

# Competition Tools for Digital Markets in Mexico: Section 94 of the Economic Competition Federal Act

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By Alejandra Palacios<sup>1</sup>

Digital markets share several economic characteristics that are manifested in isolation in traditional markets, but which come together in the digital environment: network effects (direct and indirect), economies of scale and scope, and the existence of multi-sided platforms. The above, along with a growing capacity for using and processing large quantities of information, favors concentration and results in a reduced number of providers with a large share of the market.<sup>2</sup>

Furthermore, once an economic agent obtains a wide presence in these markets it is hard for other agents to compete with the dominant player. Given the aforementioned economic characteristics and the advantages in data gathering, potential competitors face difficulties in trying to reach the critical mass required to put some competitive pressure on the dominant incumbent.

The digital world makes it easier for the dynamics of “winner takes all” to take hold, where the most relevant competitive process is that which determines who among the participants will be the first to corner the market. It must also be taken into account that during this process there may be uncompetitive practices used to displace or prevent access to the market.

This set of characteristics and circumstances has become a cause for concern among competition authorities. Indeed, in recent years several competition authorities around the world have looked into and applied sanctions to several “Big Tech” players due to

uncompetitive behavior.<sup>3</sup> However, the truth is that the results of these investigations have not brought about more competitive environments. This is in addition to the fact that the intrinsic characteristics of the digital economy mentioned above have contributed to the existence of highly dynamic markets, in stark contrast to cumbersome competition procedures that are generally lengthy and involve administrative and judicial entities.

## International Discussion Concerning Competition Policy in the Digital Environment

The Antitrust Community has raised the question of whether the current tools at their disposal (investigations for collusion and abuse of dominance, as well as merger control) and the effects of these investigations are good enough to generate competitive conditions in these markets, whether the exploration and creation of new competition policy tools is required, or even if new regulations and/or regulators are needed.

In general, the international discussion has primarily revolved around two aspects: the possibility of creating an *ex ante* regulation for certain economic agents as a function of their share of the market, and/or the creation of new competition policy tool for dealing with digital markets.

Regarding a possible *ex ante* regulation, some jurisdictions such as the UK, EU and Germany have taken it upon themselves to explore a

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<sup>2</sup> The Furman Report includes a detailed overview of these characteristics and how they appear together in digital markets. Furman, *et al.* (2019). *Unlocking Digital Competition. Report of the Digital Competition Expert Panel*, pp. 38-38. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).

<sup>3</sup> Of note are the investigation and fine applied to Google over the *Google Shopping* case in the EU; the investigation and fine applied by the German competition authority against Facebook in 2019, recently confirmed by German courts; the investigation launched by the European Commission against Amazon, with preliminary results announced a few months ago; or more recently the investigations launched by the United States Federal Trade Commission and the Department of Justice against Facebook and Google, respectively, or the probe carried out by the State Administration for Market Regulation in China against the company Alibaba, to name but a few.

series of obligations for economic agents that meet certain quantitative and/or qualitative criteria related to traits such as company size, share of the market, or ability to participate in adjacent markets, among others.

In this sense, the Digital Markets Taskforce (“DMT”) spearheaded by the United Kingdom’s Competition and Markets Authority (“CMA”)<sup>4</sup> established a new regime targeting economic agents who hold a strategic status in the market (Strategic Market Status, “SMS”). This “SMS” label is created under certain, primordially qualitative criteria, such as being of a relevant size or scale in digital activities; having control over the entry of other companies into particular markets or lines of business; as well as having entrenched market power, that is, power that is neither temporary nor transitory. One of the effects of this procedure is the imposition of several obligations, such as committing to a code of conduct or to specific merger control rules.<sup>5</sup>

In a related step, this past December the European Union launched their proposal for a Digital Markets Act (DMA), establishing a set of mostly quantitative<sup>6</sup> criteria for considering a platform to be a “gatekeeper,”<sup>7</sup> which would force it to comply a set of obligations<sup>8</sup> which, if not followed, could carry fines of up to 10 percent of the total business by volume over the previous fiscal year.<sup>9</sup>

Meanwhile, in February 2021 Germany

published an amendment to their competition law which grants new powers to the Bundeskartellamt to determine the existence of economic agents with “paramount significance for competition across markets” whenever they meet certain criteria related to their position in the market.<sup>10</sup> The determination is accompanied by a prohibition over certain behaviors, such as preferential treatment for their own products or services (self-preferencing); blocking competitors in markets where the company could expand rapidly, even if it lacks substantial power at present; and creating barriers to entry through the strategic use of data in the market, among others.<sup>11</sup>

In regards to the analysis of new tools and powers, some authorities are evaluating how appropriate these would be. The most notable case was the “New Competition Toolbox” promoted by the European Commission, which was discarded following a public consultation process. It sought to allow the European competition authority to carry out investigations on the structure of a market and, given the case, to determine: (i) the existence of structural risks to competition – the existence of market characteristics which, together with the conduct of certain economic agents, create a threat to competition -; and (ii) the structural lack of competition in scenarios where the market lacks competitive conditions due to its own structure. The proposal also provided powers to impose conduct and structural

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<sup>4</sup> Besides the CMA, the DMT is made up of the Office of Communications (OFCOM) and the Information Commissioner’s Office (“ICO”).

