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Monopolisation, Moat Building and Entrenchment Strategies – Note by Mexico

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1. Introduction

1. The term "economic moats" is used to refer to the competitive advantages, sustainable over time which undertakings possess.[1] Cost advantages, intangible assets, network effects, switching costs and economies of scale, among others, are elements that can be considered as economic moats. These may allow an undertaking to have certain market power, sustainable over time, without having significant competitive pressure from other participants.

2. The concept of economic moats is not expressly covered by the Mexican legislation; however, it can be analyzed under the current legal framework that regulates market power (substantial power); and that is defined in investigations for relative monopolistic practices (unilateral conducts), or in investigations to determine essential facilities or barriers to competition. In this regard, this contribution presents an overview of such legal framework and provides an example of the challenges faced by Cofece when assessing economic moats, particularly in the energy sector.

2. The current Mexican legislative framework to analyze economic moats and consolidation

3. Barriers to entry must be analyzed to determine whether competitors face restrictions when trying to enter a market. Several aspects such as access to facilities operated by competitors, the recent behavior of undertakings participating in the markets, and the degree of positioning of the goods or services involved in those markets, among others, must be considered when carrying out the analysis to determine whether an undertaking has substantial power in any relevant market, which is the standard provided in Mexican competition law to consider that a certain undertaking is "dominant". For purposes of this contribution "substantial power" is not, as in other jurisdictions a particularly entrenched or strong dominance, t is just the term used by the Mexican law to refer to simple "dominance" or "market power". This is where economic moats become relevant, because as the OECD has mentioned, the substantial power of an undertaking and the barriers to entry a market can also be strengthened when the dominant undertaking implements strategies to protect its position or widen its economic moats.[2]

4. The Mexican Federal Economic Competition Law (LFCE or competition law) sets forth the elements and criteria to determine whether an undertaking has substantial power in a relevant market. It also provides a procedure to determine if there are barriers that impede conditions of effective competition in a market. These will be detailed below.

[1] Morningstar. (2014). *El Economic Moat*. https://www.morningstar.es/es/news/125114/el-economic-moat.aspx

[2] OCDE. (2021) Economic Analysis and Evidence in Abuse Cases. https://one.oecd.org/document/DAF/COMP/GF(2021)6/en/pdf

2.1. Relative Monopolistic Practices

5. In Mexico, vertical restraints or abuse of dominance are referred as relative monopolistic practices. Article 54 of the LFCE defines these as any action, contract, agreement, or procedure by undertakings with individual or joint substantial power, in a relevant market, whose effect or object is to unduly displace other undertakings, prevent their access or establish exclusive advantages in favor of one or several undertakings.

6. Unlike other jurisdictions, the LFCE provides for a specific list of conducts that are considered as relative monopolistic practices. Therefore, Article 56 of the LFCE establishes 13 conducts that, when carried out by a dominant undertaking with any of the objects or effects abovementioned, they are considered illegal.

7. Additionally, as in many other jurisdictions, these conducts are analyzed under the rule of reason, so Article 55 establishes that these conducts will not be illegal if the undertakings involved prove that there are efficiency gains derived from these conducts in the competitive process and in the consumer welfare.

8. To determine if an undertaking has "substantial power" or is dominant, in accordance with article 59 of the competition law, the following elements must be considered: **i)** market share of the undertaking involved and whether it can fix prices or restrict supply in the relevant market by itself, without competing agents being able, actually or potentially, to counteract such power; **ii)** the existence of barriers to entry and the elements that are likely to alter both those barriers and the supply of other competitors;[3] **iii)** the existence and power of competitors**; iv)** the possibilities of access of undertaking(s) and their competitors to facilities; **v)** the recent behavior of the undertaking(s) participating in that market; and vi) the others established in the Regulatory Provisions, as well as the technical criteria issued by the Commission. Moreover, Article 58 of the competition law establishes de obligation to determine a relevant market in which the undertaking exerts substantial power.

9. In this regard, article 8 of the Regulatory Provisions of the Federal Economic Competition Law (Regulatory Provisions) state that, in order to consider whether one or more undertakings have substantial power in the relevant market, the Commission may consider: **i)** the degree of positioning of the goods or services in the relevant market; **ii)** lack of access to imports or high import costs; and **iii)** the existence of high cost differentials that consumers may face when switching to other suppliers.

