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- Background Note by Mexico -

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This document was prepared by Mexico to serve as a Background note for the discussion on Session III: "Media Mergers" of the Latin American and Caribbean Competition Forum that will take place on 27-28 September 2022 in Rio de Janeiro, Brazil.

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If you have any question on this document, please contact:
Mexico: asuntosinternacionales@ift.org.mx and international@cofece.mx.

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Session III: Media Mergers

Background Note by Mexico^{*}

Media industry has evolved substantially since OECD's 2003 report, mainly driven by technological innovations that have promoted changes on content production, distribution and user's access, and, consequently, in media industry competition dynamics. In particular, online content distribution has allowed new participants (OTT providers) to take an active role in the media industry, it has also led to changes on how audience consume content and how they interact with it. In media mergers, these changes have, in some cases, raised challenges to competition authorities when performing their economic competition analysis. Hence, this background presents some relevant aspects that authorities can consider in their economic analysis of media mergers and examples from some Latin American authorities. In particular, the Background Note addresses issues regarding the following topics: market definition, market power assessment, theories of harm for horizontal, vertical and conglomerate mergers; and remedies.

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The analysis in this document and its conclusions should not be understood or interpreted as an official statement by the Mexican institutions that prepared it, nor the OECD, the IDB, or its Members.

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1 Introduction

1. Since the 2003 OECD's Media Merger report, the media industry has been characterised by its constant evolution. It has experienced important changes, mainly driven by the combination of different and evolving technologies, that have contributed to flourish new distribution channels; which have led to the emergence of global and local market participants, new distribution channels and business models. All of these have had impacts in the media value chain and competition dynamics in the industry.
2. In this context, media mergers can lead to the entry and/or the consolidation of vertical and conglomerated integrated participants that can result in efficiency gains from vertical integration between upstream and downstream activities and cost savings through economies of scope and scale. However, these may also raise competition concerns and challenges to competition agencies related to, for example, market definition, innovation, data concentration, network economies, access to content and exclusivities, analysis of multisided markets, bundling and tying, pan-regional use of content rights, and appropriate remedies. Moreover, some issues may be acquiring a new dimension in the reconfiguration of the media industry, such as plurality and diversity,¹ including online distributed content.
3. This background note will focus on the assessment of media mergers considering the actual configuration of the media industry driven by the technological evolution, the digitization of traditional media and changes in consumer behaviour, as well as the growing importance of online services and large tech companies. In particular, the session will consider the role played by the digital platforms and the OTT content distributors in the media industry, and their competition implications.
4. The remaining sections of the background note are structured as follows. Section 2 provides a description of media industry, including key participants, evolving value chains, business models, and economic characteristics. Section 3 discusses the main elements that competition agencies analyse in media merger either horizontal, vertical or conglomerate. Section 4 addresses important considerations regarding remedies for media mergers. Section 5 presents conclusions.

¹ Plurality understood as the number of different voices or opinions (acknowledged as very important for democracies). Diversity understood as the number of independent participants.

2 Media industry

5. The assessment of a merger requires a good understanding of the industry economic characteristics and the interactions between the main players involved. This section explains the main characteristics of the media industry, the main actors, the business models, economic characteristics, and competition dynamics.

Definitions and key participants

6. For the purposes of this note, media refers to the main means of mass communication that enable the distribution of information and data to large audiences. The media industry incorporates both the production of content, such as news, entertainment, education and research, as well as its distribution through the means of mass communication. Mass media includes the press, television and radio broadcasting, film producing, audio and video streaming, video games, online publishing, social media and podcasting, among others (OECD, 2019: 8²).³

7. In the last twenty years, the media industry has experienced substantial changes, mainly driven by technological innovations (OECD, 2015⁴) which have had impacts on content production, distribution and user's access. One of them has allowed to most media content that was provided via end-to-end delivery distribution channels being accessed over the Internet too. As stated by OECD, "*A broadband Internet network is capable of enabling new services and applications across an entire economy and embody pervasiveness, technological dynamism, and general productivity gains. Broadband Internet networks, therefore, can be regarded as general-purpose networks (GPN) that enable the deployment of platforms that offer a broad range of services, traffic types, applications, content, and devices.*" (OECD, 2016: 6⁵). These factors have contributed to changes in the competition dynamics within the media industry, as complex relations have emerged between the different participants in the media industry: consumers, media producers, distributors and advertisers.

² OECD (2019), *Vertical Mergers in the Technology, Media and Telecom Sector*, [https://one.oecd.org/document/DAF/COMP\(2019\)5/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf).

³ Also, for the purposes of this note, as defined by OECD (2019), the Telecommunication sector refers to all economic activities required for the provision of **long-distance means of communication**, through the transmission of **signs, words, image, sound** or any other form of information. The telecommunications sector fundamentally comprises companies responsible for investing and maintaining the network infrastructure, as well as **telecom operators** who **provide** telecom services, including mobile phone, landline phone, **television** and **internet access**.

⁴ For further information see: OECD (2015), *Digital Convergence: Policy and Regulatory Issues*, pp. 5-6 and 17-30, [https://one.oecd.org/document/DSTI/ICCP/CISP\(2015\)2/en/pdf](https://one.oecd.org/document/DSTI/ICCP/CISP(2015)2/en/pdf).

⁵ OECD (2016), *Digital Convergence and Beyond: Innovation, Investment and Competition in Communication Policy and Regulation for the 21st Century*, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP\(2015\)2/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP(2015)2/FINAL&docLanguage=En).

8. For consumers, the evolution of media industry has lowered the costs of searching and accessing content, it has extended viewing and listening possibilities from TV sets, radio, press, cinemas, to webpages, ‘over-the-top’ (OTT)⁶ services –provided via smart devices (TV, PCs, laptops or tablets and other mobile devices). Also, it has provided newer interactive capabilities between consumers and content, for example consumers use tablets or smartphones, while simultaneously watching TV, to find out more about what they are watching or to interact with friends or with the producers. (European Commission, 2013: 37) In other words, some consumers are able to time-shift, multi-home, and perform active search.

9. For advertisers, one of the main sources of income for some media industry players, online advertising has become an additional channel to traditional advertising products (such as, billboards, paper press, pay TV, Free-to-air television (FTA TV) and radio broadcasting) to reach their audience of interest. Whilst, current international trends on advertising expenditure demonstrate that online advertising expenditure is increasing rapidly, the OECD (2020: 28-29⁸) noticed the ability to undertake targeted advertising online, but not offline, means that, as some authorities have pointed out, substitutability between digital advertising and other forms of offline advertising is limited. In particular, CMA’s study on digital advertising commented that “advertisers may treat offline and online advertising as complementary channels within their campaigns to achieve certain objectives, rather than substitutes.” (CMA, 2020: 217⁹) Hence, whilst advertising online will continue to grow, it is expected that advertisers will still invest in traditional media channels.

10. For content producers, Internet broadband networks has increased the channels of publishing and distributing content and their potential geographic reach, sometimes well beyond their domestic/local markets.¹⁰ Hence, has allowed some industry actors “to explore hybrid models combining the advantages

⁶ There is not a generally accepted definition of over-the-top content (OTT) services, however most definitions agree that they are services delivered over the public Internet networks. For ITU (2015), OTT services “delivery of audio, video and other media over the Internet without a multiple-system operator being involved in the control or distribution of the content. The [telecommunications] provider may be aware of the contents of the Internet Protocol packets but is not responsible for, nor able to control, the viewing abilities, copyrights, and/or other redistribution of the content.” ITU (2015), *IMT traffic estimates for the years 2020 to 2030*, https://www.itu.int/dms_pub/itu-r/opb/rep/R-REP-M.2370-2015-PDF-E.pdf.

Body of European Regulators for Electronic Communications (BEREC, 2016) define “OTT services” are “content, services or applications that are provided to the end user over the public Internet. This means that the term OTT does not refer to a particular type of service but to a method of provision, namely provision over the public Internet.” BEREC (2016), *Report on OTT Services*, p. 14, https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services.

⁷ European Commission (2013), *Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:pdf>.

⁸ OECD (2020), *Competition in digital advertising markets*, pp. 28-29, <https://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf>.

⁹ CMA (2020), *Online platforms and digital advertising. Market study final report*, https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

¹⁰ For example, the European Parliament (2022: para 30) has observed that certain obstacles persist in the provision of audiovisual services and content in the European Union. In particular, the European Commission (2020) has explained that “content producers/right holders restrict cross-border accessibility of content in their copyright licensing”. In: European Commission (2020), *Identifying and addressing barriers to the Single Market, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0093#footnote26>; European Parliament (2022), *European Parliament resolution of 17 February 2022 on tackling non-tariff and non-tax barriers in the single market*, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0043_EN.html.

of broadband in delivering individual choice of on-demand content with the efficiency of broadcasting in making content (e.g. live sports or entertainment events) simultaneously available to a large audience." (European Commission, 2013: 10¹¹) Content producers are getting closer to final consumers (audience), and this has had implications on how some of them finance their businesses.

11. Moreover, media industry evolution has been possible due to the development of different evolving technologies, such as broadband, Internet Protocol technologies, cloud computing, and content delivery networks. In this regard, besides to the traditional players, participants from the telecommunications, digital markets and technological sectors are playing an increasingly important role in the dynamics of media industry. For instance, in the case of telecommunications, traditional Internet Service Providers, mobile or fixed, have entered into the content production market, either by organic growth or by mergers and acquisitions (for example AT&T/Time Warner merger and América Móvil, S.A.B. de C.V. (AMX) in Latin America through OTT ClaroVideo¹²).

