particular trying to cover in more details some aspects (e.g. logistic systems). Moreover, an updated version of the agreement should pay particular attention to the role of online players and, more generally, to the changes and opportunities the digital revolution can bring to the industry.

Another aspect touched by the report is the impact that regulatory measures may have on the industry. To this regard, the main issues seem to occur at the local level. OECD indicators on market regulation suggest that Mexico is performing well compared to the OECD average. However, these indexes do not always take into account local regulations which seem to have a substantial impact on competition. The retailer business is significantly affected by local measures which may serve to protect incumbents in a market. The examples of Tapachula or Guanajuato demonstrate how these acts may dramatically impact a market's competitiveness with a negative effect on consumers' welfare. For instance, the lack of clarity in releasing shops permits and authorisations increases potential costs for new entrants, raising *de facto* a barrier to entry. Similarly, restrictions requiring incumbents to approve the entry of a new retailer should be removed. It is important to highlight the role of COFECE, which can issue opinions on national and local regulations, in identifying anti-competitive measures. A more systematic review of local regulations and their competition impacts may thus be advisable.

To conclude, the grocery retail industry plays a key role in the Mexican economy and in consumers' welfare. It is important to make sure that both channels – traditional and modern – work efficiently and competitively. Improving the tools to avoid any anticompetitive distortions in the commercial negotiations between retailers and providers is crucial, and the Mexican Ministry of Economy has the opportunity, through the Agreement on good commercial practices, to promote best practices in the business relationships. At the same time, further opportunities exist to ensure that local regulations do not unnecessarily restrict competition, always taking into account their underlying public policy objectives.

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