10. When analyzing relative monopolistic practices, barriers to entry are a natural part of the assessment to determine whether there is substantial power. To this end, article 7 of the Regulatory Provisions establish that the following may be considered as barriers to entry, among others: **i)** financial costs, costs of developing alternative channels, and limited access to financing, technology, or to efficient distribution channels; **ii)** amount, indivisibility and payback period of the investment, as well as the absence or low profitability of alternative uses of infrastructure and equipment; **iii)** the need for concessions, licenses, permits or any kind of government authorization, as well as rights of use or exploitation protected by intellectual and industrial property legislation; **iv)** investment in advertising required for a brand or trade name to acquire presence in the market that allows it to compete with established brands or names; **v)** restraints to competition in international markets; **vi)** restrictions by practices of incumbents in the relevant market; and **vii)** acts or legal provisions issued by any authority that discriminate

[3] Barriers to entry and expansion.

in the granting of incentives, subsidies or support to certain producers, sellers, distributors or service providers.

2.2. Essential Facilities or Barriers to Competition Procedure

11. Article 94 of LFCE establishes a special investigation procedure that allows Cofece's Investigative Authority to determine whether there are barriers to competition or essential facilities that could derive in the lack of effective competition conditions in a certain market. This procedure does not pursue any type of unlawful conduct under the competition law.

12. The competition law provides Cofece with preventive and corrective tools, which include merger control, competition advocacy, and the sanctioning of monopolistic practices and unlawful mergers. Except for merger control, which is aimed at preventing anti-competitive market structures and, to a certain extent, competition advocacy, the traditional tools provided for in the competition law are ex post. Economic regulation, on the other hand, takes place ex ante, from a proactive point of view with the design of rules and early intervention.

13. The scope of the procedure to determine essential facilities or barriers to competition falls in between these two sides. This procedure can correct competition issues that already have detrimental effects on a market (e.g., with an order to suppress a conduct that distorts the efficient functioning of a market), but it can also put in place measures to prevent future anti-competitive effects (e.g., through regulatory recommendations). Thus, with this procedure, barriers to competition may be identified and removed to restore the process of competition or to avoid the lack of competition in the future in a market. These barriers may be structural, behavioral or legal. In all cases, barriers must be the cause of the lack of conditions of effective competition and Cofece may adopt remedies in order to eliminate them.

14. With this tool, it is possible to analyze conducts that are not included in the list provided for in Article 56 of the LFCE as behavioral barriers that may have adverse effects on competition like, for example further entrench its competitive or dominant position.

15. In addition, structural market characteristics could be identified that facilitate anticompetitive conducts. These include a high level of market concentration, cross-ownership, common ownership, minority ownership, interlocking directorates, among others. With the procedure established in article 94 of the LFCE, Cofece may address these characteristics or other aspects that have adverse effects on competition. The procedure also makes it possible to identify legal provisions that are contrary to the process of competition and market access and to issue recommendations to the authorities to modify them. Finally, through this procedure, Cofece can determine the existence of essential facilities,[4] and establish guidelines to regulate access modalities, prices or rates, technical conditions, and quality, among others.

16. The procedure for the determination of barriers to competition and essential facilities may be initiated ex officio, at the request of the Federal Executive, on its own or through the Ministry of Economy or at the request of an undertaking with interference or direct participation in the market,[5] when there are elements that suggest that there is a lack

[4] Considering the elements provided for in Article 60 of the LFCE.

[5] The amparo in review 1111/2016, resolved by the Second Chamber of the Supreme Court of Justice of the Nation on May 31, 2017, added as a legitimate subject to present a request for possible barriers

of effective competition conditions in a market and in order to determine the existence of barriers to competition or essential facilities that may generate anticompetitive effects. In this case, an analysis of the relevant market and conditions of effective competition is also carried out, in accordance with articles 58 and 59 of the LFCE.