12. Additionally, traditional media providers are migrating to digital, for example, through OTT, their own apps and web pages, links from closed platforms (Facebook, Twitter, among others) to web pages, or a combination of the above; there are also new media providers focused in online content distribution only, as well as non-media digital platforms expanding from their core businesses and developing multimedia channels (e.g. mergers Google/YouTube, Amazon/MGM). In this regard, some media industry actors are vertically integrated along different stages of the media supply chain.

13. Finally, as could be the case in several markets of the digital economy, BEREC (2022: 69¹³) has pointed out that some big tech companies (e.g. Amazon, Google, Apple) *"are present across practically all of the elements of the internet ecosystem and can often leverage their position among different services and products"*, and so they *"have reached a position allowing them to shape and restrict both the competition dynamics on different elements of the internet ecosystem and the relative openness under which content, services and information can be accessed and shared."*

14. All things considered, in the last twenty years the media industry has experienced a radical transformation, as it transitioned from traditional to digital. The transition has had profound changes on investment and innovation, and it is expected to continue.

¹¹ European Commission (2013), *Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:pdf>.

¹² Claro Video produces series and programming channels as Claro Sports, <https://www.claro.com.co/institucional/claro-sports/>. Also, according to Financial Statements of América Móvil, ClaroVideo is an on-demand internet streaming video provider across all the Latin American and Caribbean countries. Service is offered through bundled packages of ClaroVideo, which may include: subscription video on demand, providing unlimited access to a catalogue of titles for a fixed monthly subscription fee; transactional video on demand and electronic sell-through, option to rent or buy new content releases; and add-on services such as subscription and other OTT services through a platform payment system, including access to FOX, HBO, Noggin and Paramount+, among others. For more information see: AMX (2022), *2021 Annual Report/20-F*, https://s22.q4cdn.com/604986553/files/doc_financials/2021/ar/Annual-Report-20F.pdf.

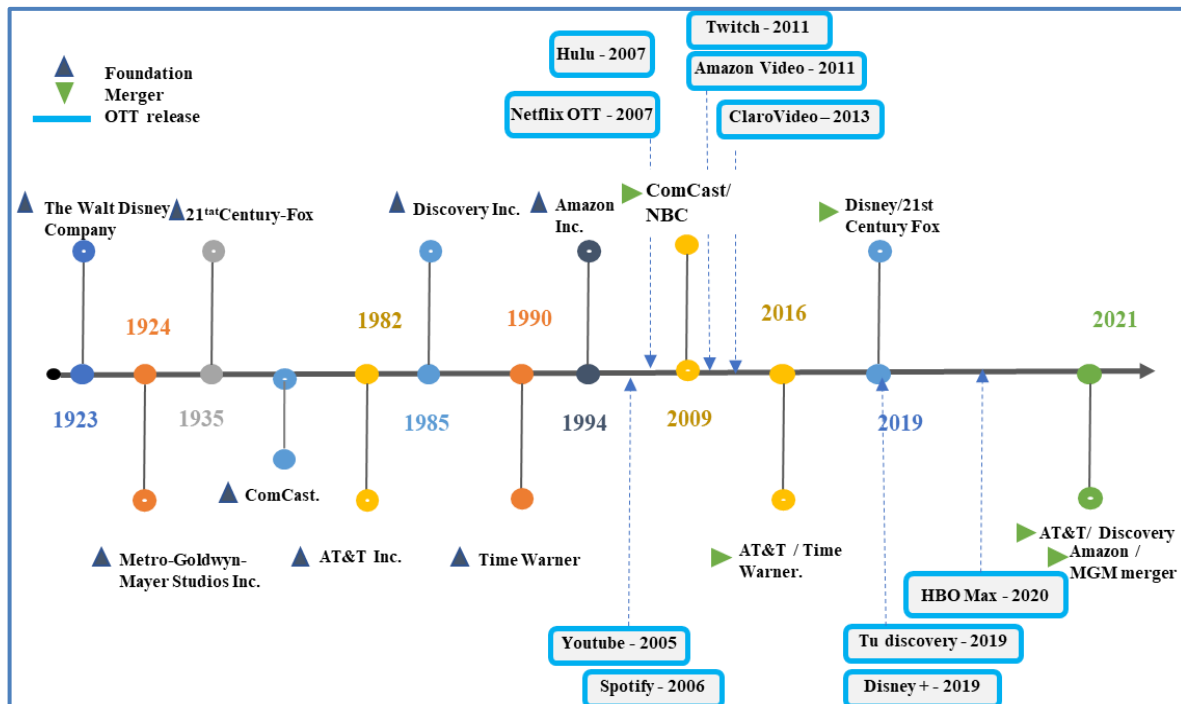
¹³ BEREC has pointed out that in recent years, big tech companies (e.g. Amazon, Google, Apple) have invested increasingly in telecommunication infrastructures and have been providing additional services related to the telecommunications and have been providing additional services related to the network and electronic communication services markets, also they are actively participating in content distribution (and even production) to final consumers. For example, Google, Apple and Amazon, participate in media industry through YouTube, Apple Music and Apple TV, and Amazon Prime. In: BEREC (2022), *Draft BEREC Report on the ex ante regulation of digital gatekeepers*, p. 69. https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/BoR%20%2822%29%2087%20Draft%20BEREC%20Report%20on%20the%20Internet%20Ecosystem.pdf.

Evolution and mergers in the media industry

15. As aforementioned, the media industry around the world has experienced some important changes in the last twenty years.

16. The following figure presents some of the most important international actors in the media industry, as well as some of the mergers that have taken place on recent years, and which have been analysed in the United States, European Union, and Latin-America. The figure is an example that shows the more frequent participation of companies in several stages of value chain of media industry and emphasize that this trend has accelerated since the year 2010.

Figure 1. Evolution of main audiovisual content providers

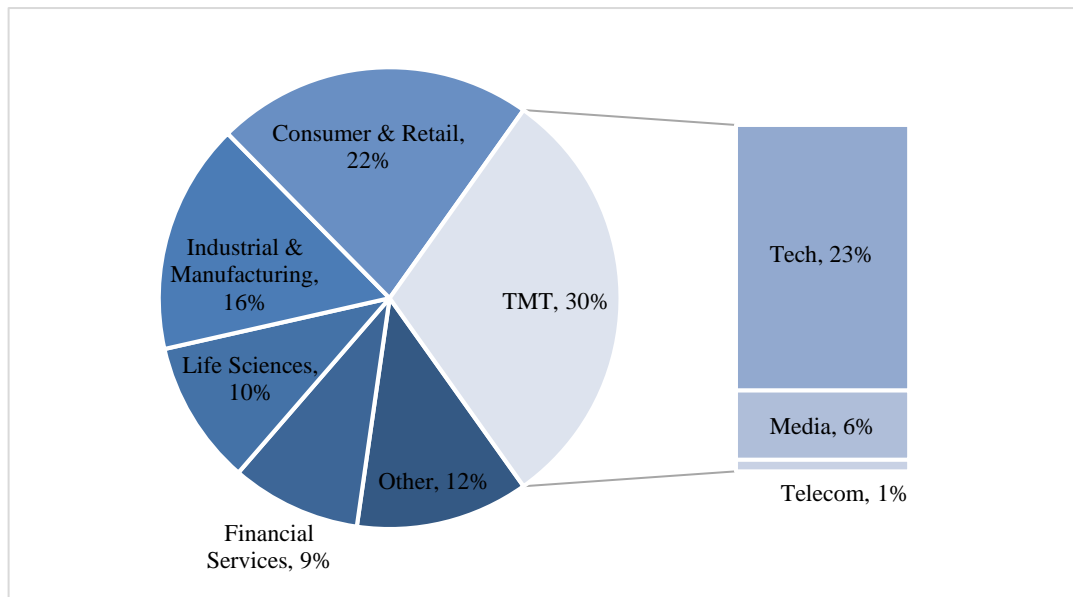


Source: Own elaboration with information from the companies.

17. The figure also shows the raise of new big OTT players and an increase in the number of mergers and acquisitions in this sector. For OTT players since the creation of YouTube, Spotify, Netflix, and Hulu in the mid-2000s, new OTT players are increasingly participating in the industry (Twitch, Amazon Video, Discovery, HBO, Disney+). Also, since the 2010s media mergers are more frequent.

18. Regarding mergers and acquisitions, the Technological, Media and Telecommunications sectors have a high incidence of these transactions, exceeding in 2021 jointly the volume of transactions in any other sector and currently accounting for 30% of the total M&A activity around the world (Figure 3). Considering the all economic sectors, the vast majority of mergers take place within the technological sector (23%), followed by media which account for 6%, and finally telecommunications sector with 1%.

Figure 2. Mergers & Acquisitions per sector in 2021 in selected countries, by volume



Source: Allen & Overy (2022), *Global Trends in Merger Control Enforcement*, <https://www.allenoverly.com/en-gb/global/news-and-insights/global-trends-in-merger-control-enforcement>.¹⁴

Note: "Other" category include Energy & Natural Resources (5%) and Transport & Infrastructure (2%) and Others (5%). The reported figures are based on 2021 data on merger control activity from 26 jurisdictions.

