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The Role of Innovation in Enforcement Cases – Note by Mexico

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More documents related to this discussion can be found at www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm.

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Competition and innovation on digital platforms

1. The IFT is constantly updated on the advances and innovative elements in the telecommunications and broadcasting sector. This involves studying the impact of innovation and technological advances in the light of competition policy, as well as the regulatory policy under its responsibility. This enforcement is carried out with a central focus on the end users' benefit, seeking to establish competitive conditions for operators, thus fostering the innovation process, as well as economic and social development.

2. Aware of the innovative business models presented by the digital ecosystem around platforms, the IFT´s Investigative Authority has conducted a study on digital platforms and their business models[1]. The study highlights that the five companies known as the Big Five or Big Tech[2] have revolutionized the economy, online behavior, as well as in the daily lives of people in Mexico and around the world.

1. On digital platforms

3. Innovation, as defined by the Merriam-Webster Dictionary, is understood as a new idea, method, or device or the introduction of something new[3]. Authors such as Bourreau and de Streel[4] argue that the process of innovation can be classified with respect to the state of the art of technology. On one hand, innovation is considered incremental if it represents a small step forward (an improvement of a feature), while breakthrough innovation occurs when there is a significant technological leap (a paradigm shift). Additionally, innovation can be classified as sustainable or disruptive when comparing its relationship with the value network. Sustainable innovation takes place within the value network, while disruptive occurs outside this network and displaces it.

4. In the context of digital platforms, innovation plays a crucial role in ensuring successful market entry, particularly when network effects are in play and users tend to use only one platform. Nevertheless, GAFAM platforms continue to invest substantial sums in research and development to stay at the forefront of continuous innovation. They even have a tendency to acquire startups to leverage the synergies of their technologies, although in some cases, these acquisitions can be classified

[1] *Estudio sobre plataformas digitales y sus modelos de negocios*, available in Spanish at: https://autoridadinvestigadora.ift.org.mx/estudios.php

[2] GAFAM: Google (Alphabet), Amazon, Facebook (Meta), Apple y Microsoft.

[3] Merriam-Webster. (n.d.). Innovation. *Merriam-Webster.com dictionary*. at: https://www.merriam-webster.com/dictionary/innovation

[4] Bourreau, M., & de Streel, A. (2020). Big tech acquisitions: competition & innovation effects and EU merger control, p. 3.

as competitive strategies with the aim of stifling potential rivals (killer acquisitions).[5]

5. The behavior of digital platforms is also characterized by a business strategy in which a platform utilizes its digital presence or brand to diversify or expand into services beyond its original core business. Additionally, partnerships between platforms and/or companies while potentially enhancing efficiency, can also raise concerns related to competition[6].

6. Both innovation and expansion beyond the core business can serve as strategies for new entrants in the digital platform market to challenge incumbents. Consequently, competition often takes the form of *involvement*, also known as drastic innovation in which a new technology completely displaces the old one. This causes competition to be for the market, rather than in the market.

7. Innovation in digital world does not only refer to products and services, but also the utilization of technological advancements to integrate functionalities from platforms that initially targeted distinct shared markets. This enables the leverage of user and common components of these platforms. Multi-sided platforms, where users, developers, manufacturers, and content providers coexist, serve as a foundation for delivering value and give rise to ecosystems that facilitate cooperation, transactions, innovation, co-creation, and potentially generate network effects across the offerings of various products and services.

2. In the relevant market definition

8. The determination of the relevant market is fundamental in the analysis of economic competition. This delineation allows for the evaluation of the object and/or effects of a conduct or operation, leading to the assessment of the existence of significant market power or the conditions necessary for effective and free competition.