2.3. Analysis of economic moats and consolidation strategies under the Mexican competition law

17. In the investigation procedures mentioned before, relating to the determination of substantial power and the analysis of effective competition conditions under the LFCE, the possible analysis of economic moats is noted, as well as consolidation strategies, in particular under articles 59 and 94 of the LFCE, as well as 7, 8 and 9 of the Regulatory Provisions. Some hypothetical examples of possible regulatory amendment recommendations are set out, including but not limited to:

18. Intangible assets: The patents and licenses that undertakings manage to protect their goods or services will have the effect of granting them the right to exploit a certain good without their competitors being able to do so and therefore obtain an advantage that can give them a certain competitive advantage and market power. Article 59, section II of the LFCE, related to article 7, section III, of the Regulatory Provisions, allows Cofece to assess whether concessions, licenses, or any government authorization, as well as rights of use or exploitation protected by the legislation on industrial intellectual property, can be considered a barrier to entry. Therefore, having some type of intangible asset such as licenses or patents can represent a competitive advantage and a possible barrier to entry that new participants to the market would face. The effect is exacerbated when dominant agents in the market carry out strategies such as sham litigation or evergreening.

19. Switching costs: Switching costs involve costs that must be incurred by the consumer to change from one provider to another. This economic moat may be inherent in the characteristics of the good or service offered or may be artificially created by an undertaking to prevent its customers from switching suppliers. Both cases could be analyzed under Article 8, section III, of the Regulatory Provisions, which requires consideration of the existence of high-cost differentials that consumers may face when going to other providers. These switching costs may be further exacerbated if the industry presents strong network effects.

20. Economies of scale: when economies of scale are found in a market and an undertaking manages to capture a significant proportion of the market that allows it to exploit these economies of scale, it gives it advantages over others that do not achieve sufficient scale to reduce their costs. In this sense, these possible advantages over its competitors could be assessed by analyzing the economic costs generated by barriers to entry, such as those established in Article 59 of the LFCE and 7 of the Regulatory Provisions.

21. Consolidation Strategies: are all those whose objective is to strengthen the market power of an undertaking. Particularly, in the context of the analysis of economic moats, entrenchment strategies may occur, among others, when **i)** an undertaking adopts a mergers and acquisitions strategy that allows it to have access to tangible and intangible assets, technology and *know-how*, which strengthens its position in the market, and limits its competitors, or contractual strategies to prolong over time the benefit obtained or developed with respect to this type of elements; or ii) an undertaking creates a loyalty

to competition or essential input to undertakings with direct participation in the market (Undertaking with Interference).

program, which includes goods or services in addition to its main line of business, in order to influence the behavior of its consumers, and thus artificially increase their demand. In this sense, these could also be analyzed by article 59, section V, of the LFCE and article 7, section VI, of the Regulatory Provisions.[6]

3. Main challenges for Cofece assessing economic moats and consolidation strategies

22. There are several challenges when analyzing potential economic moats and consolidation strategies under the regulatory framework of the LFCE, which may vary by market and sector. As an example, in Mexico, energy markets could represent a challenge when studying economic moats and consolidation strategies.

3.1. Mexican Energy Market Challenges

23. In Mexico, for several decades, markets linked to the energy sector operated under a regulatory regime that gave state-owned companies exclusive control over various segments of the value chain.

24. The Energy Reform of 2013 introduced significant changes in the operation and structures of gas, energy, and hydrocarbon markets in general. These reforms included opening up to private participation in import, production and/or generation, transport and storage, as well as commercialization; modification of the methodology to set wholesale prices; the liberalization of prices to the final consumer; the promotion of clean energy generation; the asymmetric regulation of First-Hand Sale prices for the state-owned oil company Pemex; the vertical separation of the Federal Electricity Commission (CFE); and the granting of powers to different related regulatory authorities that would oversee, supervise and monitor the new responsibilities imposed to ensure competition in the markets.

25. This allowed Cofece to play an important role in the analysis of competition and anticompetitive conducts in the newly liberated markets. However, the transition to more competitive markets has faced challenges due to competitive advantages of state-owned enterprises in terms of market know-how, infrastructure, and economies of scale and scope.

26. The effective entry into the market of third parties has been limited due to the high investments required and the presence of sunk costs. Additionally, sectorial regulation provides for several procedures, need for permits and long waiting times, which may also discourage entry.

