Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2024)18

Unclassified

English - Or. English

10 June 2024

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 7 June 2024

Working Party No. 3 on Co-operation and Enforcement

Monopolisation, Moat Building and Entrenchment Strategies – Summaries of contributions

11 June 2024

This document reproduces summaries of contributions submitted for Item 2 of the 139th meeting of Working Party 3 on 11 June 2024.

More documents related to this discussion can be found at www.oecd.org/competition/monopolisation-moat-building-and-entrenchment-strategies.htm

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Argentina

An economic moat refers to the competitive advantages that enable a company to maintain its monopoly or dominant position over the long term. These advantages are fundamental to the company's operations and are typically built up over time, leading to their longevity. In contrast, entrenchment strategies involve actions taken by a firm to reinforce its existing competitive advantages or defend its dominant position against competitive threats by raising barriers to market entry. These strategies are more transitory and are often adapted to respond to specific market conditions or competitive challenges.

In the context of antitrust legislation in Argentina, the present note explores how economic moats and entrenchment strategies are addressed within the current competition law framework. While entrenchments strategies may predominantly be addressed by the competition authority as practices involving an abuse of dominant position of exclusionary nature, economic moats are assessed as barriers to entry when investigating alleged anticompetitive conducts and in the process of merger control analysis.

The note also analyses a case of entrenchment strategies in a mass consumer products market, characterised by the strong brand positioning of the sanctioned company, with a focus on the investigative tools used by the CNDC to prove the anticompetitive practices linked to these strategies and a case of entrenchment strategies in the pay-TV market that resulted on a vertical practice of exclusionary nature.

BIAC

Business at OECD (BIAC) appreciates the opportunity to submit these comments to the roundtable on monopolization, moat building and entrenchment strategies. This topic is of increasing relevance to competition enforcement and to the business community. This draws on previous BIAC contributions addressing innovation[1] and other issues considered by the Competition Committee with respect to digital markets.[2] This contribution covers both enforcement of unilateral conduct and merger enforcement, although, further to the Secretariat's note, greater focus will be devoted to unilateral conduct.

Monopolization or dominance, when illegally obtained or maintained, is a serious competition issue worthy of considerable attention. BIAC strongly endorses a focus on those issues by the WP3. Loose descriptive terms such as "economic moat" and "entrenchment," which are increasingly being used by some observers and antitrust authorities in a pejorative sense to describe certain behaviors, however, are not, in and of themselves, helpful in defining or evaluating those abusive and exclusionary practices that should be subject to stringent antitrust enforcement. In short, it is not the (trendy) description of the conduct that is relevant, it is the effect of that conduct.

It is acknowledged that certain business strategies may seek to entrench or leverage a company's competitive advantages. But it is important to distinguish between those strategies which result in effects that are anti-competitive – and hence merit enforcement action – and those which may be pro-competitive and efficiency enhancing or neutral. In these latter instances, i.e., in the absence of exclusionary effect, enforcement action is unwarranted, and intervention is likely to result in worse outcomes for customers and consumers. While distinguishing anti-competitive conduct from pro-competitive business strategy can be difficult in practice, applying established economic and competition law principles and theories of harm, as well as evidentiary rigor, is far more likely to yield reliable results than the use of catchy labels. For example, while terms such as "moat building" and "entrenchment" may serve to label certain conduct, they do not adequately capture whether the acts being scrutinized are being undertaken for anti-competitive purposes or for valid, pro-competitive or efficiency enhancing reasons. Nor do they necessarily imply a particular effect on the markets at issue.

The concept of dominance in a specific product market serves as a starting point because it provides an important and relevant underpinning for considerations of whether entrenchment or leveraging strategies give rise to anti-competitive concerns. Dominance resulting from market power – i.e., the ability of a firm to act independently of competition – should remain at the heart of any theories of harm concerning entrenchment and leverage.[3] Yet, dominance alone does not imply that business strategies relating to complementary, vertical, or product extension markets necessarily harm competition –

[1] OECD, The Role of Innovation in Competition Enforcement – Note by BIAC, DAF/COMP/WD(2023)100 (Nov. 29, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)100/en/pdf. [hereinafter BIAC Note on Innovation in Competition Enforcement].

[2] OECD, Theories of Harm for Digital Mergers – Note by BIAC, DAF/COMP/WD(2023)73 (June 5, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)73/en/pdf [hereinafter BIAC Note on Theories of Harm for Digital Mergers].