Value chain

19. The supply chain of media industry has been mostly depicted as concerning three main phases: content production, content aggregation and content distribution.¹⁵ Each of which main activities can be defined as:

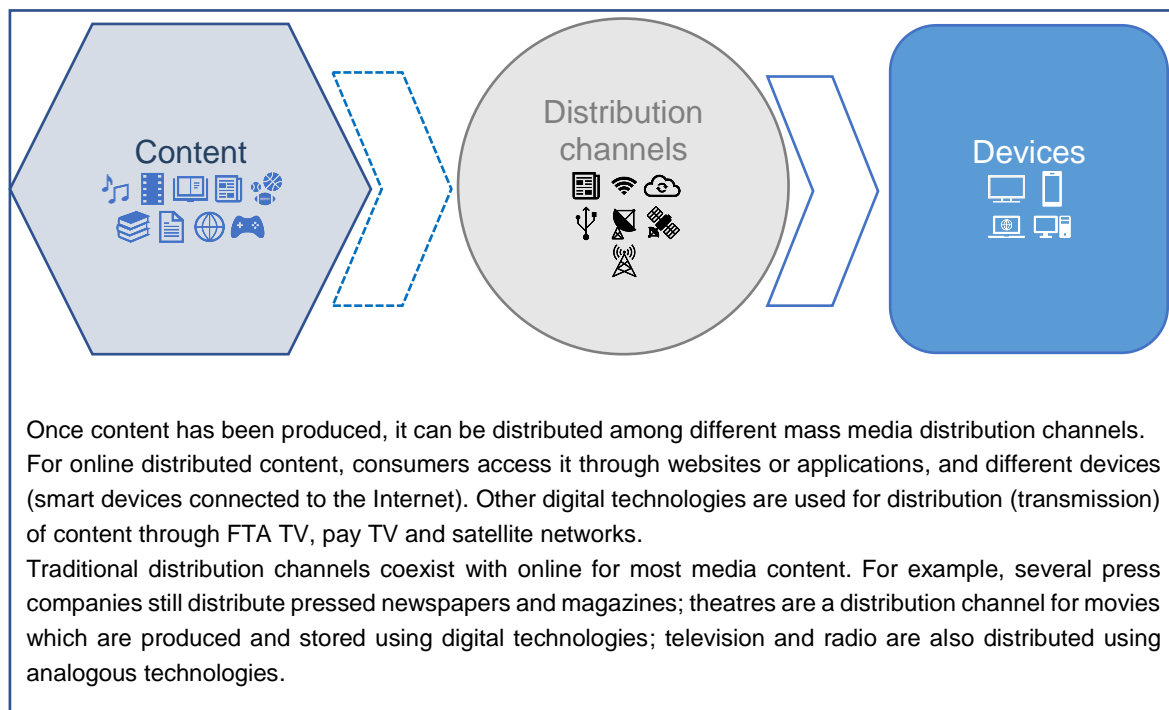
- **Content production:** refers to the all the people, processes and technologies required to produce media content, all of which depend on the type of content produced.
- **Content aggregation:** refers to the stage where content is compiled in order to be distributed.¹⁶ For example, for linear content distribution channels this stage is where content is compiled into schedules targeted to specific audiences.
- **Content distribution:** refers to activities related to content delivery to consumers.

¹⁴ Allen & Overy (2022), *Global Trends in Merger Control Enforcement*, <https://www.allenoverly.com/en-gb/global/news-and-insights/global-trends-in-merger-control-enforcement>.

¹⁵ Wirtz, B. W. (2011), *Media and Internet Management*, Wiesbaden 2011. ISBN: 978-3-658-25223-6.

¹⁶ In some media markets aggregators are vertically integrated with content distributors.

Figure 3. Value chain of Media Industry related to digital content



Source: Own elaboration

20. In traditional media industry relations between these phases were mostly linear, either content providers: (i) made a contract with content distributors (either an independent or an aggregator) or (ii) were vertically integrated with distributors. Then content was distributed along specific channels, as is the case of radio spectrum for broadcasting, physical stalls for newspapers, pamphlets and magazines, cinemas, among others, to be finally consumed by audience.

21. As explained, technological innovations have also transformed some of these phases. As more media content is provided over the Internet, content producers, aggregators and distributors, are investing more on IP-based infrastructure and other services (e.g. data centres capacity and cloud computing) to deliver their content directly to consumers, so they are establishing direct to consumer relationships. Consequently, some players are using technological services to enhance content delivery; for example, data centres have become important input for media providers, since they work as central hub to effectively store and deliver its content to final consumers (audience).

22. In the near future, Deloitte (2021)¹⁷ explains that cloud computing could enable that “as soon as a piece of content arrives, the media supply chain systems in the cloud can automatically create (at scale) the different formats needed for traditional multichannel video programming distributors, different broadcast standards around the world, and streaming formats for companies such as Hulu and Netflix.” Hence, content can then be reused across platforms by generating new versions on demand from the highest-quality program masters and program elements.

¹⁷ Deloitte (2021), *The case for M&E cloud. Moving to fourth-generation broadcast infrastructure*, p. 10, <https://www2.deloitte.com/us/en/pages/consulting/articles/cloud-broadcast-infrastructure-media-entertainment.html>.

23. Many of the markets across the media industry have experienced, and will continue to experience, rapid changes. The changes have taken place in terms of the size of the market, the identity of the participants and the introduction of new products and services.

Business models

24. Media industry business models have been mainly financed through one or a combination of the following: subscriptions, paid per event, advertising, and licencing rights. The type of business model depends on many factors and each media actor considers which is the best way to commercialise its services. Technological innovations have allowed content producers and distributors to use alternative business models (e.g. “freemium” model).¹⁸ In particular, new market entrants are accelerating their use of direct-to-consumer (D2C) models, either through websites or apps over the Internet.

25. In the case of online video services, the FCC (2020¹⁹) has identified several business models, which include one or a combination of the following:

- **Paid by consumer:** (i) subscription to streamed linear video programming channels (subscription linear); (ii) subscription to on-demand services, subscriber pays a fee to watch content as requested; (iii) “download-to-rent” services, consumer, on demand, pays to view/download video content for a limited period of times; (iv) electronic-sell-through services provide consumers, on demand, permanent access to content.²⁰
- **Financed through advertising:** advertising-based linear or on-demand content, linear or on-demand content is available without charge (zero prize), but financed through advertising.²¹

26. For example, some content providers previously relied mainly on revenues from licensing rights distribution among FTA TV, pay TV, and cinemas; however, nowadays, several content providers are providing their own content (Disney+, MGM/Amazon Prime) over Internet. Also, traditional media providers of FTA TV services still rely on revenues of advertising inserted in linear programming, nowadays they are also getting revenues from advertising in their own webpages or apps.

27. In the case of news publishing through Internet, some of the most important business models are: (i) subscription-based model; (ii) digital advertising model by placing advertising on their own websites and applications; or (iii) digital advertising model by posting news content on third-party platforms and indirectly monetising through advertising revenue generated on these platforms (OECD, 2021²²).

¹⁸ One example is the “freemium” model, in which part of the service is provided free, and an enhanced service is provided on a subscription basis. OECD (2020), *Competition in Digital Advertising Markets*, p. 27, Box 5, <https://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf>.

¹⁹ FCC (2020), *FCC Releases 2020 Communications Marketplace Report*, FCC-20-188, pp. 113-119, <https://www.fcc.gov/document/fcc-releases-2020-communications-marketplace-report>.

²⁰ Linear channels offer specific video programs at a specific time of day in a manner akin to broadcast television. Video on Demand services store programs electronically which can be viewed by the consumer at any time, i.e., on demand. FCC (2020), p. 103.

²¹ Advertising-based media providers operate a business model that can be regarded as two-sided (or even multi-sided) market, in which these platforms intermediate an audience of subscribers or users for the advertisers. Evans, D. S. (2003), “The Antitrust Economics of Multi-Sided Platform Markets”, *Yale Journal of Regulation*, 20(2), <https://openyls.law.yale.edu/handle/20.500.13051/8032>.

²² OECD (2021), *Competition Issues Concerning News Media and Digital Platforms*, <https://www.oecd.org/daf/competition/competition-issues-concerning-news-media-and-digital-platforms-2021.pdf>.

28. Accordingly, in media industry current trends show that revenues from online distribution are increasing. For example, according to a survey done by Reuters Institute (2022)²³, for news publishers' digital revenue now outstrips print and many upmarket titles, and it shows that for 79% of commercial publishers subscription remains the number one source of income, followed by display advertising (73%) and native advertising (59%).

29. The following table shows how different actors play some sort of different roles in the new digital context.

Table 1. Comparison between traditional and new business models in media industry

	Traditional business model	New business model
Value-adding steps covered by media companies	Content creation, distribution	Management of content, operation of digital space (apps, websites, social media), alliance with various sectors
Value chain	Fixed, controlled, supplier-led, one-way	Flexible, organic, user-centric, interactive
Value creation	Copyright exploitation	Multiplatform business
Revenue source	User payment, advertising	User payment, advertising, user subscription fees, sale of user data
Role of creators	Strong, but moderated by the intermediary (aggregators)	Direct connection with users
Role of consumers	Passive	Active
Traits valued by consumers	Quality of content	Social communication about content, convenient access, Quality of Experience
Primary competences of media companies	Artistic/journalistic editing, curation and distribution	Aggregating content, algorithms for matching content and users
Advertisers' interest	Mass marketing	Targeted marketing

Source: Own elaboration with information from Hess (2014²⁴).

²³ Newman, N. (2022), *Journalism, Media, and Technology Trends and Predictions 2022*, p. 10, Reuters Institute for the Study of Journalism, <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf>.

²⁴ Hess, T. (2014), "What Is a Media Company? A Reconceptualization for the Online World", *The International Journal on Media Management* 16 (2014): 3–8, <https://www.tandfonline.com/doi/abs/10.1080/14241277.2014.906993>.