9. The concept of relevant market is defined in the literature as *"the set of products (and geographical areas) that could create competitive constraints for the analysed companies [e.g. the merger firms]" or "the set of products (and geographical areas) that exert some competitive pressure on each other"*.[7]

10. In this context, the Federal Judiciary has indicated that the relevant market refers to the set of "*all products that are reasonably interchangeable or substitutable, according to the purposes for which they were made, considering the characteristics of price, use and quality. In simpler terms, the relevant market is the geographical space in which similar products or services are offered or demanded, which gives it a double dimension: of products or services and geographical or territorial. In this situation, in order for there to be a relevant market, it is necessary that a set of the same or similar goods or services are*

[5] Killer acquisitions occur when a company acquires another company with the goal of stopping the innovation project of the company it acquired and that threatened its business model, thereby eliminating a future competitor.

[6] Rossotto, C. M., Lal Das, P., Gasol Ramos, E., Clemente Miranda, E., Badran, M. F., Martinez Licetti, M., y Miralles Murciego, G. (2018). Digital platforms: A literature review and policy implications for development. *Competition and Regulation in Network Industries*, 19(1-2), 93-109.

[7] Motta, M. (2004). *Competition Policy. Theory and Practice*, chapter 3, pp. 1 y 2. Cambridge University Press.

available to the consumer in a territory large enough for the consumer to be willing to obtain the goods or services at some point in that geographical space, during the time in which the consumer is willing to wait to satisfy his need. In this order of ideas, it can be seen that this concept, (...) has a triple delimitation: objective, geographical and temporal (...).[8]

11. In the telecommunications and broadcasting sectors, a considerable number of the provided products are differentiated, either due to strategic decisions by suppliers (e.g., zero-price services that differ in quality or other elements) or due to the ongoing innovation that characterizes the markets in these sectors.[9] This includes factors like technological convergence, the emergence of new technologies, digitalization and the constant emergence of new business models.

12. To determine the relevant market in the presence of differentiated products, the IFT may take into account, among other factors, the new differentiation variables, resulting from technological innovation and new business models.

13. When it comes to substitute products, it's crucial to note that asymmetric substitution refers to a situation where the substitution between two products occurs in only one direction. In simpler terms, product *A* can replace product *B*, but the reverse is not possible due to specific characteristics (such as lower quality, more restricted or specialized functionalities, or product *A* being a bundled offering that includes product *B*). This concept of asymmetric substitution holds significant implications for establishing the relevant market, as it may vary depending on which product is chosen as the starting point for the substitution analysis.

14. In the specific context of telecommunications services, asymmetric substitution can occur. For instance, during technological transitions, a new technological advancement may encompass the attributes of the prior development while introducing new features or functionalities that consumers value. Additionally, it may occur between individual services and bundles of services. In this scenario, users might be unwilling to replace a bundle with an individual service, but they would be open to substituting an individual service with a bundle.[10]

15. Given the aforementioned factors, technological convergence and the enhanced capacity and speed of information transmission in next-generation telecommunications networks enable the provision of a multitude of services. Depending on the marketing strategies of the providers, these services can be bundled and offered as packages.

16. Packaging can take two forms: (i) pure packaging, where services are exclusively sold as a bundle without the option to purchase individual components separately; or (ii) mixed packaging, where services are available to users both as part of a bundle and individually. To ascertain whether it constitutes a market for packages or individual services, it's crucial to examine whether there is asymmetric substitution—meaning that packages can replace individual services, but the reverse is not possible. This aspect is

[8] SCJN (2008). *Relevant Market. Its Concept in Matters of Economic Competition*. Thesis I.4o.A. J/75. Collegiate Circuit Courts. Judicial Weekly of the Federation and its Gazette. Volume XXVIII, October 2008. Ninth Epoch. p. 2225.

[9] EC (2018). *Guidelines on market analysis and assessment of significant market power within the regulatory framework for EU electronic communications networks and services.*

[10] Willington, M. (2010). *Relevant Markets in the Telecommunications Sector: FNE and TDLC Approaches and International Review. Work carried out for the National Economic Prosecutor's Office.*

significant as it influences the analysis depending on whether the starting point for substitution analysis is a service package or an individual service.

3. In efficiencies

17. In cases of potential engagement in anti-competitive practices related to dominance (or relative monopolistic practices) or unlawful concentrations, the parties involved may argue that they achieve efficiency gains that positively impact the competitive process and promote free competition. They may assert that these gains outweigh any potential anti-competitive effects, ultimately leading to an enhancement of consumer welfare.