<sup>5</sup> [https://assets.publishing.service.gov.uk/media/5f9e90e07562f98286c/Digital\\_Taskforce\\_-\\_Advice.pdf](https://assets.publishing.service.gov.uk/media/5f9e90e07562f98286c/Digital_Taskforce_-_Advice.pdf).

<sup>6</sup> Among others, the annual sales volume of the platform being equal to or larger than 6.5 billion Euros over the the past three fiscal years; the market value of the platform being higher than 65 billion Euros over the most recent fiscal year; or having 10,000 commercial users or more.

<sup>7</sup> [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_es](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_es).

<sup>8</sup> Allowing commercial users to access the data they generate while using the platform; allowing commercial users to promote their offers and close their transactions outside of the platform provided by the Gatekeeper; providing companies who buy advertising on the platform provided by the Gatekeeper with the tools and information needed for advertisers and editors to carry out their own independent verification of ads; ban favorable treatment in terms of services or products offered by the same Gatekeeper within their platform; and allow end users to link up with other companies outside the platform.

<sup>9</sup> European Commission (2020), Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). Available at [https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act\\_en.pdf](https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf).

<sup>10</sup> (i) Dominant position in one or several markets; (ii) financial solidity and ease of Access to resources; (iii) vertical integration and activities in other related markets; (iv) Access to data relevant to their competitors; (v) relevance of their services for third-party access to supply or sale markets; and (vi) their influence over third-party commercial activities.

<sup>11</sup> [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19\\_01\\_2021\\_GWB%20Novelle.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html).

remedies in order to solve these competition problems.

The CMA, for their part, also has the power to carry out market investigations whereby it analyzes the particular characteristics of a market, including other elements unrelated to competition policy but which have an impact on competitive dynamics; for example, consumers' cognitive biases. Market investigations allow the regulator to impose conduct and structural remedies that can generate or restore the competitive process and can even make policy recommendations to the government or sector regulators.<sup>12</sup>

### **Article 94 of the Mexican Federal Law on Economic Competition**

COFECE is no stranger to this debate, and we have dedicated our time and resources to analyze whether the tools at our disposal are sufficient for facing the challenges posed by digital markets.

Through these discussions we have noted there are certain issues related to the digital environment where our catalogue of uncompetitive practices related to abuse of dominance largely covers the conducts that have recently been looked into in other jurisdictions. However, this catalogue was not designed to analyze the so-called "exploitative practices" directed towards consumers, such as the imposition by a platform of obscure or abusive terms and conditions, which have been sanctioned in the digital environment.<sup>13</sup>

We have also studied the possible scope of Article 94 in the Federal Economic Competition Law (Ley Federal de Competencia Económica, LFCE), which allows the Commission to identify structural, behavioral, and normative barriers or essential inputs that could result in the absence of competitive conditions in a specific market, so as to apply corrections through behavioral or

structural remedies and/or regulate access to the essential input.

This determination came about with the constitutional reform of 2013 and materialized as part of the LFCE in 2014. It was integrated with the idea of addressing a very Mexican reality: highly concentrated markets in certain economic sectors, where the current lack of competition cannot be explained as due to anticompetitive conducts by the companies involved, but rather as a result of years of regulatory failures or antiquated behaviors that created market concentrations and market structures that traditional antitrust tools are unable to correct. For instance, there are markets that have been segmented for years, where at one time there may have been an uncompetitive agreement that is no longer there today, yet the legacy of which has seen the market become configured in that way, and/or markets where dominant players have advantages in accessing the necessary infrastructure for participation in the market, with access restricted to others.

In this sense, Article 94 allows for the analysis of a specific market following any indication that could make the Commission suspect the presence of market distortions that do not necessarily depend on an anticompetitive of an economic agent, but which is due to the structures and conditions of the market itself, or to the normativity that affects the competitive process.