Economic Characteristics

30. While analysing media mergers, specially where digital providers are involved, such as OTT content distributors, some economic characteristics that competition authorities might consider are: (OECD, 2022²⁵) (European Commission, 2021²⁶) (Bundeskartellamt, 2016²⁷)

- **Indirect Network Effects.** Indirect network effects are common in multisided markets, where two or more groups interact, and the decisions of one group affect the other group through an externality. In this case, the utility that a given user derives from a certain good or service depends upon the number of other users who are in the other group.

The traditional media services such as newspapers, radio and TV channels, are advertising-based media. These services intermediate an audience of subscribers or users for the advertisers, also referred as audience-providing platforms. In the case of audience-providing platforms, there are strong indirect network effects which are materialized on the advertisers' side, but not on the users' side.

Indirect network effects are prominent on the media industry, because paid advertising finance a great number of media services, the more consumers viewing a site the more valuable is the advertising. In addition, digital media services, such as social media can target and personalize advertisements, which makes this mean very cost-effective.

On multi-sided platforms is common to observe a price of zero for one or more groups in a very lucrative model. This is because the presence of those groups attracts paying customers, such as advertisers.

- **Economies of scale.** The cost structure of the media industry frequently involves substantial economies of scale. This is due to economies of scale at both the content level (which can be associated with the public good aspects of media content) and at the distribution level. An important implication of this cost structure is that one should expect value-based pricing, which can be achieved through price discrimination or bundling, both of which bring significant methodological issues to market definition. (European Commission, 2002: 8-9²⁸)

Media content can be described as non-rivalrous because, once created, the information good itself (rather than its distribution) can always be provided to an additional person at zero marginal cost of production. Consequently, economies of scale in content production are an inherent feature of media markets: as more consumers experience content, the average cost of the content production decreases. This stems directly from the public good attribute of non-rivalry. Furthermore, in many cases, average costs of distribution decrease with audience size,

²⁵ OECD (2022), *The Evolving Concept of Market Power in the Digital Economy*, <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf>.

²⁶ European Commission (2021), *Support study accompanying the evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law*, by Wik Consult, W|FO, Valdani Vicari & Associati, LE Europe, Grimaldi, https://ec.europa.eu/competition-policy/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf.

²⁷ Bundeskartellamt (2016), *Working Paper: Market Power of Platforms and Networks*, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2.

²⁸ European Commission (2002), *Market Definition in the Media industry -Economic Issues-*, https://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf.

augmenting the economies of scale generated in content production (an example of this is the provision of cable television services within a particular area).²⁹

Whilst, the cost of producing some type of content has decreased due to the technological innovations (users of video sharing platforms, such as YouTube, Facebook and Instagram, can produce their own content just with a medium quality mobile); nonetheless, the cost of producing or acquiring licencing rights of certain content –mainly premium content, high budget movies and series, or premiere live sport or music events–, still remains high.

- **Economies of Scope.** Economies of scope occur when producing a wider variety of goods or services in tandem is more cost effective for a firm than producing less of a variety or producing each good independently. In the media industry, it's easy to find examples of economies of scope, so it's always more cost effective to produce different kind of content, such as movies, series, tv programs (sports, news, magazine, etc.), that can be distributed by the same means, and uses similar inputs (talent, studios, etc.).

31. Also, there is another element that produces economies of scope in media industry, data. The access to extensive datasets of an existing service can be used to enter an adjacent or related service with better quality product: quantity drives quality (Stigler, 2019³⁰). For example, in a merger of an OTT provider with a content distributor, the first uses data gathered from its consumer's preferences to recommend and produce content, knowing beforehand that will be well received by its users. This can provide a competitive advantage compared to ther content providers, but not necessarily unfair.

- **Big Data and free services.** Big Data can be defined as a very large set of data that are produced by people using the internet and that can only be stored, understood, and used with the help of special tools and methods. Digital services such as social media, or OTT content services use data for two main purposes: (i) **improve their services**, for example, through showing content that is more relevant to a user, and (ii) **target advertising**, data analysis allows these services to characterize consumers to show them relevant advertisement. (APEC, 2019³¹)

As mentioned above, OTT services through Big Data Analytics are capable to extract, store and analyse big datasets. The more detailed the data, the wider the range of transactions, the bigger the user sample, the greater the company's analytics experience (Barwise and Watkins, 2018³²). Data is an important asset for media digital services, a great number of them found their business model on analysis made on data they extract from their users, hence they either sell their datasets to data brokers or can offer targeted advertising.

- **Network effects.** Network effects can increase the barriers to entry to expansion and prevent the development of effective competition. In a market where network effects are important, early entrants can enjoy first-mover advantage and command a dominant position in a market that is durable and difficult for later entrants to disrupt. This can result in highly concentrated markets and dominant companies with market power.

²⁹ European Commission (2002), *Market Definition in the Media industry -Economic Issues-*, https://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf.

³⁰ Stigler, G.J. (2019), *Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee: Report*. Center for the Study of the Economy and the State, <https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf>.

³¹ APEC (2019), *Project Report on Competition Policy for Regulating Online Platforms in the APEC Region*, <https://www.apec.org/publications/2019/08/competition-policy-for-regulating-online-platforms-in-the-apec-region>.

³² Barwise, P. and L. Watkins (2018), "The evolution of digital dominance", In *Digital Dominance: The power of Google, Amazon, Facebook, and Apple*, Editors M. Moore and D. Tambini, Oxford University Press, https://lbsresearch.london.edu/id/eprint/914/1/9780190845124_Barwise_Chapter%201.pdf.

In this way, by increasing barriers to entry, network effects can be an important factor in evaluating the possible competition effects of some media mergers.

- **Single-homing and Multi-homing.** The situation when a group of consumers uses only one platform provider to access a certain product or service is known as single-homing. For example, consumers that only use one OTT content distribution service. Whilst, multi-homing refers to a group of consumers that uses more than one alternative service. The decision whether to multi-home or not, depends on different elements ranging from the existence of significant switching costs to consumer's preferences. For example, CMA's (2020³³) market study on Digital Advertising analysed the lack of multi-homing on the side of users for social media, and explained that these were due to factors such as limited interoperability as well as the time cost for consumers to set up an account on another platform).

32. All of these factors interact in the competition dynamics of the media industry. So, they must be considered in the analysis of media mergers. In particular, these factors must be analysed as intertwined characteristics that have impact on market definition, market power and competition dynamics.

Competition dynamics

33. In media industry one of the main targets is getting users' attention. Usually different players compete on different markets for such attention,³⁴ by differentiating their content and make it as much appealing as possible in order to engage with the highest number possible of viewers or readers. Since, the more viewers the more revenue, either by selling more books (e-books), more clicks, more advertising, among others. Hence, this implies that providers must decide how to differentiate their content, how to make as attractive as possible, and where to display it (which distribution channels are better).

34. Market players try to differentiate their offers by providing premium or attractive content. In the case of audiovisual content, it has been demonstrated that premium content (e.g. major sport events, exclusive news, and successful recently released films) generates high demand and significant revenues in the media industry. Hence, the success of the content producer, and even the content distributors, may depend, among others, on the ability to consistently offer such content to its viewers. This could motivate exclusive dealings between content providers and its distributors (FTV TV, pay TV, radio, newspapers, OTT). Whilst these might enhance content production, it may also restrict the possibilities of third parties to provide such content to their audiences, so they can constitute barriers to entry or expansion, especially when these agreements are concluded between large players in a given market (e.g. Hollywood studios and large pay-television providers). (OECD, 2015: 19³⁵)

35. Other important element that defines the competition dynamics in the media industry is the existence of price discrimination. As mentioned above, the value-based pricing resulting from high fixed costs and low marginal costs, as seen in many parts of the media industry, often entails price discrimination. In particular, firms will seek to expand output by offering products at low prices to customers with low estimated willingness to pay, but only if this does not endanger their ability to charge higher prices to customers who place a higher value on the product. Such a pricing structure is often necessary to justify

³³ CMA (2020), *Online platforms and digital advertising. Market study final report*, https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

³⁴ OECD (2020), *Competition in digital advertising markets*, p. 29, <http://www.oecd.org/da/competition/competition-in-digital-advertising-markets-2020.pdf>.

³⁵ OECD (2015), *Digital Convergence: Policy and Regulatory Issues*, [https://one.oecd.org/document/DSTI/ICCP/CISP\(2015\)2/en/pdf](https://one.oecd.org/document/DSTI/ICCP/CISP(2015)2/en/pdf).

investment and/or to recover fixed and sunk costs. (European Commission, 2002³⁶) Price discrimination in media industry can be identified in some traditional media services, but also in online media services. OTT content distributors such as Spotify, offer its services to users with low willingness to pay on an advertisement-based model and for users with high willingness to pay on a subscription-based model. This strategy is replicated in several media services, like online newspaper and video-sharing platforms (OFCOM, 2022³⁷).

36. Also, some zero-price OTTs, may also differentiate through other qualitative variables, for example providing ultra/high-quality definition (i.e. non-price competition) (European Commission, 2021: 61-63³⁸). Hence, content providers can reach agreements with ISP or other technological infrastructure to increase the quality of their offerings. (Scarlato et al, 2018³⁹)

³⁶ European Commission (2002), *Market Definition in the Media industry -Economic Issues-*, https://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf.

³⁷ Definition: "Video-sharing platforms" are a type of online video service which allow users to upload and share videos with the public. OFCOM (2022), *Video Sharing Platforms: Ofcom's Plan and Approach*, https://www.ofcom.org.uk/data/assets/pdf_file/0016/226303/vsp-plan-approach.pdf.