27. In addition to the issues mentioned above, there are other concerns related to regulation which may slow down the entrance of competitors. For example, complying with the processes to obtain the necessary permits to carry out activities in the value chains of the energy sector can represent an obstacle to the entry of new competitors. Companies may face long waiting times due to the lack of a centralized application system, limited resources by authorities to process applications and, in some cases, different requirements to obtain the same permit which can make it difficult for new undertakings to participate in energy markets.

[6] Not all consolidation strategies are anticompetitive, only those that have the object or effect of displacing, preventing access to, or conferring anticompetitive advantages.

28. In this sense, in regulated markets such as energy, economic moats inherent to market structure can be observed. For example, incumbents, before liberalization, may benefit from cost advantages, since the incumbent had the advantage of being the first to enter the market and incurring in the necessary investments in infrastructure. As such, its operations costs have already been covered.

29. Also, the companies that participated in the market prior to the Energy Reform enjoy the economic moat of brand recognition as they have positioned themselves for decades as the renowned supplier companies. In addition, access to this market requires permits, licenses, and concessions, which could represent a considerable economic moat, where new entrants would find it difficult to obtain them.

30. A case in the energy sector that exemplifies the above was the investigation into barriers to competition in the national aircraft fuel market (under file number IEBC-002-2019), which includes the production, import, storage, transportation, distribution, commercialization, sale, and related services.[7]

31. In the resolution of this case, Cofece's Board of Commissioners determined the lack of effective competition of conditions in the relevant markets, the existence of five barriers to competition that hindered the efficient functioning of the markets for primary and secondary commercialization, internal and external storage, as well as the sale of jet fuel.[8] Some of these may fall within the concept of economic moats in accordance with the economic literature, such as the requirements for obtaining a prior import permit and the advantages they entail for the undertakings participating in the market that already have them. As a result, recommendations and orders were issued to eliminate them.

32. In this sense, barriers were found that could fit into the concepts of economic moats and that are preventing the market from having conditions of effective competition. Recommendations to remove barriers and thus restore conditions for effective competition in the markets were addressed to various government authorities and a coordinated energy regulatory body, and among other issues, recommendations were made on modifications and establishment of enforceable regulation. Likewise, an undertaking was ordered to comply with the functional, operational, and accounting separation obligations ordered by the Energy Regulatory Commission. With compliance with the recommendations and measures ordered, a greater entry of competitors into the markets of the jet fuel value chain is expected, generating conditions of effective competition in these markets.

[7] The public version of the resolution is available in Spanish at: https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V359/1/5915637.pdf

[8] For more information see press release Cofece-009-2023, available at: https://www.cofece.mx/wp-content/uploads/2023/03/COFECE-009-2023_ENG.pdf

Federal Telecommunications Institute (IFT)

1. Introduction

33. The Federal Telecommunications Institute (IFT, for its initials in Spanish) is the authority in charge of the enforcement of the Federal Economic Competition Law (LFCE, for its initials in Spanish) in the telecommunications and broadcasting sectors in Mexico. This implies that the IFT is not only the regulator of these sectors - with the power to apply all the regulatory tools proper of a sector regulator- but it also has the tools set by the competition law.

34. Among those tools set by the Mexican competition law, market investigations are established in article 94 of the LFCE, which will be explained below. This tool is suitable for addressing structural issues like economic moats and entrenchment. As the exclusive competition enforcer for the telecoms and broadcasting sectors, the following analysis will focus on the experience of the IFT in such sectors.

2. Economic Moats and Entrenchment

35. The concept of a moats is a reference to medieval castles or towns, that were surrounded by a water-filled ditch, to prevent outsiders to enter said town or castle. They were intended to protect the town from outside threats or attacks. Hence, an *economic moat* is a defensive barrier, that protects companies from its competitors; it is designed to keep those competitors out. It has been argued that the deeper and wider the moats were, the better they serve to protect and preserve the castle; therefore, companies will have an incentive to create moats, and to make them deeper and wider.

36. Whether a firm has an incentive to create a moat depends directly on what it its protecting. Traditionally, an economic moat refers to a *competitive advantage* that allows a firm to reap outsized profits; it refers to brands, trademarks or patents, economies of scale, among others. That competitive advantage is precisely what needs protecting.