In Mexico's case the LFCE defines as a barrier to competition any structural characteristics, facts, or actions by economic agents that would impede access to competitors, limit their capacity to compete within the market, or prevents or distorts competition, as well as legal dispositions that unduly cause these damaging effects for the competitive process.<sup>14</sup> In order to eliminate these barriers to competition Article 94 grants the Commission the power to impose two kinds of remedies: (i)

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<sup>12</sup> See Fletcher, Amelia. *Market Investigations for Digital Platforms: Panacea or Complement?*, September 2020.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3668289](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289).

<sup>13</sup> See the German competition authority's case against Facebook:

[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07\\_02\\_2019\\_Facebook.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html).

<sup>14</sup> Article 3, Section IV of the LFCE.

behavioral, forcing economic agents to act in a certain way or stop performing actions that distort the competitive process; and (ii) structural, which allow for modifications to the market structure, including the possibility of divesting assets, rights, or social entities with the goal of creating or restoring competitive conditions in the market. Additionally, COFECE may issue recommendations to authorities at every level of government to help eliminate any detected normative barrier.

Likewise, essential inputs are the set of elements (goods, infrastructure, and rights, among others) whose availability to other economic agents is indispensable for the delivery of goods or services in one or several markets; which are controlled by an economic agent with substantial market power; have no close substitutes; and whose reproduction is not viable from a technical, legal, or economic reasons by another economic agent.<sup>15</sup> Through this procedure the Commission can determine whether such an input exists, and establish rules for access and use by other economic agents.

Article 94 is a “hybrid” tool. On the one hand, there is the rigor and respect to the formalities as for investigations into monopolistic practices, while it allows for the imposition of regulatory-type remedies. The Commission holds the same powers and investigative tools as those needed to detect anticompetitive conducts, including requests for information, dawn raids, subpoenas, forensic analyses, and screenings. Furthermore, it includes a stage similar to a trial-like procedure for investigative procedures, where the economic agents involved are given the opportunity to present their arguments and evidence, which are analyzed by the Commission’s Board before a final decision is made. On the other hand, the procedure included in Article 94 is not aimed at sanctioning anticompetitive conducts carried out by economic agents, but rather on identifying structural problems, and using several types of remedies, including setting conditions or regulation for access to essential

inputs.

### **COFECE’s Experience in Using Article 94**

COFECE has applied Article 94 of the LFCE to eight investigations since 2014:

- IEBC-001-2015, probe into the market for the provision of air transport services used in the Mexico City International Airport for takeoff and/or landing services, as well as into the market for airport services offered by the same airport, necessary for takeoff and/or landing procedures (SLOTS).
- IEBC -002-2015, probe into the market for public transportation of cargo in each of the eighteen municipalities in Sinaloa state, for the transport of construction or stone materials, for the transport of agricultural resources and products, their derivatives, and general cargo (TRANSPORTE SINALOA).
- IEBC-001-2016, carried out in the market for production, distribution, and sale of malted barley (*cebada*) seed and grain for beer production (CEBADA).
- IEBC-002-2016, in the market for port services, maritime transport services, and land transportation services for the commercialization of agricultural wholesale and general cargo in the port of Progreso, in the state of Yucatan (PUERTO PROGRESO).
- IEBC-002-2017, in the market for production, distribution and/or sale of raw bovine milk for industrial uses originating in and/or destined for the state of Chihuahua (LECHE CHIHUAHUA).
- IEBC-003-2017, probe into the market for accreditation, evaluation of conformity and normalization services nationwide (SERVICIOS DE ACREDITACIÓN).
- IEBC-005-2018, probe into the market for card-based payment systems whose processing includes a Clearing House

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<sup>15</sup> The Analysis for determining an essential input is provided for in Article 60, LFCE.

(SISTEMAS DE PAGO).

- IEBC-002-2019, probing the national market for aircraft fuel, including production, storage, transportation, distribution, sale, dispatch, and related services (COMBUSTIBLES PARA AERONAVES).

Of these eight cases, three have been closed (CEBADA, PUERTO PROGRESO, and SERVICIOS DE ACREDITACIÓN), one (SISTEMAS DE PAGO) is currently in the post-investigation stage, and another (COMBUSTIBLES PARA AERONAVES) is still in the investigative stage.

With the application of this procedure we have identified some interesting learning points. For instance, in TRANSPORTE SINALOA and LECHE CHIHUAHUA it was determined that the competitive process had been distorted by normative barriers. In both cases non-binding recommendations were made to local authorities to eliminate said barriers. They remain in place. The lesson here is that, if during the pre-investigation process one notices that anticompetitive effects are derived from normative barriers, and therefore the likely result of the market investigation will be only recommendations for authorities to modify said norms, it becomes senseless to allocate investigation resources to these cases, especially if the same result can be reached via an opinion by the Commission's Board. To my judgement, while market investigations are undoubtedly helpful for determining the impact (including monetary impact) on competitive conditions caused by the normative barrier, it is not worth the expense of the resources assigned.