³⁸ European Commission (2021), *Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law*, by Wik Consult, W|FO, Valdani Vicari & Associati, LE Europe, Grimaldi, https://ec.europa.eu/competition-policy/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf.

³⁹ Scarlato, M., Ortiz, J., Perra, C. and Skarmeta, A. (2018), "Leveraging OTT and ISP Cooperation to Enhance End to End QoS by Exchanging Valuable Resources," *2018 Tenth International Conference on Ubiquitous and Future Networks (ICUFN)*, pp. 118-120, doi: 10.1109/ICUFN.2018.8436975, <https://ieeexplore.ieee.org/document/8436975>.

3 Relevant issues in Media Mergers

37. Merger control is an important competition enforcement tool, most often structured with an *ex ante* system. Its objective is to prevent real or potential harms to market dynamics and consumers that could be triggered as a result of a merger.

38. In some countries, some media mergers are usually subject to particular requirements in order to prevent harms to “public interest”, such as plurality. In countries, such as the United States⁴⁰, Australia⁴¹ and United Kingdom⁴², mergers are also required to comply with “broadcast ownership rules”. For example, in the United States these thresholds apply to FTA TV (national and local) and radio (FTC, 2020⁴³). If a merger is suspected to harm public interest, then agencies (Ministry or regulators) are entitled to block a merger or require commitments from merging parties to prevent them.

39. The main elements in the merger analysis for the media industry are presented below.

Definition of Relevant Markets in Media Mergers

40. In general terms, the definition of a relevant market comprises a process using quantitative and qualitative tools to determine which goods or services are close substitutes, in other words which exert significant competitive pressure on each other, to the good or service that will be provided by the merged entity. Thus, the definition of the relevant market consists of identifying the competitive constraints that the good or service provided by the merged entity would face. The relevant market definition is the first step in analysing and determining whether a firm possesses market power or market power is created or

⁴⁰ As explained, “public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. The leading examples may come from broadcast transactions, where the Commission has long applied the congressional admonition to promote localism in programming, and especially news programming, available to communities.” FCC (2014), *FCC Transaction Review: Competition and the Public Interest*, <https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest>.

⁴¹ In Australia media mergers are subject to the ownership framework within the Broadcasting Services Act 1992 which states that, among others, at least five independent media voices must be present in metropolitan commercial radio licensee areas, and at least four in regional commercial radio licensee areas. In: ACCC (2017), *Media Merger Guidelines*, https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017_0.pdf.

⁴² In the United Kingdom, Ofcom for the proposed acquisition of Sky plc by 21st Century Fox, Inc, identified that through the merger there was an “increased influence by members of the Murdoch Family Trust over the UK news agenda and the political process, with its unique presence on radio, television, in print and online.” In: Ofcom (2017), *Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc Ofcom’s report to the Secretary of State*, https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf.

⁴³ FCC (2020), *FCC Broadcast Ownership Rules*, <https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules>.

strengthened by a merger, though market definition serves more functions than to give a first simple indication of market power (OECD, 2012: 26⁴⁴).

41. Regarding product market definition in the media industry, there are some particular considerations that competition agencies might be interested in analysing in order to determine if two services belong in the same relevant market:

- **Modes of delivery:** the agencies consider the extent of substitution between different modes of delivery a final consumer may access media content (digital vs non-digital; linear or on-demand for audiovisual content).⁴⁵
- **Content and differentiation.** Type and characteristics of content distributed are important in relevant market definition. For audiovisual content is relevant to distinguish between stages of value chain. For example, in the case of the production of programs (series, soap operas, reality shows), movies and sport events; or in the case of programming channels, whether they are: sports, factual, kids, movies, live events, music, etc. Also, it would be relevant to determine whether content is self-produced, licensed,⁴⁶ or comes from a video-sharing platforms, etc.
- **Bundling.** Bundling offers are common in media industry. This does not mean that in all cases a product market for bundles shall be defined.⁴⁷ In this regard, to determine whether a bundle market exists, the European Commission has recommended, in the retail mass-market, consider the following: (i) if stand-alone offers are available; (ii) if consumers are able to bundle services on their own; (iii) consumer's consumption of OTT services (European Commission, 2020: 36⁴⁸). A relevant criterion for these purposes is to consider products in the bundle as part of the same market if there is no more independent demand for individual parts of the bundle, or that when in the presence of

⁴⁴ OECD (2012), *Market Definition*. Policy Roundtables, DAF/COMP(2012)19, <https://www.oecd.org/daf/competition/Marketdefinition2012.pdf>.

⁴⁵ For example, ACCC (2017) presents some examples of modes of delivery: print, radio broadcasting, FTA TV broadcasting, accessed in home or via mobile devices, subscription or pay television via cable or satellite, accessed in home or via mobile devices, digital media platforms, including online sites and social media, OTT video or audio on demand services accessed via the internet, OTT video or audio streaming services accessed via the internet, other Internet Protocol Television (IPTV) services. ACCC (2017), *Media Merger Guidelines*, p. 3, https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017_0.pdf.

⁴⁶ Must be observed that not all content is distributed over Internet through multi-sided platforms. For several websites or applications which only distribute own content or that can be characterized as resellers and not as "marketplaces", the multi-sided conceptual framework can be inadequate. (See Belleflamme, P. and Peitz, M. (2010), *Industrial Organization, Markets and Strategies*, p. 617. Cambridge University Press.) So that to define a product market, the way in which content is licenced is relevant.

⁴⁷ The Dutch Independent Post and Telecommunications Authority (OPTA) indicates that substantial unbundling costs can indicate the existence of a cluster market. In particular, it explains that a "*cluster market may exist if transactional complementarities are such that consumers do not consider "unbundling" a suitable alternative to purchase of the bundled (or clustered) products. The level of unbundling costs depends on the cost advantages of joint supply (or the cost disadvantages of separate supply), the level of the fixed transaction costs and whether these can be spread over several products, and the level of the switching costs.*" See: OPTA (2007), *The Bundle the market?*, Regulatory Policy Note, no. 5, p. 14, https://www.acm.nl/sites/default/files/old_publication/publicaties/9379_The%20Bundle%20The%20Market%20-%20Regulatory%20Position%20Note%20nr.%205.pdf.

⁴⁸ European Commission (2020), *Commission Staff Working Document Explanatory Note. Accompanying the document COMMISSION RECOMMENDATION on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code*, <https://digital-strategy.ec.europa.eu/en/news/recommendation-relevant-markets>.

a small but significant non-transitory increase in price there is evidence that a sufficient number of customers would “unpick” the bundle and obtain the service elements of the bundle separately, then it can be concluded that the service elements constitute the relevant markets in their own right and not the bundle.⁴⁹

- **Business model.** The type of business model, in other words how is it financed, for example, through advertising, by subscription, online (either free, pay-per-event, subscription), among others.
- **Regulations.** Whether there are applicable regulations. For example, if the provision of the service requires licencing or not, or if it is subject to particular regulations.

42. Many media providers operate as two-sided or multi-sided platforms, however, the fact that a platform provides multiple services to multiple different users does not imply that the competition authority must analyse it as a multi-sided market (OECD, 2018: 39 and 40⁵⁰). In particular, advertising-based media, such as newspapers, FTA TV and social media, intermediate an audience of subscribers or users for the advertisers, so they face cross-side network effects that are unidirectional: these effects materialise on the advertisers’ side, but not on the users’ side (European Union, 2021: 40-41⁵¹).

43. To determine whether the market should consider one, two or multi-sides of a media participant, the competition agencies must determine the “strength” and the “sign” of the interrelation between the different sides, as well as the business model.

44. As aforementioned, when there is sufficient information, competition agencies implement the hypothetical monopolist test (SSNIP test). However, in the case of the media industry, as in other two- or multi-sided markets, at least two challenges arise from the application of this test: (i) the agencies must consider, in the case of two- or multi-sided markets, the strength and meaning of the interrelation between participating users on different sides of the platform to establish their prices –do audience and advertisers derive the same externality?–; and (ii) that the competition between providers may not necessarily be via price, this is particularly noticeable if the service has a “zero price” (attention)⁵² for one of the sides of the platform, consequently the providers compete in terms of other variables (e.g. privacy, recommendations, quality and diversity of content, among others) (OECD, 2018: 12-16, Box 2⁵³). (For further information on

⁴⁹ European Commission (2007), *Explanatory note accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*, pp. 15-16, <https://www.anacom.pt/render.jsp?contentId=991202>.

⁵⁰ OECD (2018), *Rethinking antitrust tools for multi-sided platforms*, <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

⁵¹ European Union (2021), *Support study accompanying the evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law*, by Wik Consult, W|FO, Valdani Vicari & Associati, LE Europe, Grimaldi, https://competition-policy.ec.europa.eu/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf.

⁵² Zero Price is a common name to refer to services/products that are offered to public without a charge, however it is not completely accurate, as “zero price” services can be exchanged for privacy or attention. Newman, J. M. (2015), “Antitrust in zero-price Markets: Foundations.” *University of Pennsylvania Law Review*, 164(1), 149–206. <http://www.jstor.org/stable/24752847>.

⁵³ OECD (2018), *Rethinking antitrust tools for multi-sided platforms*, <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

the assessment in multi-sided markets, please see: OECD, 2018⁵⁴; Oxera, 2020⁵⁵; Bundeskartellamt, 2016⁵⁶)

45. Consequently, it has been warned of the importance to use further qualitative evidence so the agencies can abound in their conclusions on the products/services that maybe included in the relevant market (European Commission, 2021⁵⁷).