[3] OECD, Guidance to Business on Monopolisation and Abuse of Dominance, DAF/COMP(2007)43 (June 17, 2008), https://www.oecd.org/daf/competition/40880976.pdf.

indeed, a successful company extending its offering to other areas often provides significant consumer benefits.

In addition, while there may be specific indicia and considerations regarding market power in the context of digital markets – for example, network effects[4] – this does not fundamentally change the relevance of established competition law principles to address any anti-competitive concerns regarding entrenchment and leveraging in these markets. Nor are these considerations a sufficient justification for taking a completely different approach than in other markets, including in digital markets. BIAC acknowledges, however, the fact patterns (and counterfactuals) that may induce harm in the specific context of digital services are less well-established.

In terms of merger enforcement, as with innovation theories of harm discussed by the Competition Committee in December 2023,[5] a key issue in enforcement is the burden of proof and who bears it. There is good reason to maintain the same burden of proof in these cases as those involving other types of harm, like price effects and output reduction. The priority for merger enforcement should remain focused on transactions involving direct competitors, typically competing with each other in the same product and geographic markets.

[4] BIAC Note on Theories of Harm for Digital Mergers, *supra* 2.

[5] BIAC Note on Innovation in Competition Enforcement, *supra* note 1.

Brazil

In 2023, more than 600 cases were adjudicated by the Brazilian antitrust authority. For each case review, CADE aims to elaborate the proper theory of harm and adequate assessment tools. The terms entrenchment and economic moat were scarcely used by the council; however, it discussed theories of harm related to these concepts in several cases.

Entrenchment can be seen as the consolidation of a dominant position in a way that both new entries and threats by competitors are less likely to occur. It is facilitated by certain market conditions such as network and scale economies. The concept has been increasingly used in the analysis of potential anticompetitive conduct and merger reviews in digital markets where these conditions are often present.

As for the term economic moat, it refers to the dominant position of a company that is not likely to be threatened by competitors or possible entrants' actions. This is because the company has some competitive advantage, which can be strategically created.

Although the terms are intertwined as evidenced by their definitions, we do not consider them synonyms. Entrenchment seems to derive mainly from specific market conditions, while economic moats are usually strategically created.

Internal research showed that the term entrenchment was mentioned in two votes of commissioners regarding mergers and acquisitions and in an opinion of the Office of the Superintendent-General of CADE. There is also a vote in which a previous mention was referred. CADE research, in its Tribunal's precedent decisions, did not find mentions of the term economic moat.

Despite the low frequency of use, we believe that the concepts of these terms have been fundamental to CADE's decisions. For example, considerations regarding the establishment of dominant positions arising from network economies are common. Therefore, even though the concepts have not been explicitly adopted, they have guided several discussions in Brazil.

Costa Rica

An economic moat refers to a company's ability to maintain a competitive advantage over its competitors by establishing mechanisms that can result in a barrier that protects said advantage. On the other hand, an entrenchment is understood as a situation in which the company develops a strategy focused on consolidating or expanding a dominant position. These types of strategies often leverage the market power that the company already enjoys in a market or group of markets and can lead to a significant decrease in competition.

With regard to the investigation and sanction of anti-competitive practices, article 52 of the General Telecommunications Law, Law 8642, provides that it is the obligation of the Superintendence of Telecommunications (SUTEL), inter alia, to "prevent and detect monopolies", and that article also recognizes anti-competitive practices committed by operators or suppliers could have the objective or the effects of "limit, diminish or eliminate competition in the telecommunications market" and establishes the following legal types could be employed in cases of moat building or entrenchment: "Unjustified actions to increase costs or hinder the production process of a competitor" and "Any deliberate act that has the sole purpose of procuring the exit of operators or suppliers from the market, or involves an obstacle to their entry."

Regarding merger control, the regulatory framework is also broad enough to specifically consider cases of entrenchment. Article 101 of the Law on the Strengthening of the Competition Authorities of Costa Rica, Law 9736, provides: "Concentrations that do not have the foreseeable object or effect of significantly impeding competition in the relevant market affected by the transaction or in other similar or substantially related markets shall be approved by the highest body of the corresponding competition authority." In this sense, the assessment of the competition authority should consider among the elements to be analyzed, the creation or reinforcement of substantial market power, allowing to consider possible entrenchment situation that seek to extend or leverage already existing dominant positions to other markets.