37. A walled garden is a business model or a strategy that directs consumers to stay within the ecosystem, by providing all the resources it needs within the ecosystem, and also to make it costly to look for such resources elsewhere. The owner of the walled garden will have total control over what the consumer has access to. The effect of having a walled garden is making the economic moat deeper, as it will make it difficult for competitors to reach the consumers within that walled garden.

38. This implies that there are markets where two different issues come up: the moat created to keep competitors out and a walled garden created to keep consumers in. This creates a particular problem for competition enforcers because competition could be lessened. The markets with this type of players might be less dynamic and there will be less rivalry among the different players.

39. The lack of dynamism is precisely what leads to entrenchment. Seen like this, it is worth considering that firms will not only strive to obtain market power, but to keep it too. It is fair to say that for a firm an outcome where they can enjoy outsized profits with little to no competition is something worth attempting.

40. In the 1960's, in the US, the *Entrenchment doctrine* established that mergers could be prohibited if they strengthened the position of the parties through efficiencies, broader

product ranges, or greater financial resources.[9] In other words, if a merger strengthened an already dominant firm it was thought to harm smaller rivals, as it would make it more difficult for them to compete. This doctrine was heavily criticized and is no longer used in the US. One of the biggest criticisms was that it punished efficiencies for the only reason that it could make already big firms bigger, which would allow them to consolidate their market power, ignoring all the positive effects like lower costs, production or distribution efficiencies that would benefit consumers.

41. Recent developments in markets, especially with the rise of the platform economy, scale as well as scope have proven to be key indicators for ecosystem building. The first element to build an ecosystem is a *core market*. Once a core market has established a strong position it could expand to other markets. It is likely that the firm would enter adjacent markets, or markets within the sector, to create a strong position across the different markets that comprise the sector. It is precisely the presence of the firm across the different markets of the sector that creates scope. This also creates a diverse and unique set of services that may induce consumers to stay within the ecosystem of the firm, it consolidates the walled garden.[10]

42. There are two ways a firm could enter the adjacent markets, either organically or by acquisition. If it is the latter, then it is likely the competition authority may have to sanction it before the acquisition is completed. Alternatively, firms could also enter adjacent markets organically, simply by developing a new product related to its core market. It can leverage the position of the strong core market to enhance the product in the adjacent market, it could also use the user base, or the data gathered in one market to grow and expand in other markets. This is trickier for competition enforcement, because in a blink of the eye the companies that were once focused on a core market can become whole ecosystems with high walls and wide moats.

43. Here is the issue, while being big is not bad in itself, certain present factors in network or platform markets might make big companies a threat to competition, even if they create efficiencies and synergies or offer low prices for consumers. These closed ecosystems might hinder the entry of new competitors or hamper growth of smaller ones, who will not gain the critical mass to stay in the market. While the competition authorities can deal with acquisitions and certain conducts that may lead to consolidation of market power, the mere structure of the firm in some instances can become a hindrance to competition itself, and if there are several firms that behave in a similar manner, then whole markets and sectors could be affected.

3. The IFT and the Mexican Legal Framework

44. In 2013, in compliance with a constitutional reform and after a mandated investigation, the IFT found two incumbent firms in the telecom and broadcasting sectors to be preponderant agents and therefore subject to specific regulation. In accordance with the definition established in the Mexican Constitution, a preponderant agent is an economic agent that has more than 50% of market participation in a sector, either by traffic, audience, or capacity. After ten years from the imposition of the asymmetric regulations, their market shares are still above 50%. It is fair to say that they are entrenched.

[9] Federal Trade Commission v Procter and Gamble 386 US 568 (1967). NIELS Gunnar *et al*, Economics for Competition Lawyers, p. 4 and 536.

[10] BOSTIEN Friso, Abuse of Platform Power: Leveraging Conduct in Digital Markets under EU Competition Law and Beyond, pages 36-43.