Substitutability between modes of delivery

46. As has been explained, consumers usually have access to media content through newspapers, magazines, cinema, FTA TV, pay TV, radio stations, among others, all of them traditionally considered different markets generally.⁵⁸ However, the growing importance of media content provided over the Internet has induced many competition authorities to undertake analysis to determine whether OTT content distribution and traditional distribution channels belong to the same relevant market.

47. In particular, recent evidence in different countries has demonstrated the relevance to carry out specific analysis to determine the extent of the substitution between OTT and traditional services; hence, substitutability must be analysed considering the particular aspects of each country.⁵⁹

48. For the substitution analysis, on the demand side for audiovisual content, some agencies have considered information regarding recent consumption patterns of households in the geographical dimension in which the merger has effects. In particular, some of the characteristics that the competition authorities may consider are: (i) penetration, access prices and coverage of ISP high-speed broadband

⁵⁴ OECD (2018), *Rethinking antitrust tools for multi-sided platforms*, <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

⁵⁵ Oxera (2020), *How do non-poaching agreements distort competition? Two-sided market definition: some common misunderstandings*, <https://www.oxera.com/wp-content/uploads/2020/09/Two-sided-market-definition-some-common-misunderstandings.pdf>.

⁵⁶ Bundeskartellamt (2016), *Bundeskartellamt Paper on Platform Market Power - Results and Recommendations*, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht-Kurzzusammenfassung_Englisch.pdf?__blob=publicationFile&v=2.

⁵⁷ For example, European Commission has stated that “*Digital ecosystems are defined as a number of firms that work together to create a new market and produce goods and services of value to the consumer. Open systems are equipped with an interface that is accessible to component makers or system developers other than the system owner itself; while in a closed system, each component can work only with selected components. The literature and practice show that the more closed an ecosystem is, the more appropriate it may be to define the relevant market at a single ecosystem-level.*” European Commission (2021), *Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law. Final Report*. Executive Summary, p. 2, by Wik Consult, W|FO, Valdani Vicari & Associati, LE Europe, Grimaldi, https://ec.europa.eu/competition-policy/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf.

⁵⁸ Hewitt, G. (2004), *Media mergers: background note*, in OECD Journal: Competition Law and Policy, pp. 98-101, https://www.oecd-ilibrary.org/governance/media-mergers-background-note_clp-v5-art16-en.

⁵⁹ For example, the ACCC (2017) explains that “*media services using the same mode of delivery are likely to be closer substitutes than those operating via different platforms, all else being equal. However, developments in technology are facilitating convergence between different modes of delivery such that the supply of content or advertising across different platforms may compete more closely than in the past.*” ACCC (2017), *Media Merger Guidelines*, p. 4, https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017_0.pdf.

networks⁶⁰; (ii) quality of experience of end users⁶¹; (iii) demographics⁶²; (iv) innovations of platforms⁶³; (v) payment (whether it is “zero priced”, subscription, paid by transaction, or a combination)⁶⁴; (vi) content⁶⁵, among others. (See: Bunzinski et. al., 2021⁶⁶; Evans 2013: 27-33⁶⁷; Fudurić et. al., 2019⁶⁸, Bundeskartellamt, 2015⁶⁹; European Audiovisual Observatory, 2020: 56⁷⁰)

49. In the case of other media, such as newspapers, some variables that have been considered to determine the product market, are: (i) frequency of printed publications (daily or weekly, for example), (ii) if its paid or free, (iii) content characteristics, and the printed or non-printed character have been analysed to determine the product market. For geographical dimension, local, regional and national scopes

⁶⁰ Unlike the provision of traditional audiovisual content, OTT users require a broadband Internet connection to access content. Consequently, users need (i) to access and contract monthly for the broadband Internet access service and (ii) in the case of OTT subscription services, the payment of monthly subscriptions for the services of the OTT audiovisual platforms. Therefore, it should be considered whether the cost and coverage of broadband networks could limit access to such content to a significant number of households.

⁶¹ OTT service providers have no control over the quality of delivery to the end user (Quality of Experience) and their services are offered subject to the quality of provision of the Internet access service of the service provider. end user, so users can notice differences in the quality of access to the content of their choice.

⁶² Median age in households can have an impact on the decision for consuming traditional versus OTT services; in particular it has been demonstrated that OTT services are most preferred among younger generations, whilst older prefer to consume media through traditional channels. Nonetheless, recent evidence shows that for example in India, for people between ages 41 to 55, consumption of audiovisual content patterns might have changed after Covid-19 pandemic, hence more of them are willing to watch online content. See: Sridhar, S. and Phadtare, P. (2022), “Behavioral shift of generation X towards OTT during Covid-19 in India”, Symbiosis Institute of Media and Communication, Symbiosis International, *Cardiometry*; Issue 22; May 2022; p. 176-184, <https://cardiometry.net/media/rus/issues/no22-may-2022/behavioral-shift-generation.pdf>.

⁶³ The consumption of content through OTT platforms can be carried out through multiple screens, anywhere and at any time, this is usually a fundamental difference with respect to the presentation model of traditional audiovisual content, which it is usually linear.

⁶⁴ In the cases of subscription OTT platforms, the content is usually not displayed with ads; in the cases of free access OTT platforms, it is usually shown with advertisements, and even with advertisements that attend to “target advertisement”. If households dislike advertisings they would potentially more willing to pay for non-advertising media.

⁶⁵ Content distributors usually have rights for the transmission of content, mainly for high value content to the audience, and hence this content may only be available through certain platforms; how important this content for consumers is also a key characteristic to consider.

⁶⁶ Budzinski, O., Gaenssle, S. and Lindstädt-Dreusicke, N. (2021), “The battle of YouTube, TV and Netflix: an empirical analysis of competition in audiovisual media markets”, *SN Business & Economics*, Volume 1, Article number 116, <https://link.springer.com/article/10.1007/s43546-021-00122-0>.

⁶⁷ Evans, D.S. (2013), “Attention rivalry among online platforms”. *Journal of Competition Law Economics*, 9(2):313–357, <https://doi.org/10.1093%2Fjoclec%2Fnht014>.

⁶⁸ Fudurić, M., Malthouse, E.C. and Lee, M.H. (2020), “Understanding the drivers of cable TV cord shaving with big data”. *Journal Media of Business Studies*, 17(2):172–189, <https://doi.org/10.1080/16522354.2019.1701363>.

⁶⁹ Bundeskartellamt (2015), *Case summary: ARD and ZDF online platform “Germany’s Gold”*, B6–81/11–2, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2015/B6-81-11.pdf?__blob=publicationFile&v=2.

⁷⁰ European Audiovisual Observatory (2020), *Yearbook 2019/2020. Key Trends*, p. 56. <https://rm.coe.int/yearbook-keytrends-2019-2020-en/16809ce58d>.

have been analysed. (OFT, 2011; OFT, 2006⁷¹) Regarding online news content, several reference cases have concluded that online news media are not in the same market that printed newspaper; however, in the analysis all competitive constraints were considered. In particular, CMA has stated “*that general migration trends from one product to another (in this case, print newspapers to online news) do not necessarily indicate that there is diversion between them in response to marginal increases in price or quality degradation*”.⁷²

50. Also, empirical studies have tried to determine whether news referral traffic compensates for loss of direct traffic to newspapers online websites, incorporating aspects about market power of digital platforms and on the existence of viable alternatives for news publishers. Evidence from Spain regarding the effect Google News’ shutdown showed that this service was complement to news articles (traffic to newspapers websites), but is substitute of webpages that served as landing point for a website or a particular section of a website (OECD, 2021: 22⁷³).

51. Given the two-sided character of content distribution, market definition on the advertising side, competition authorities should assess whether if traditional and online advertising are close substitutes. Nonetheless, recent international experience has shown that until now online advertising is not a substitute for traditional media advertising (CNMC, 2021⁷⁴; CMA, 2020⁷⁵).

⁷¹ Office of Fair Trading (2011), *Anticipated acquisition by of seven local weekly newspaper titles by Kent Messenger Limited from Northcliffe Media Limited*, <https://assets.publishing.service.gov.uk/media/55797424e5274a151000023/kent-messenger.pdf>; and Office of Fair Trading (2006), *Completed acquisition by DC Thomson & Co Limited of Aberdeen Journals Limited*, <https://assets.publishing.service.gov.uk/media/555de3eeed915d7ae50000e2/dcthomson.pdf>.

Completed joint venture between Daily Mail General Holdings Limited, the trustees of the Iliffe Settlement and Trinity Mirror plc. <https://assets.publishing.service.gov.uk/media/555de2d0ed915d7ae500002e/local-world.pdf>.

⁷² See for example CMA (2020), *Completed acquisition by DMG Media Limited of JPI Media Publications Limited Report to the Secretary of State for Digital, Culture, Media and Sport on relevant merger situation and substantial lessening of competition*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959649/DMGT-JPIMedia_CMA_report_for_SoS_Redacted_V2.pdf.

⁷³ OECD (2021), *Competition issues concerning news media and digital platforms, OECD Competition Committee Discussion Paper*, <https://www.oecd.org/daf/competition/competition-issues-concerning-news-media-and-digital-platforms-2021.pdf>.

⁷⁴ CNMC (2021), *Estudio sobre las condiciones de competencia en el sector de la publicidad online en España*, <https://www.cnmc.es/expedientes/ecnmc00219>.