As a relevant example, in the case of the Costa Rican telecommunications sector, a series of administrative decisions have been identified that could have resulted in the state operator enjoying a significant advantage in relation to privately owned operators in relation to the provision of mobile services. This situation has become an advantage for this operator and has generated a situation of asymmetry in the market, which has become particularly relevant in the case of the deployment of the latest mobile technologies, such as the deployment of 5G networks.

Given that the existence of this advantage has not resulted from actions directly carried out by the operator in question, but from decisions and omissions in control of the radio spectrum, SUTEL has so far used the tools available in the field of promotion and advocacy of competition to promote the elimination or at least a reduction in the advantages granted to the state-owned operator, and the playing field can be levelled through the application of competitive neutrality policies. However, in recent years, the state operator has taken a series of actions regarding to protect and extend this advantage, which led to the filing of complaints for the alleged commission of anti-competitive practices in relation to the management of the radio spectrum for the deployment of 5G mobile networks. These allegations are currently at the preliminary investigation stage.

European Union

The notions of moats, moat building and entrenchment strategies have not been defined in legislation or jurisprudence in the EU, so there are no commonly accepted definitions of these notions. The Commission has traditionally not used these terms in its decisional practice when enforcing EU antitrust and merger control rules.

However, the underlying considerations and concepts have played a role, notably in decisions concerning Article 102 TFEU on the abuse of a dominant position. The existence of moats will typically be relevant for the finding of dominance. Moats will often constitute a barrier to market entry and expansion which constitute key factors for the finding of dominance.

While moat building or entrenchment strategies as such do not form part of the categories of established abuses under Article 102 TFEU, such practices may – depending on the circumstances of the case - infringe Article 102 TFEU. They may harm consumers not only by reducing quantity and quality of products or by increasing prices, but also by hampering innovation. Moat building strategies may be particularly effective if they take place within an ecosystem of products and services which are all built around, support or form part of the "economic castle" protected by the moats.

The most instructive case the Commission has dealt with which could be considered to deal with moat building and entrenchment strategies is the Google Android case, which concerned Google's strategy to cement the dominance in the "economic castle", that is its online search service, by creating and maintaining moats around it.

Mergers may lead to the creation or strengthening of a dominant position by allowing the merged entity to widen its economic moats and to entrench its market power. As a result, such mergers may weaken the existing degree of competition and undermine the future contestability of the market. Generally, entrenchment is more likely in markets with significant barriers to entry. Also complementarities between related products may entrench a dominant position by raising barriers to entry. Merger cases where the entrenchment of dominance were assessed by the Commission include Booking/Etraveli, Adobe/Figma and Microsoft/Activision.

The Digital Markets Act ("DMA") equally does not use the terms "moats" and "entrenchment". However, the economic principles underlying these terms can be found in the DMA's objectives, the criteria for designating gatekeepers under the DMA and the obligations that apply to them. Many obligations in the DMA attempt to overcome existing moats by requiring designated gatekeepers to do something that levels the playing field for rivals. Other obligations try to prevent that a gatekeeper strengthens its position by maintaining or strengthening its moats or by otherwise making it difficult for competitors to challenge its market position.

Germany

The concept of an "economic moat" can be understood to refer to structural competitive advantages that allow a company to protect its (core) market(s) in which it holds a dominant or at least an economically strong position from competition with rivals over the long term.[6] Such a moat often includes the existence of high barriers to entry around one or more products or services. In particular as regards digital markets, these barriers to entry can be caused or increased by network effects, data-driven advantages as well as "ecosystem effects" brought about by economies of scale and scope from the different products and services offered by the respective undertaking.

Relatedly, while the concept of an economic moat can be considered to be a more static one that focuses on structural aspects, the notion of entrenchment seems to put more emphasis on actions and strategies employed by companies with the goal of maintaining or expanding their positions of economic power.[7] Compared to structural factors that contribute to an economic moat, entrenchment strategies can, at least in some instances, be considered anti-competitive, for example when they impede market entry of innovative challengers or foreclose existing competitors.