In the SLOTS case, the existence of an essential input was determined, as was the consequent regulation. This experience led to an important preliminary criteria related to the Commission's scope in regulating access to an essential input, insofar as the Judicial Branch has interpreted that COFECE's powers to regulate access to essential facilities have limits when a sector regulator exists, in this case being the Aeronautical authority. With reference to this judiciary interpretation it is

important to point out two aspects: first, this is an isolated judicial precedent that does not carry an obligatory jurisprudence, and second, Mexico has no entity in charge of regulating the digital economy, which allows the Commission, in any case, to exert its powers as they relate to regulatory measures for essential inputs in said markets.

The most relevant lesson is that, with Article 94, it is possible to carry out far more detailed analyses of market structures, bringing to light elements that may hamper competition, but which are often overlooked in anticompetitive conduct investigations. Within these elements are factors that help better understand consumers' behavior, including behavioral biases that could be induced by economic agents, the use of personal user data for commercial ends, as well as the influence of other public policies and consumer or data protection policies on the conduct of economic agents.

### **Application of Article 94 to Digital Markets**

The Commission's experience with market investigations has contributed to our identification of Article 94 as a possible tool for analyzing digital markets and the problems related to them in at least three areas.

The characteristics of certain markets within the digital environment makes them prone to reaching a "tipping point," which may take place when they attain a critical mass of users who, due to network effects, accelerate the move towards a highly concentrated market with one or very few competitors. There are certain conducts taken by economic agents who, even if they lack substantial market power, may accelerate this *tipping point* and affect the competitive process. For instance, behaviors that make it more difficult for users to switch between platforms or services (switching) or that reduce multi-homing, such as price parity clauses, bundling. This is especially the case with pure bundling, "most favored nation"

pricing clauses, among others.<sup>16</sup>

And so, Article 94 allows us to analyze and correct behavioral barriers used by economic agents who, despite having no substantial market power, can still engage in conducts that accelerates the “tipping point” and may affect the competitive process. In this sense, the international discourse has pointed out that intervention by competition authorities using traditional tools may come too late, when the remaining potential entrants are no longer able to compete with consolidated platforms. Here, Article 94 would allow the Commission to intervene at an earlier stage and, given the case, establish remedies to counteract any potential anticompetitive effects within the market.

Also, this disposition would allow for the analysis of behaviors not included in our catalogue of abuse of dominance practices established by the LFCE such as, as mentioned above, exploitative practices. In the digital environment some jurisdictions, such as Germany, have considered the imposition of abusive or excessive terms and conditions for the use of platforms to be exploitative practices, as it allows for considerable amounts of information and user data to be gathered for commercial use.

Finally, Article 94 allows for the imposition of behavioral remedies that have already been discussed in the global stage as possible solutions to the lack of competition in these markets. This includes: (i) establishing codes of conduct applicable to dominant platforms, in the hopes of prohibiting certain behaviors; (ii) prohibiting self-preferencing or differential treatment measures; (iii) data and protocol interoperability; (iv) data portability allowing user data to migrate from one platform to another; and (v) divestment and functional

separation of digital platforms with the capability of wielding market power and distorting the competitive process.

### **New Methods and Solutions for New Challenges**

Reality makes it clear that, whenever new challenges arise, what is needed are new methods and new solutions that are up to the task. COFECE has cutting-edge tools at its disposal and must be ready to use them as needed.

Lastly, I would like to mention that, even with the advantages of Article 94 presented here, one of its main disadvantages is the time that it takes to implement structural or behavioral remedies. This is why, to my judgement, we must also consider the need for an expedited procedure which through clearly determined quantitative criteria and equally concrete effects allows for the imposition of obligations in a swift, opportune and effective way against economic agents who meet similar characteristics to what other jurisdictions have labelled “*gatekeepers*”: an expedite procedure that would allow us to guarantee competitive conditions in digital markets, recognizing that the tools contemplated by Mexican law – including Article 94 -- cannot respond quickly enough.

Mexico has ample experience with such expedited procedures, such as the procedure used to determine the existence of dominant economic agents in the telecommunications and broadcasting sectors when they hold a national market share above 50 percent. Such a proposal would require the inclusion of a new procedure into the LFCE.

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<sup>16</sup> “Intervention triggers and underlying theories of harm. Expert advice for the Impact Assessment of a New Competition Tool” Massimo Motta & Martin Peitz (2020), pages 27 to 30. Available at [https://ec.europa.eu/competition/consultations/2020\\_new\\_comp\\_tool/kd0420575enn.pdf](https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420575enn.pdf).