⁷⁵ CMA (2020), *Online platforms and digital advertising. Market study final report*, <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>

Box 1. Brazilian competition authority analysis on extent of competitive pressure of OTT services on sport content programmers⁷⁶

In the merger between The Walt Disney Company and 21st Century Fox, the Brazilian authority analysed whether OTT service providers exerted a competitive pressure on content providers for pay TV. In the economic analysis the authority acknowledged that:

“the historical analysis of market shares, in isolation, suggests that the audience of Disney and Fox sports channels has grown significantly, even after digital platforms began to broadcast sports events in Brazil. Furthermore, the manifestations of the Interested Third Parties point to a scenario in which the market power of Disney and Fox in the negotiations with the distributors will tend to intensify in the post-Operation context, despite the expansion of VoD platforms in recent years.”

It also pointed out that *“another obstacle to competition on the part of sports OTTs is related to technical factors that make it difficult for end consumers to watch sports broadcasts through streaming platforms. In this regard, Ancine highlighted factors such as (i) delays in the live broadcast; (ii) the loss of audio and image quality and (iii) the dispersion of sporting events among different content providers that must be cumulatively counted by users.”*

Consequently, the authority concluded that *“the competitive pressure exerted by OTTs on programmers still seems incipient to contain an exercise of market power by the Claimants in the post-Operation scenario”*.

Source: CADE (2019).

52. In this regard, as the European Commission has commented “so called “over-the-top” (OTT) services or other internet-related communications paths have emerged as a potential competing force to established retail communications services. As a result, NRAs [national competition authorities] should assess whether such services may, on a forward-looking basis, provide partial or full substitutes to traditional telecommunications services.” (European Commission, 2018: p. 9)⁷⁷

Geographic relevant market

53. In media mergers, it has been stressed the relevance to determine if the effect of the merger would be the same across different geographic locations. This is important because it is very likely that participants may differ between different locations, hence the effect of the merger would not be the same across locations. Some relevant variables that would be useful to consider in the case of media mergers are: (i) coverage of services produced by the merging parties and competitors; (ii) differences in regulatory regimes regarding permits or authorizations; (iii) price or quality discrimination based on the location of consumers; and (iv) costs of expanding or changing production and distribution systems to supply customers in alternative regions.

⁷⁶ CADE (2019), *Cade aprova compra da Fox pela Disney com restrições*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOcVK-n71Bwre7bTJYGLwRq9tJb100HRh87WxtBhK19dpmCaTT6P6Ep1ZHBhjUQZD553LNcUyAbILson1ISDNc.

⁷⁷ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, <https://digital-strategy.ec.europa.eu/es/node/2212>.

54. Important cases in media mergers have assessed competition effects in different geographic relevant markets. For example, in the United States the DoJ (2018⁷⁸) acknowledged that the merger between The Walt Disney Co. and 21st Century Fox included, among others, the acquisition of 22 regional sports networks ("RSNs"⁷⁹) owned by Fox. A RSN is a network that telecasts live games of one or more local professional sports teams, contracts typically provide the RSN with exclusive rights within a team's local region (i.e. they are not national licenses, are limited to the "Designated Market Areas" (DMAs) comprising the "home" territory of the team or teams carried by the RSN);⁸⁰ RSNs compete regionally to be carried in the programming packages of multichannel video programming distributors (MVPDs). Accordingly, the DoJ defined "licensing of cable sports programming to MVPDs" as the relevant product market, and as the geographic relevant market: each one of the 25 DMAs in which the merger would have effects.⁸¹ The DoJ pointed out that the geographic market was consistent with: (i) FCC's geographic markets to establish MVPD regulations (in particular, broadcast signal carriage rules, also known as must-carry obligations);⁸² and (ii) were widely accepted by MVPDs as the standard geographic area to use in evaluating television audience size and demographic composition.⁸³

Related Markets

55. In merger cases, authorities are advised to carefully assess the relation between the relevant and the related markets.

56. For example, in a horizontal merger, related markets will be defined for a product or service where entities do not directly compete, either because the product or service is complementary or independent. In the last case, the condition of "related market" depends on which is the market where harm to competition is expected, given the analysis carried out, to arise because this one will be the relevant market, and the others would be classified as related markets.

⁷⁸ DoJ (2018), *United States v. The Walt Disney Company and Twenty-First Century Fox, Inc.*, <https://www.justice.gov/atr/case/us-v-walt-disney-company-and-twenty-first-century-fox-inc>.

⁷⁹ An RSN is a cable network that telecasts live games of one or more local professional sports team—i.e., a "home" team or teams within that particular region. An RSN's contract with a local sports team typically provides the RSN with the exclusive rights, within a team's local region, to telecast live nearly all that team's games.

⁸⁰ RSNs' differ from national television networks which typically comprise all DMAs in a MVPD's footprint.

⁸¹ A DMA is a "geographic market designation that defines each television market exclusively of others, based on measured viewing patterns", by 2022 there were 210 DMAs in the United States. FCC (2000), *In the Matter of: McLaughlin Broadcasting, Inc. v. Comcast Cablevision of the South. Request for Carriage of WQHB Sumter, South Carolina, CSR5177-M*, pp. 5692-5693, <https://docs.fcc.gov/public/attachments/DA-00-686A1.pdf>.

⁸² Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, ("Must Carry Order"). According to section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 5j4(h)(1)(C). Effective January 1, 2000, Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. This is now under revision, see: <https://www.fcc.gov/document/fcc-proposes-update-publication-used-determine-local-tv-markets>.

⁸³ DoJ (2018), *Competitive Impact Statement: U.S. v. The Walt Disney Company and Twenty-First Century Fox, Inc.*, pp. <https://www.justice.gov/atr/case-document/file/1085951/download>.

57. In a vertical merger, the condition of “related market” depends on the identification of potential sources of harm to competition again. If the upstream market is the potential source of harm to competition, either for unilateral or coordinated effects, this will be treated as the relevant market and the downstream market as the related market, or vice-versa.

58. In a conglomerate merger, one particular challenge of assessing these mergers is that it may not be clear at the time of the transaction whether the acquisition target is, or will be, a horizontal competitor, or if the transaction would more appropriately be assessed in terms of tying and bundling risk, i.e. unilateral effects theories of harm (OECD, 2020: 10 and 28⁸⁴). Thus, when is pertinent to analyse the transaction as conglomerate merger, must be considered that theories of harm in these cases require the existence of substantial market power (OECD, 2020: 12⁸⁵). This implies that the relevant market will be the one where potential source of harm to competition areas, in this case the market where substantial market power is observed; the other markets will be the related markets.

59. In the international experience some cases are identified that are consistent with this approach. In the practice, pure horizontal, vertical or conglomerate mergers are rare; it is common to observe mergers with a mix of these type of mergers.

60. The case in the next box shows the importance to identify relevant and related markets.

Box 2. Relations analysed in the Amazon/MGM Case- European Commission⁸⁶

In 2021, the European Commission examined the proposed merger considering: (i) that Amazon is a global provider in the consumer electronics and technology services for several industries, including media industry; and (ii) MGM is a producer and distributor of audiovisual content.

During its investigation, the Commission examined different potential markets where there could be overlaps between the activities of Amazon and MGM¹:

- **The horizontal overlaps in the audiovisual content value chain.** The parties are primarily active in different parts of the audiovideo content value chain, where both parties are active their combined market shares are low.
- **The vertical links between the activities of Amazon and MGM in the audiovisual content value chain:** (i) MGM’s upstream activities as a producer and licensor of audiovideo content are limited compared to other market players’ activities, (ii) MGM’s content cannot be considered as must-have and (iii) a wide variety of alternative content exists, iv) where Amazon has a sizeable market presence among OTT, it faces strong competition from other players.
- **The vertical link between the activities of Amazon and MGM in the upstream market for the production and licensing of films for theatrical release and the downstream market for the theatrical exhibition of films:** MGM’s films represent only a limited share of box office revenues in the EEA and that overall MGM is not among the top production studios, despite its rights over successful film franchises such as James Bond.

⁸⁴ OECD (2020), *Roundtable on Conglomerate Effects of Mergers - Background Note*, [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf).

⁸⁵ OECD (2020), *Roundtable on Conglomerate Effects of Mergers - Background Note*, [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf).

⁸⁶ European Commission (2022), *Mergers: Commission approves acquisition of MGM by Amazon*, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1762.

- **The conglomerate links regarding MGM’s content and Amazon’s existing bundle of AV retail and marketplace service products:** the addition of MGM’s content into Amazon’s Prime Video offer would not have a significant impact on Amazon’s position as provider of marketplace services.

Sources: European Commission (2022). Mergers: Commission approves acquisition of MGM by Amazon.

61. All things considered, when analysing media mergers that produce and use large amounts of data, a market that could be analysed is the data market, which, due to its characteristics, could influence current and future dynamics of competition. For example, the merger of Amazon/MGM demonstrates how the competition agencies have addressed the complexity of media mergers value chains. (See Box 2)

Market power and market shares

62. Market power is an important concept for competition law and policy: it can make the difference between procompetitive and abusive firm conduct, and the difference between beneficial and harmful mergers. (OECD, 2022⁸⁷) Consequently, as part of three-step analytical framework “ability-incentive-effect”, and once the relevant and related markets have been defined, the next step consists of determining whether the merging entity would have the ability to harm competition, this is to determine whether the merger creates or strengthens the market power of any of the merging entities.

63. In several countries, competition agencies define that an entity (or a group of them) has significant market power (SMP) if it enjoys a position where its economic strength is enough such that it can behave to an appreciable extent independently of competitors and customers (European Commission, 2018: para. 11⁸⁸).