In this note, we will share some thoughts on how the concepts of economic moats and entrenchment relate to recent developments in German competition law. In doing so, we will focus on the digital sector and in particular highlight potential links with Section 19a of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter "GWB"). While this should not be taken to mean that the Bundeskartellamt considers concepts like moats or entrenchment irrelevant for non-digital markets, there are – as will be laid out in the following in more detail – certain characteristics of digital markets that make them particularly prone to the proliferation of economic moats and entrenchment strategies.

[6] Cf. OECD Secretariat, Monopolisation, Moat Building and Entrenchment Strategies – Background Note, June 2024, p. 6, https://one.oecd.org/document/DAF/COMP/WP3(2024)1/en/pdf

[7] Ibid, p.7.

Japan

In Japan, conducts such as “moat building” and “entrenchment,” in which a dominant enterprise maintains its market position and excludes competitors, are primarily regulated as exclusionary private monopolization. The requirements of exclusionary private monopolization include "artificiality that deviates from the normal methods of competition” and “substantial restriction of competition,” which means the establishment, maintenance or enhancement of market power.

The NTT East case is the case in which the Supreme Court ruled for the first time that the requirement of "exclusion" needs "artificiality that deviates from the scope of normal methods of competition.” NTT East is a telecommunications carrier, and provided FTTH services, which mean telecommunication services to users in detached houses using optical fiber facilities. Furthermore, NTT East, that owned approximately 70% or more of the optical fiber facilities used for FTTH services, was obligated under the Telecommunications Business Law to make its optical fiber facilities available to other telecommunications service providers (competitors in the user service market). Under these circumstances, NTT East set lower prices for users of FTTH services than charges for connection to optical fiber facilities for other FTTH service providers. The Court concluded that the conduct had "artificiality that deviates from the scope of normal methods of competition”.

In two other cases (JASRAC, Mainami), courts also admitted the existence of "artificiality that deviates from the scope of normal means of competition”.

The Google case is a recent case. Google had provided Yahoo with the technologies for search engines and search advertising necessary for mobile syndication transactions. However, Google ceased providing Yahoo with the technologies, thereby making it difficult for Yahoo to carry on mobile syndication transactions. The conduct could violate the Antimonopoly Act as private monopolization or unfair trade practices. As Google submitted a commitment plan, the JFTC approved it in 2024.

Finally, the Cabinet has approved a new draft law to improve the competitive environment for software used in smartphones. The new law is to designate regulated entities and prescribes certain prohibited conducts and compliance requirements, as well as measures to be taken in the event of violation. The draft law is to be discussed in the Parliament.

Kazakhstan

The contribution discusses the concepts of Economic Moat and Entrenchment Strategies, emphasizing their relevance in digital markets and their impact on competition. While not explicitly mentioned in Kazakhstani legislation, the antimonopoly agency views them as crucial for understanding and enforcing competition law.

The contribution highlights challenges in measuring the benefits and costs of Economic Moats and Entrenchment Strategies and outlines effective tools for identifying potential anticompetitive practices. It also discusses barriers to entry in commodity markets and key indicators used by the Agency to evaluate economic Moats and Entrenchment.

Korea

In today's economy, businesses tend to employ strategies of monopolization, economic moat building and entrenchment to secure competitiveness and bolster their position in a market. If exploited or unfairly employed, these strategies can undermine fair competition and consumer welfare. That is why appropriate regulation and supervision are necessary, and the Korea Fair Trade Commission (hereinafter the "KFTC") imposes sanctions on businesses engaging in anticompetitive conduct.

Kakao Mobility's Self-preferencing (February 2023)

The KFTC imposed remedies and a KRW 27.1 billion (EUR 19 million) fine on Kakao Mobility, the largest company in the general ride-hailing service market, for abusing its market dominance. The company manipulated its passenger-driver matching algorithm to give preferential treatment to its affiliated drivers over non-affiliated drivers to increase market share and further solidify dominance in the general ride-hailing service market.

Google's abuse of dominance in the app store market (April 2023)

Google restricted competition and consumer choice by compelling game developers to release their apps exclusively through Google Play, which is an entrenchment strategy. The KFTC imposed remedies and a KRW 42.1 billion (EUR 29.6 million) fine on Google for anticompetitive conduct including abuse of dominance.

Such enforcement action by the KFTC have implications that the KFTC established fair business practices and created a more competitive landscape in the app store market by taking strict measures against a company engaging in abuse of dominance, attempting to maintain and strengthen its market power. The KFTC will continue strict enforcement against unfair anticompetitive conduct in the platform market.