45. In addition to the asymmetric regulation, telecom and broadcasting companies are also subject to competition laws, enforced by the IFT. Over the past ten years, there have been several cases brought against these companies for monopolistic practices. However, it has proven difficult to isolate the effects of the practices when the defendant is a preponderant agent in the sector. For example, there was a case that accused an incumbent of cross-subsidization which had artificially altered market shares and prices. The alleged conduct consisted of the transfer of profits among different companies within the same group that had less optimal performance. It used the deep pockets of the group to its advantage. While in this particular case, the IFT could not prove the alleged negative effects -hence there was no sanction- because the data did not sustained the claim, the defendant pointed out the fact that the defendants are part of the same group (the same owner), they have the same interests, it is a modern conglomerate in which the allocation of risk and resources is expected to position its different services and products across adjacent markets, and cross-subsidization is part of its strategy.

46. The cases of abuse of dominance in these sectors almost always involve allegations regarding the size of the defendants: their power to negotiate, to foreclose, to block access to essential facilities, among others. While fines have been imposed in many cases, these agents (in particular the preponderant agents) are continuously accused by smaller market participants, they have presence across markets within the sector and they are conglomerates that are striving with their closed ecosystems and massive moats.

47. The LFCE clearly states that a concentration will be considered unlawful if i*t confers or may confer the surviving entity, the acquirer or the Economic Agent resulting from the concentration, substantial market power in terms of this Law, or if it increases or could increase said substantial market power, by which free market access and economic competition may be hindered, diminished, harmed or impeded;*[11] following these precept, if a merger, is considered unlawful it would be rejected by the authority, specifically, if said merger aims to consolidate market power or it would increase the power of an economic agent, so that it may hinder competition, then it should be deemed unlawful and not allowed.

48. However, firms can acquire other firms without raising the enforcers attention, either because of the amount of money exchanged does not reach the threshold, the size and operations of the agent in the market of the merger is not relevant, or because the products are unrelated to the economic agents' main activity. It might not necessarily be obvious to the enforcer that the objective of a particular merger is to consolidate its presence across different markets, to build an ecosystem. By the time it is obvious, it will probably be too late, and the firm might already be entrenched.

49. It is also noteworthy that agents in the sectors of telecommunications and broadcasting have had decades to consolidate its market power, so only today they are reaping the benefits of investments made decades ago. As noted, closed ecosystems just like conglomerates can also be built organically, by internal growth not always by acquisitions. This is one of the reasons why the reform of 2013 included the concept of preponderant agents.

50. The Constitutional reform of 2013 and the LFCE from 2014 also introduced a new tool denominated *Special Procedures: investigations to Determine Essential Facilities of Barriers to Competition.* Article 94 of the LFCE introduces a procedure that focuses on determining the existence of barriers to competition and free market access or of essential

[11] Article 64, fraction I of the LFCE.

facilities, that could generate anticompetitive effects. The investigation can start either ex-officio or per request of the Federal Executive Branch.

51. The LFCE defines a barriers to competition as **any structural market characteristic**, act or deed performed by Economic Agents with the purpose or effect of impeding access to competitors or limit their ability to compete in the markets; which impedes or distorts the process of competition and free market access, as well as any legal provision issued by any level of government that unduly impedes or distorts the process of competition and free market access;[12] Said definition clearly recognizes that any structural market characteristic can be a competition barrier if it impedes access to competitors or it limits their ability to compete.

52. The procedure of Article 94 is very straightforward. First, the Investigative Authority (IA) starts the investigation with the purpose of finding elements that suggest that a market has no effective competition conditions, and that that lack of effective competition is consequence of either the existence of barriers to competition and free market access or there are essential facilities. Once the Investigation period is over, the IA makes a preliminary report, in which it can propose measures or remedies to correct the market. This preliminary report is published in the Federal Official Gazette (DOF, for its initials in Spanish).

53. The economic agents with legal standing in the procedure will have the opportunity to manifest and make arguments, present evidence to prove that the barriers generate consumer welfare or generate efficiency gains in the market and how the proposed measures will not achieve said efficiencies. It is similar to the trail-like procedure that is used for monopolistic practices. Before the file is completed or integrated, the economic agents have the opportunity to present suitable and economically feasible measures to eliminate the competition problems identified by the investigation.

