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## **Global Forum on Competition**

### **ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Mexico**

- Session II -

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This contribution is submitted by Mexico (IFT) under Session II of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: [oe.cd/dmkt](https://oe.cd/dmkt).

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## *Abuse of dominance in digital markets*

### **- Contribution from Mexico –**

#### **Federal Telecommunications Institute (IFT)**

##### **1. Introduction**

1. The identification of abuse of dominance is complex because it requires to first determining the existence of an agent with a dominant position and then proving that such agent has incurred in an abusive conduct. This task faces even greater challenges in emerging, dynamic and complex markets such as digital markets.

2. In this document, the IFT describes the Mexican legal framework regarding abuse of dominance in the telecommunications and broadcasting (T&B) sectors; it sets out the challenges to determine, in digital markets, whether an economic agent has a dominant position (substantial market power) and whether it has incurred in an abusive conduct (relative monopolistic practices); and it shares studies and two merger cases in which it has analyzed issues related to abuse of dominance in digital markets.

##### **2. Legal Framework**

3. The IFT is the competition authority and regulator in the T&B sectors in Mexico, and its purpose is to regulate and promote economic competition, free market access, and efficient development of these sectors.

4. Article 59 of the Federal Economic Competition Law (LFCE) establishes the elements that must be analyzed to determine the existence of a dominant position. Article 56 of the same law establishes the conducts that may constitute an abuse of dominance (for example, tying, exclusive dealing, margin squeeze, boycott, cross-subsidies, predation, price discrimination, and refusal to deal) and article 54 establishes the requirements that must be met to conclude that an economic agent has incurred in abuse of dominance. Those are if:

- It has a dominant position;
- It has incurred in a conduct provided for in Article 56 of LFCE; and
- The conduct has or may have the purpose or effect of unduly displacing other economic agents, substantially impeding them the access to the market, or establishing exclusive advantages in favor of one or several economic agents.

5. Abuse of dominance in Mexico is illegal and it is sanctioned in terms of the competition law,<sup>1</sup> unless the involved economic agents prove that the conduct produces gains in efficiency overcoming their possible anticompetitive effects and improving consumer welfare.

### 3. Elements and Challenges in the Analysis of Abuse of Dominance in Digital Markets

6. In the following paragraphs, the IFT sets out elements that might be considered in the analysis of abuse of dominance in digital markets:<sup>2</sup>

7. **Analytical tools to evaluate dominance.** Digital markets require the adaptation of traditional analytical tools or adoption of new elements to assess dominance. For instance, tools such as market shares are usually static, so they could be inadequate to the dynamic nature of digital markets. In this regard, to evaluate market power, some competition authorities have opted to reduce the importance of market shares in favor of analyzing the contestability of the market, direct and indirect network effects, multi-homing practices, switching costs, access to data by rivals and the competitive pressure exerted by innovation.

8. **Winner-takes-all.** Due to the winner-takes-all dynamics in some digital markets, the nature of competition is for the market rather than in the market. This way, competition is driven by innovation, differentiation and the development of new products or services. Therefore, competition authorities must evaluate the probability of disruptive innovations that could modify the market structure in the near future.

9. **Multi-homing.** Specifically in digital platforms, the possibility of multi-homing practices by users on all sides of the digital platform can diminish dominance, provided that users could exert competitive pressure on the demand side.

10. **Direct and indirect network effects.** The presence of direct and indirect network effects can generate an increase of the market share, even to the level of monopolization (market tipping), because the positive network effects could discourage users to change digital service providers.

11. **Access and accumulation of data.** Data is an asset of key importance for digital markets, since they can be used to improve the quality and personalization of services, giving the company who owns the data, advantages over its competitors. Likewise, data accumulation, and the exclusive access to them, could constitute barriers to entry.

12. **Barriers to entry.** It is widely known that large economies of scale could create barriers to entry and give incumbents an important advantage in the market. Other barriers to entry in digital markets are:

1. **network effects**, that impede reaching a large base of users for entrants;

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<sup>1</sup> The economic agent subject to the investigation, for a single occasion, may express in writing its willingness to avail itself of the benefit of dispensation or reduction of the amount of the penalty. See *Guía del procedimiento de dispensa o reducción del importe de multas en investigaciones de prácticas monopólicas relativas o concentraciones ilícitas, para los sectores de telecomunicaciones y radiodifusión, que es de carácter informativo y tiene como finalidad orientar al público en general sobre el procedimiento de dispensa o reducción del importe de multas en los sectores de telecomunicaciones y radiodifusión.* Available in Spanish at: <http://www.ift.org.mx/sites/default/files/guiadelprocedimientodedispensaoreducciondelimportedemultas.pdf>

<sup>2</sup> IFT and APEC (2019). *Competition Policy for Regulating Online Platforms in the APEC Region.* Available at: <https://www.apec.org/Publications/2019/08/Competition-Policy-for-Regulating-Online-Platforms-in-the-APEC-Region>