18. It is worth highlighting those efficiencies that are closely related to the concept of innovation. In this sense, and under an investigation for probable relative monopolistic conduct or an unlawful concentration, economic agents will be able to demonstrate, among others, the introduction of new goods or services, the cost reductions derived from the creation of new techniques and production methods, as well as the introduction of technological advances that produce new or improved goods or services. It is important to mention that, in these cases, it will be necessary for the economic operator to demonstrate that the net contributions to consumer welfare derived from such practices outweigh the anti-competitive effects.

19. In view of the above, it is of great importance for the IFT Investigative Authority to consider the elements of innovation in the case of digital markets, including digital platforms, and even more when investigations have been initiated in markets such as mobile operating systems, application stores, the distribution of audiovisual content through platforms, among others[11]. This is relevant since the ultimate goal is for consumers to benefit from the innovative processes that technological advances allow.

20. In addition to what has been mentioned in the framework of the attributions of competition agency, it is important to mention that the IFT, as a sectoral regulator, is responsible for the application of the Federal Telecommunications and Broadcasting Law (LFTR).

4. In the management of the radio spectrum

21. The radio spectrum and orbital resources are public domain assets and are managed by the IFT. The administration includes the preparation and approval of plans and programs of use, the establishment of the conditions for the allocation of a frequency band, the granting of concessions, the supervision of radio broadcasts, the application of the sanctions regime, among others.

22. When administering the spectrum, the IFT will pursue, for the benefit of users, effective competition in convergent markets, efficient investment in infrastructure, innovation and industry development of convergent products and services, as well as the promotion of technological neutrality.

23. For the proper planning, administration and control of the radio spectrum and for its efficient use and exploitation, the IFT keeps the National Frequency Allocation Table updated based on the general interest. The IFT considers technological developments in

[11] Investigations carried out by the IFT´s Investigative Authority available at: https://autoridadinvestigadora.ift.org.mx/investigaciones.php

telecommunications and broadcasting, particularly radiocommunication and the radiocommunication regulations of the International Telecommunication Union.

24. In this regard, the IFT issue each year the program of frequency bands with the frequencies or frequency bands of a given spectrum that will be subject to a bidding procedure or that may be allocated directly and will contain, at least, the services that can be provided through those frequencies or frequency bands, its category, modes of use and geographical coverage. This program must meet criteria that promote the convergence of networks and services to achieve efficiency in the use of infrastructure and innovation in the development of applications, among others.

25. Concessions for the use, exploitation or exploitation of the radio spectrum for commercial or private use[12] shall be granted only through a public bidding procedure upon payment of a consideration, for which the following factors must be observed, among others: coverage, quality and innovation, the prevention of concentration phenomena that contradict the public interest, the possible entry of new competitors into the market, as well as the favoring of lower prices in services to the end user.

26. On the other hand, the LFTR recognises the existence of concessions for private use. This type of concession confers the right to use and exploit frequency bands of the radio spectrum for specific use or for the occupation and exploitation of orbital resources, for the purposes of experimentation, verification of the technical and economic viability of technologies under development, temporary testing of equipment, among others.

5. Telecommunications networks and services

27. It is important to share that in Mexico, concessionaires operating public telecommunications networks must adopt open network architecture designs to guarantee the interconnection and interoperability of their networks.

28. To this end, the IFT prepares, updates and administers the fundamental technical plans for numbering, switching, signaling, transmission, pricing, synchronization and interconnection, among others, to which concessionaires operating public telecommunications networks must be subject.

29. These plans aim to promote the broad development of new telecommunications concessionaires, technologies, infrastructures and services, through the deployment and investment in telecommunications networks and the promotion of innovation; non-discriminatory treatment of concessionaires; establish flexible mechanisms that allow and encourage the use of new technologies in telecommunication networks, for the benefit of users; adopt measures to ensure technological neutrality, as well as ensure the effective interconnection and interoperability of public telecommunications networks.

[12] For private communication purposes.