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“Are market investigations a suitable tool for the analysis of digital markets?”

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This is a question that many competition authorities from different jurisdictions around the world and some competition experts are currently trying to answer. In fact, a salient discussion within the antitrust community around this question is related to the proposal to create the “new competition tool” by the European Commission (according to the European Commission, the new competition tool constitutes one of the three pillars through which more effective competition in the digital ecosystem is sought. When this text was being elaborated, the tool was in process of being issued. See https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html), as part of the search for a market analysis tool that allows an effective and timely enforcement intervention against the structural problems that the digital economy presents (As has been widely discussed, digital markets are often characterized by strong economies of scale and scope due to low production cost of digital services and the large number of customers served. Moreover, they are often multiple-sided and have strong network externalities, meaning that a digital technology will become more popular and convenient as more individuals use it. In addition, data collection and processing capabilities of a digital technology provide a digital supplier with a substantial competitive advantage).

In Mexico, market investigations are established in Article 94 of the Competition Law. Drawing from COFECE’s experiences conducting market investigations, an exhaustive analysis of this tool was carried out by a small task force within the Commission to answer this specific question. My conclusion is that market investigations indeed could be effective in addressing the competition challenges that the digital era has brought to competition authorities, albeit with some challenges.

This affirmation derives from three reasons. First, because of the intrinsic characteristics of our market investigations, it is possible to address structural competition problems that prevent a market from functioning properly. Second, this tool effectively allows for more holistic analyses, taking into account that the functioning of the market is explained not only by the behavior of the market players but also by other factors such as the behavior of consumers, as well as regulatory aspects. And third, the specific circumstances of digital markets that facilitate a dynamic that derives in market concentration, as well as a rapid decrease in competition, could be addressed with the type of remedies that this enforcement tool enables.

Article 94 of the Competition Law

COFECE's market investigations empower us to determine the existence of barriers to competition and to eliminate them, or the existence of an essential facility and to regulate its access.

Regarding barriers to competition, Article 94 allows the Commission to impose two types of remedies. First, there are behavioral remedies, which oblige economic agents to act in a specific way or to stop acts that distort the competitive process. There are also structural remedies, which allow modification of the structure of a market with the objective to create or restore competitive conditions. Moreover, we can also issue non-binding recommendations to authorities of any level of government to eliminate the regulatory barriers identified in a market investigation.

We can also determine the existence of essential facilities and, if deemed necessary, establish rules for their access and use by other economic agents when their existence is determined as a result of the market investigation.

Due to the aforesaid characteristics, Article 94 constitutes a hybrid competition and regulatory tool with the advantage that it allows to conduct a thorough market assessment employing all the Commission's investigative tools (among which are forensic analysis, screening, onsite searches, requests for information, depositions and international cooperation with other competition authorities). It also allows us to impose appropriate remedies even though competition problems are not directly related to traditional anticompetitive conducts.

Furthermore, this is a tool that is not intended for sanctioning anticompetitive practices carried out by an economic agent in particular, but rather to identify behavioral and structural problems present in the investigated market, and to order their correction through various remedies, including regulating the access to an essential facility.

COFECE's experience in market investigations

Thus far the Commission has opened seven market investigations into: (i) slot allocation at the Mexico City airport; (ii) local freight transportation in Sinaloa; (iii) barley production and distribution for beer factories; (iv) port services and transportation for bulk grains in Puerto Progreso in the state of Yucatan; (v) distribution and transportation of unprocessed milk in Chihuahua; (vi) norms and standards for evaluation of conformity assessment; and (vii) card payment systems.

Of these, three cases were closed by the Commission (barley, norms and standards, and port services) and one is still ongoing (payment systems). The cases related to freight transportation and milk determined that the competitive process was flawed because of the existence of regulatory barriers. In both cases, we issued non-binding recommendations to the local authorities in order to eliminate these barriers. In these cases, we learned that if we identify in advance that the main anticompetitive effects derive from regulatory barriers, and that the likely result of the market investigation will solely involve non-binding recommendations for public authorities to amend those regulations, then the outcome will be the same as our non-binding opinions. Hence, it does not make sense to devote too many enforcement resources to these types of cases.

Other salient experience we had with this tool derived from the airport slot allocation case, where we determined the existence of an essential facility. This case generated important lessons related to the Commission's scope to regulate access to an essential facility, since the Judiciary interpreted that COFECE's powers to regulate access to essential facilities have limits in the presence of a sectoral regulator, in this case the aeronautical authorities of the country. However, this judiciary precedent is not mandatory as case law. Additionally, as in other countries, no regulatory body for the digital economy exists in Mexico, so this allows COFECE to exercise its powers related to regulatory measures for essential facilities in said markets.