54. In the case they do present these measures, the Economic Competition Unit (UCE) of the IFT would have to make a report, analyzing the measures, proving if the proposed measures are in fact feasible and adequate for eliminating the competition problems identified by the investigation. This report is presented to the Board of Commissioners, and they will have to either accept or deny the proposed measures.

55. If the measures were rejected, or the economic agents did not propose any measures, then once the file is completed it is sent to the Board of Directors which will have 60 days to issue their final resolution, that may include measures or remedies aimed at eliminating the lack of competition in the market. These measures may include recommendations to public authorities, orders to the firm to effectively eliminate a barrier to entry; and if the issue is regarding an essential facility, the measures may include guidelines to regulate access, prices or rates, and technical and quality conditions. The measures could also include divestiture of assets, rights, stocks in the necessary proportions to eliminate the anticompetitive effects when other corrective measures are not sufficient to solve the identified competition problem.[13]

56. Article 94 of the LFCE also states that the IFT has to verify that the proposed measures will generate efficiency gains in the market. Also, if the Economic Agent in question demonstrates that the barriers to entry generate efficiencies and have a favorable impact on the economic competition process, or other gains of efficiency, and increased consumer welfare, then the measures should not be imposed.

[12] Article 3, fraction IV of the LFCE.

[13] Article 94 of the LFCE.

57. It would seem that this special procedure is in fact a very good solution to address competition issues that arise by the presence of entrenched market power due to the presence of conglomerates, and other forms of economic moats, that may escape merger review or do not fall within monopolistic practices.

4. Article 94 of the LFCE in Practice

58. The IFT has resolved two investigations within the scope of Article 94 and there is one ongoing procedure. The two market investigations were regarding two local State laws that affected the telecom markets. The IFT imposed measures to counter the adverse effects of the law and has been cooperating with the local State officials to enforce the measures.

59. The experience that the IFT has in applying Article 94 has made clear that the remedies or measures imposed need to be designed carefully, which is not an easy task. Also, the law indicates that if the agents with legal standing manage to prove that the barriers generate consumer welfare or market efficiencies, then the proposed measures should not be imposed. This implies that the proposed measures (the ones proposed by the IA) cannot be changed by the Board of Commissioners in their final resolution, which could limit the effectiveness of the tool, as new measures or remedies could come up at later stages.

5. Conclusions

60. Firms with certain characteristics will try to establish an economic moat, they will make all the investments necessary to achieve that protection from other competitors. It can be argued that in certain sectors such as telecom and broadcasting, as well as platform markets, firms can also build a closed ecosystem or a walled garden, that has the objective to keep users and consumers within such walls. In this sense, firms that have an economic moat in addition to a walled garden, could easily isolate themselves from the market and simply cease to compete with others.

61. The market investigations tool set in Article 94 of the LFCE is a suitable tool for addressing structural issues that might generate barriers to competition. Structural issues such as economic moats and walled gardens, especially when they are within certain sectors such as platform markets, telecom, and broadcasting, which may escape traditional competition tools such as merger controls.

62. Two interesting concepts from the past are coming up when addressing platform economies, digital markets as well as telecoms: conglomerates and entrenchment theory. Firstly, regarding conglomerates, the corporate structure of firms themselves may allow it to create an economic moat, as it is capable of leveraging its resources among its different firms; it can also allocate risk, and enjoy of certain efficiencies like lowering costs of administration and brand recognition as a whole. However, conglomerates have come back to us as ecosystems, to narrow the concept to platform and digital markets, but in essence it is the same. Merger control has a limited scope as not all conglomerates are constructed by acquisitions, since they can be a result of internal growth, and restructuring. Also, it may be possible that many conglomerate firms already existed by the time competition enforcement comes into play. In this sense, Article 94 could also complement merger control by dealing with conglomerates, that may be generating barriers in the markets.

63. Secondly, regarding entrenchment theory, while it is true that a merger should not be prohibited just because it is going to create a very big firm ignoring the potential

efficiencies it might generate, also, the truth is that if the size and structure of the firm will enable it to consolidate its position within one or several markets, it could be challenged by the authority. In Mexico, as indicated above, the competition law states that a concentration could be deemed unlawful if it consolidates or has the potential to consolidate market power. It is hard to say but this is the same as entrenchment theory.

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