Mexico

Federal Economic Competition Commission (Cofece)

The concept of economic moats is not expressly covered by the Mexican legislation; however, it can be analysed 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 contribution, Cofece 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.

Federal Telecommunications Institute (IFT)

In this contribution, the IFT discusses the concepts of economic moats and entrenchment, reviews the Mexican legal framework and the tools set by the Federal Economic Competition Law (LFCE) to address structural issues like economic moats and entrenchment; and presents its experience as the exclusive national competition authority for the telecommunications and broadcasting sectors of Mexico, using the market investigations tool foreseen as a special procedure under Article 94 of the LFCE.

The IFT has resolved two investigations within the scope of Article 94 and there is one ongoing procedure. The IFT's shares its experience addressing monopolistic practices, especially where preponderant economic agents, entrenched in the markets, are involved. These market investigations offer a promising solution, but careful design of remedies and measures is essential and may have limitations.

In conclusion, Article 94 serves as a crucial tool for tackling structural barriers to competition, especially in sectors like telecoms and broadcasting, where traditional methods like merger control may fall short in addressing conglomerates and entrenchment.

Spain

This contribution by the Spanish National Markets and Competition Commission (CNMC) addresses the topic of the Roundtable on "Monopolisation, Moat Building and Entrenchment Strategies" to be hosted by the OECD in June 2024.

The CNMC relies on its experience in taking into consideration these concepts to establish dominance and to assess potential abuses.

These dynamics are not necessarily new. Even if increasingly related to platforms and ecosystems in digital markets, these notions have also been applied in more traditional sectors. In this regard, the CNMC has assessed some cases regarding intellectual property and rail freight transport.

The Spanish competition framework is flexible enough for the authority to meet the challenges and risks that emerge when dominant firms resort to these types of actions and strategies with the aim of strengthening and consolidating their competitive advantage, protecting their market position from competitors through anticompetitive means.

Chinese Taipei

This paper provides a brief overview of how the Chinese Taipei Fair Trade Commission ("CTFTC") perceives monopolisation, moat building and entrenchment strategies in terms of competition enforcement. It also provides case examples to illustrate applications of the Fair Trade Act (the "FTA") on these business strategies.

The terms "economic moats" and "entrenchment" have not been expressly referenced in the CTFTC's past decisions to examine behaviours that may improperly impede or exclude competition. However, the conceptual elements of the terms have been considered and incorporated in practice when enforcing the FTA. Both can refer to strategies and tactics businesses adopt to enable them to protect and preserve their long-term competitive advantage. This paper focuses on those anticompetitive practices that aim to create barriers to market entry. In the process of assessing whether a business engages in an anticompetitive behavior, the CTFTC will consider the following factors: the business's intent, purpose, market position and the structure of the relevant market, as well as characteristics of the goods or services offered by the business and the impact of its behavior on market competition.

In terms of case examples, in 2005 the CTFTC launched an investigation on Tradevan's loyalty programs. Tradevan was a monopoly firm in the customs clearance value-added network service market. The investigation showed that Tradevan's loyalty scheme effectively limited customers from switching to the rival company, Universal, and thereby foreclosed the possibilities of the rival company to compete for customers. In 2000, CTFTC initiated an investigation on alleged abuse of monopoly power by CPC to prevent its competitor from competing. CPC was the only supplier of aviation fuel in the upstream market while it was also a downstream operator to provide refueling services. The CTFTC found that CPC leveraged its market power in the upstream market by refusing to provide quotations that excluded Win Both from competing in the downstream market.

In 2005 the CTFTC imposed significant fines on 21 domestic cement businesses that reached agreements to restrict each other's business activities by jointly setting prices, coordinating market exits, imposing capacity and resale limits as well as geographic restrictions on imports. To build an economic moat, they mutually agreed on market division, rotational use of storage facilities with foreign cement companies, and non-compete arrangements in respective regions. The cartel participants also reached an agreement with Japanese steel companies to limit slag exports, in order to gain the control over the domestic cement market and block foreign cement companies from entering the market.

The CTFTC focuses on the impact of such business strategies on market competition by considering whether they have created exceptional and unjustified barriers to entry, or whether they have unjustifiably prevented their competitors' entry, expansion or growth, and the intent and purpose of the strategies. Justifications raised by businesses are also taken into account in the CTFTC's competition assessment.