2. **lack of interoperability** between platforms (for example, the inability of a rival application to operate in a certain operating system);
  3. **lack of multi-homing** and data portability, that could impede mobility of users through different digital service providers because the user cannot move with its data; and
  4. **loyalty programs**, like bonuses and rewards for seniority and activity.
13. **Abusive conducts.** In digital markets, economic agents could commit the following anti-competitive practices:
- **Predatory pricing.** To assess the profitability of an alleged practice of predation, the authority must identify if this practice is not part of a strategy to attract users and evaluate the profitability of the practice against a counterfactual exercise in which this practice does not generate costs for rivals. Authorities must also evaluate the future profitability of the practice, since it is possible for a platform to recover the costs of a practice on one side by resorting to the benefits it obtains on other sides.<sup>3</sup> A particular challenge in the evaluation of predatory pricing occurs when the products or services have zero-price.
  - **Exclusive dealing.** In the case of exclusivity clauses, it is suggested to evaluate the impact on rivals' costs (specifically, given the economies of scale between the sides generated by indirect network effects, if the practice makes it difficult for rivals to attract and generate a user base on all sides). In addition, authorities must evaluate the impact on the intensity of competition.
  - **Price discrimination.** The use of data could facilitate that digital service providers customize their prices at levels that could constitute price discrimination.
  - **Refusal to deal.** Data are important or necessary inputs in digital markets. The scarcity or low replicability of data and their importance to improve algorithms and increase the quality of service, represent a competitive risk because it gives to the company who owns the data incentives to refuse to offer access to them.

#### 4. Experience related to digital markets

14. The IFT expects to analyze more competition cases related to digital markets in the following years, given their growing importance in the Mexican economy and their close interdependence with telecommunication networks and services.

15. In this context, the IFT has conducted studies and surveys regarding digital markets, especially in audiovisual content provision and distribution in traditional and digital platforms.<sup>4</sup> Likewise, in order to prevent practices inhibiting or limiting competition and

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<sup>3</sup> Katz, M. (2018). *Exclusionary conduct in multi-sided markets*, in OECD (2018). *Rethinking antitrust tools for multi-sided platforms*. Available at <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>

<sup>4</sup> IFT (2020). *Estudios y reportes de análisis de medios y contenidos audiovisuales*. Available in Spanish at: <http://www.ift.org.mx/medios-y-contenidos-audiovisuales/estudios-y-reportes-de-analisis-de-medios-y-contenidos-audiovisuales>.

A study related to the digital ecosystem is forthcoming, which describes de value chain and challenges and opportunities of topics such as OTT services, artificial intelligence, Internet of Things, Blockchain and Big Data. IFT (forthcoming). *Un acercamiento al ecosistema digital: Retos y oportunidades para el sector de telecomunicaciones*.

entry, the IFT has monitored and will continue assessing digital markets evolution in the coming years.

16. Regarding mergers and acquisitions, in 2016 and 2018, IFT analyzed two mergers (AT&T/Time Warner<sup>5</sup> and Disney/Fox<sup>6</sup>) whose parties provide audiovisual content to OTT platforms. In these cases, the IFT identified the following relevant markets:

- Provision and licensing of audiovisual contents for its distribution through OTT services; and
- Production of audiovisual content for its distribution through free-to-air TV, pay-TV and OTT services.

17. In both cases, the main concerns arose from possible non-horizontal effects, such as capacity and incentives for the resulting entity for coordination, foreclosure, and setting up barriers to entry, considering that anti-competitive foreclosure is likely to occur when the vertically integrated economic agent has a dominant position in one of the markets and when it has the incentives and the ability to leverage its dominant position into other stages.

18. Notwithstanding, in both cases, IFT dismissed anti-competitive effects in the digital markets identified either because:

1. the market share was less than 3%;
2. the parties did not participate in OTT markets; and/or
3. no significant barriers to entry were identified.

## 5. Conclusions

19. The IFT recognizes that abuse of dominance analysis in digital markets has particular characteristics that must be acknowledged such as the existence of strong network effects, significant economies of scale, usually low or zero marginal costs, their fast-moving or fast developing nature, innovation, and the relevance of data.

20. Considering the above-mentioned characteristics, the growing importance of digital markets and their close interdependence with telecommunication networks and services, it is essential for the IFT to keep a close watch on how digital markets evolve, considering potential risks to competition in digital and traditional markets, as well as efficiency gains and benefits to final consumers.

21. In this sense, the IFT, as a competition and regulatory authority in the telecommunications and broadcasting sectors, will continue monitoring and assessing traditional and digital markets and its evolution, focusing on providers holding a dominant position and preventing abuse of dominance.

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<sup>5</sup> IFT (2017). *RESOLUCIÓN MEDIANTE LA CUAL EL PLENO DEL INSTITUTO FEDERAL DE TELECOMUNICACIONES AUTORIZA LLEVAR A CABO LA CONCENTRACIÓN RADICADA BAJO EL EXPEDIENTE NO. UCE/CNC-004-2016, NOTIFICADA POR AT&T INC., WEST MERGER SUB INC. Y TIME WARNER INC SUJETA AL CUMPLIMIENTO DE CONDICIONES*. Acuerdo P/IFT/150817/487. Available in Spanish at: [http://apps.ift.org.mx/publicdata/VP\\_P\\_IFT\\_150817\\_487.pdf](http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf).

<sup>6</sup> IFT (2019). *RESOLUCIÓN MEDIANTE LA CUAL EL PLENO DEL INSTITUTO FEDERAL DE TELECOMUNICACIONES AUTORIZA LLEVAR A CABO LA CONCENTRACIÓN RADICADA BAJO EL EXPEDIENTE NO. UCE/CNC-001-2018, NOTIFICADA POR THE WALT DISNEY COMPANY Y TWENTY-FIRST CENTURY FOX, INC SUJETA AL CUMPLIMIENTO DE CONDICIONES*. Acuerdo P/IFT/110319/122. Available in Spanish at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/verpubpift110319122canxuce.pdf>.