On the positive side, the experience with this tool has shown us that we are able to conduct deeper analyses of market structures, bringing to light elements which hinder competition but are usually unnoticed in the investigation of anticompetitive practices. Among these elements are behavioral biases, practices which affect competition but are not included in the Mexican catalogue of abuse of dominance practices, use of personal information, and the behavior of other competitors. The analysis of these elements is relevant in digital markets which exhibit characteristics that often result in high concentration, accumulation and control over large volumes of data, strong network effects, bundling of digital products or services, etc.

Applying Article 94 in the analysis of digital markets

The Commission's experience with market investigations has contributed identifying Article 94 as a possible mechanism for the analysis of digital markets and their intrinsic problems in at least four areas.

First, Article 94 facilitates the analysis and correction of behavioral barriers carried out by economic agents that do not necessarily enjoy at the present moment substantial market power, but that participate in markets with characteristics (i.e., network externalities, economies of scale and scope, etc.) that generate competition for the market. In this sense, the international discussion has warned that the intervention of competition authorities through traditional tools could happen too late, when the rest of the potential entrants can no longer compete with the consolidated platforms, even to offer improved or innovative features against dominant economic agents. In the competition jargon, this phenomenon is known as “tipped markets,” which favor “winner-take-all” outcomes. Therefore, our market investigation tool can allow us to intervene at an early stage and establish behavioral or structural remedies that promote competitive processes.

Second, as I mentioned, Article 94 can also allow us to analyze practices that are not expressly found in the Mexican catalogue of abuse of dominance practices of Article 56 of the Competition Law. Some behaviors that have been identified in the international discussion as potential abuses of dominant position and do not necessarily fit in the list of abuse of dominance practices are self-preferencing or the imposition of abusive contract terms. These are likely to occur when a platform holds a gatekeeper position (that is to say, platforms that have control over distribution and/or entry channels to other lines of business and that benefit from network effects).

Third, with the use of Article 94 we could impose structural remedies such as:

- Interoperability of data and protocols which could occur in different forms. For example, through compatible interoperability for third parties under discriminatory conditions, by making a protocol of one digital platform interoperable for competitors in the market. Or by establishing specific requirements to provide interoperability in relation to specific areas of a business model, and by generating interoperability in various related digital markets.
- Data portability to allow the migration of each user’s data from one platform to another, so it can be reused independently and without losing information previously created.
- Establishment of codes of conduct applicable to dominant platforms in order to self-regulate the behavior of these agents and prohibit certain conducts (such as self-preferential practices or “abusive” contracts).

- Prohibition of discriminatory treatment or self-preferencing measures which could warrant diverse measures such as the application of an *ex ante* regulation to a vertically integrated digital platform that has a gatekeeper role.
- Divestiture and functional separation of digital platforms that have the ability to exercise market power and distort the competition process.

Fourth and last, as already mentioned, this mechanism can allow us to determine whether an economic agent possesses an essential facility and, if deemed necessary, to regulate its access. On the international level, discussions have focused on whether the data or databases in possession of certain economic agents, and even their processing capacity, could be considered as essential facilities. These can generate a competitive advantage that is difficult or impossible to achieve or replicate by their competitors.

Final remark

Currently there are very few countries that have mechanisms that, independently of anticompetitive practices, allow to analyze and, when appropriate, correct market structures through remedies that favor the entry of new competitors and generate environments favorable to competition. Iceland, Greece, Mexico, South Africa and the United Kingdom are among the few countries that have mechanisms of this nature.

It is interesting to see how the characteristics of our market investigations and our experience with this tool have motivated the international community to turn its attention to the analysis of Article 94 in the search for answers to the question of its suitability to address competition problems arising in digital markets. When this provision was enacted in the 2014 Mexican Competition Act, it was largely criticized by various actors of the competition community. They considered it an unnecessary mechanism because we already had our abuse of dominance enforcement powers and because the Commission was not a regulator.

I believe that our experience and the four advantages described above can contribute positively to the international debate, and the accumulated knowledge from this debate will allow us, as a competition authority, to apply this tool in an effective manner. It corresponds to COFECE to assess in detail the application of Article 94 on a case-by-case basis. Our actions most certainly are going to be challenged by the investigated parties in the courts. But new challenges require new methods and new solutions that keep up with the times. ■

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