United Kingdom

The OECD defines "economic moats" as "key competitive advantages that allow a company to protect its core monopoly from rivals on a long-term basis". The UK Competition and Markets Authority (CMA) interprets this to refer to intrinsic barriers to entry and expansion which make it challenging for an incumbent's position to be challenged. In contrast the OECD defines "entrenchment" as "strategic actions adopted by a dominant firm to maintain its competitive advantage".

The CMA has not defined "economics moats" and "entrenchment" in the same way as the OECD. However, the concepts covered by the OECD's definitions have been relevant in a number of areas of the CMA's work.

In this note we summarise some recent UK cases in which "economic moats" and "entrenchment" (as defined by the OECD) have been relevant. These examples include our:

- Online Platforms and Digital Advertising Market Study,
- Mobile Ecosystems Market Study,
- Google Privacy Sandbox case and
- Cloud market Investigation

and illustrate how incumbents can have incentives to take actions (the OECD's definition of entrenchment) so as to exacerbate pre-existing competitive advantages (the OECDs "economic moats").

In addition, the UK Government is shortly expected to pass legislation to formally establish the Digital Markets Unit and to create a new Strategic Market Status (SMS test). The SMS regime is intended "to unlock the benefits of competition in digital markets and tackle the strategic market position of a small number of key digital firms". Once the legislation has passed the CMA will publish draft guidance that will explain the CMA's proposed interpretation of "entrenched" for the purposes of the SMS test and its proposed approach to assessing whether market power is "substantial and entrenched".

United States

The Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (collectively, the "Agencies") submit this paper to describe analysis of monopolization, moat building, and entrenchment strategies in the United States.

The Agencies are committed to vigorous enforcement of the antitrust laws, which rest on the premise that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[8] U.S. antitrust law prohibits dominant firms from exploiting their power through exclusionary tactics, tools, and business models, as well as unfair methods of competition. Nor can they engage in mergers "that would entrench or extend a dominant position through exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process."[9] Protecting a free and fair competitive process means that all firms will have the opportunity to compete on the merits, resulting in greater innovation, consumer choice, improved quality, higher growth, and lower prices.

Firms may gain sales and grow organically by competing on the merits, such as by continually improving and expanding their products and services to the benefit of the consumers that use them. But firms can also become dominant by excluding rivals and depriving them of the ability to grow and succeed themselves. For example, firms may engage in anticompetitive "moat-building" tactics that create barriers to protect their core products or services from outside threats. This can be done in myriad ways,[10] but this note focuses on moat building and entrenchment by dominant firms through mergers. As Assistant Attorney General Jonathan Kanter has explained, "Moat building uses exclusionary strategies in combination to ensure the deepest and widest barrier around the economic castle of the core monopoly service."[11]

This paper first discusses analysis of mergers that may harm competition by entrenching or extending an already dominant position. We describe the modern approach to

[8] *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 4-5 (1958)).

[9] U.S. Dept. of Justice and Fed. Trade Comm'n, Merger Guidelines § 2.6 (2023) (2023 Merger Guidelines).

[10] A small sample of the Agencies' non-merger conduct work shows that dominant firms use multiple tactics to insulate their products from competition. For example, in the pharmaceutical industry, branded pharmaceutical companies have sought to protect their monopolies by paying generic pharmaceutical companies to delay bringing lower-cost alternatives to market. *See* FTC v. Actavis, Inc., 570 U.S. 136 (2013). Other branded pharmaceutical companies have sought to build moats by preventing would-be generic competitors from obtaining drug samples needed to conduct the bioequivalence tests necessary for regulatory approval. *See* FTC v. Shkreli, 581 F. Supp. 3d 579, 634 (S.D.N.Y. 2022). Monopolists also seek to protect their dominance by imposing exclusivity agreements on their customers. *See* McWane, Inc. v. FTC, 783 F.3d 814, 842 (11th Cir. 2015); see also Shkreli, 581 F. Supp. 3d 636 (exclusive supply agreements can also be unlawful monopolization).

[11] Kanter, Jonathan, Keynote Speech, CRA Conference (Mar. 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

entrenchment, as set forth in the recently released 2023 Merger Guidelines issued by the Agencies, and we then discuss the history and evolution of entrenchment theories in the United States. We next address moat-building and entrenchment tactics that can arise in digital platform markets. Finally, we describe recent case experience in the United States.