64. One of the key measures to determine SMP is market concentration, which in combination with other elements can provide sound evidence on the competitive effects of a merger. In this regard, market shares (and its concentration) can provide a useful first indication for the competition agencies of the market structure and the relative importance of competitors active on the market.

65. In some countries, competition agencies use market shares and market concentration indexes (such as the Herfindahl-Hirschman Index, IHH) as a first screening process to determine whether a merger should be subject to further analysis. Competition agencies may interpret market shares and market concentration in the light of key structural market features that determine market dynamics. For example, other elements that have been analysed by competition agencies are: (i) barriers to entry and expansion; (ii) absolute and relative size of the undertakings, (iii) control of infrastructure or assets not easily duplicated, e.g. data or exclusive licencing rights; (iv) distribution and commercial advantages, e.g. technologies to reach consumers (audience in the case of media); (v) countervailing buying power, e.g. degree of countervailing power from intermediate providers or consumers; (vi) product/services diversification strategies, e.g. importance of bundled services; (vii) relevance of economies of scale, economies of scope, and direct and indirect network effects.

⁸⁷ OECD (2022), *Market Power in the Digital Economy and Competition Policy*, OECD’s webpage, <https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm>.

⁸⁸ European Commission (2018), *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services*, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507\(01\)&rid=7](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507(01)&rid=7).

66. Particularly relevant for media industry, when assessing the market power of providers who participate as platforms, competition agencies are advised to consider the following forms in which market power can manifest: (i) power of intermediation between sides of the platform; (ii) capacity to act as a bottleneck between two or more types of users of the platform; (iii) capacity to become a player of paramount significance for competition across markets; (iv) superior bargaining power, etc.

Particular competition issues that may arise in media mergers

67. The following is a list of particular issues that may arise in the context of media mergers:

- **Plurality and diversity.** An example of media diversity loss occurs when a merger would result in a reduced number of voices and the potential for a consequent loss or reduction in quality news or local and regional content.

The likely effects of a horizontal media merger on competition and diversity will depend on the particular circumstances. A media merger that increases the market share of the merged firm will increase the level of market concentration; at the same time, in traditional media it has been considered that concentration will lead to a reduction in the number of independently owned media outlets and potentially a reduction in diversity and plurality. Hence, regulatory and competition authorities may also analyse mergers considering cross-ownership rules (when those normative provisions are available) between different media content distribution channels. (Ofcom, 2021: 15⁸⁹).

- **Technological evolution.** Technology plays an important role in the delivery of content in media industry, and can have a significant influence on the competitive pressure between market participants. Thus, changes in technology, and changes in the way consumers and businesses use and apply technology, can change the competitive dynamics of media markets. For example, in recent years, the rise of digital media has caused significant changes in the way content and advertisements are delivered and consumed. These changes may impact in the assessment of the mergers, however, the circumstances must be analysed on a case-by-case basis.
- **Access to “prominent” content.** Engaging, premium, or key content is content that is likely to attract a significant number of viewers. Live sports content has been identified as an important part of the offerings of FTA TV or pay TV providers, due to the high ratings and the fact that the viewer's interest in the main sports generally focuses on live content.

68. It has also been identified that the difficulty of obtaining attractive or premium content can constitute a barrier to entry in FTA TV and pay TV markets. Competition concerns may arise from a merger if the merger significantly increases ownership of proprietary content or significantly increases the ability of the merged entity to acquire such content, for example, through vertical integration. The ability of providers to control access to compelling content can create a barrier to entry and expansion, as it can hamper the ability of providers who do not have access to this content to grow and compete.

⁸⁹ Particularly, the regulator has explained that recommendation algorithms can play a critical role in ensuring exposure diversity, hence, it is not enough to concentrate on the diversity that is supplied (following traditional ownership rules), but also the amount of, and the conditions under which users (can) consume diverse content, p. 15. Ofcom (2021), *The future of media plurality in the UK Ofcom's report to the Secretary of State on the Media Ownership Rules and our next steps on media plurality*, https://www.ofcom.org.uk/_data/assets/pdf_file/0019/228124/statement-future-of-media-plurality.pdf.

69. The duration of licencing rights contracts is also considered in assessing media mergers, including how often these contracts are renewed and whether consumer preferences have changed over time. For example, if licencing rights for a content that is very relevant for consumers (“prominent content”) across time, are renewed every 10 years, and one of the merging parties holds significant market power and has exclusivity rights to this content, then this could pose competition concerns. Also, situations where content owners prefer to sell their rights on key content in a single package, making it commercially unattractive or infeasible to acquire for smaller competitors. (OECD, 2015: 18-19⁹⁰)

⁹⁰ OECD (2015), *Digital Convergence: Policy and Regulatory Issues*, [https://one.oecd.org/document/DSTI/ICCP/CISP\(2015\)2/en/pdf](https://one.oecd.org/document/DSTI/ICCP/CISP(2015)2/en/pdf).

4 Horizontal Mergers

70. Horizontal mergers are concentrations between firms that are actual or potential competitors in the same relevant market, in other words these mergers have the effect of eliminating a competitor in the market. (OECD, 1993⁹¹) Hence, competition agencies assess whether the transaction may have as object or effect reducing or hampering competition and free entry in the relevant market.

71. As well, as in other types of merger, the competition agencies analyse these mergers through the ability-incentive-effects framework. Firstly, but once a relevant market is defined, agencies analyse the capacity of the merging entities in terms of market power, for example through screening relative to market shares and other relevant aspects. Secondly, determine whether the merger entities would have the incentive and if the merger would entail some harm: (i) unilateral effects (creation or increase of market power) and (ii) coordination effects (changes in the market structure that would facilitate the coordination between the participants).

72. In the case of horizontal media mergers, international experience demonstrates that authorities have considered with particular attention the following factors in their analyses: modes of delivery in the provision of media services, barriers to entry and expansion, and innovations in business models.⁹² In this sense, it is important for authorities to carefully assess mergers that eliminate competitors which provide services through disruptive technologies or business models, potential competitors, and innovative services that could be offered by the one of the merging firms.

73. Also, it is essential that the authorities receive all the necessary information from the merging firms to determine: the actual services provided, markets involved in the operation, where the activities of the notifying agents coincide, including information on market shares. Likewise, the authorities should have full capacities to gather and recollect all the necessary data and information, including studies and documents from third-party agents outside the notifying parties, that allows identifying the characteristics of the markets and the effects that the merger could have from their point of view. In this case, all relevant information should be considered by the authorities when issuing its decision.

⁹¹ OECD (1993), *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, <http://www.oecd.org/dataoecd/8/61/2376087.pdf>.

⁹² For example see: IFT (2019), *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones autoriza, sujeta al cumplimiento de condiciones, llevar a cabo la Concentración radicada bajo el expediente No. UCE/CNC-001-2018, notificada por por Twenty-First Century Fox, Inc. y The Walt Disney Company*, <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vppift110319122accuce.pdf>; and CADE (2019), *Cade aprova compra da Fox pela Disney com restrições*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRkzMwwbd5g_PuAKStTINgP-jtcH5MdmPeznqYAOxKmGO9r4mCfJITXxQMN01pTgFwPLudA9bslIpLMma_vBQ69USyuU5w0wEE_ApQwBihQnmXqktC.

74. In horizontal mergers, competition agencies might use market shares and market concentration indexes (IHH), and the changes in IHH, as a first screening process to determine whether a horizontal merger should be subject to further analysis. (DoJ, 2018⁹³; European Commission, 2004: para. 16⁹⁴; FNE, 2012:13⁹⁵; Superintendencia de Industria y Comercio, 2019: 19⁹⁶)

75. Notwithstanding, possible anti-competitive effects could be analysed in greater detail if any of the following situations arise: (DoJ, 2010⁹⁷)

- One of the parties is a potential competitor, or a recent entrant with a small market share.
- One of the parties involved a maverick competitor.
- There is indicative evidence of coordination practices in the relevant market, or practices that could make it more likely.

76. In cases where it is not possible to rule out potential risks to competition and free entry, competition authorities analyse whether the notified merger grants, reinforces or increases the ability of the merging firm (unilateral effects), or jointly with other agents (coordinated effects), of hindering, diminishing, damaging or impeding the competition process and free entry in the markets where the notified concentration has effects.

Main and novel Theories of Harm and tests and evidence to analyse ToH

77. This section presents the Theories-of-Harm mainly considered by the competition authorities in the analysis of horizontal mergers. Subsequently, the section abounds on some particular elements that competition authorities have addressed in media mergers.

Unilateral effects

78. Unilateral effects in a merger refer to the capacity that the notified transaction confer or may confer to the merged firm, market power, increments or potential market power, with which it may unilaterally hinder, diminish, damage or impede the competition process and free entry in the relevant market where the notified concentration is realized.

79. In particular in media merger cases, authorities might consider whether the merging firm: (i) provide very close substitutes, for example they participate in same categories of programming channels; (ii) limited possibilities for consumers to change providers, for example due to high switching costs; (iii) low probability that competitors will increase supply if the event of a price increments, for example

⁹³ DoJ (2018), *Herfindahl–Hirschman Index*, <https://www.justice.gov/atr/herfindahl-hirschman-index>.

⁹⁴ European Commission (2004), *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52004XC0205%2802%29>.

⁹⁵ FNE (2012), *Guía para el Análisis de Operaciones de Concentración*, <https://www.fne.gob.cl/wp-content/uploads/2012/10/Guia-Fusiones.pdf>.

⁹⁶ Superintendencia de Industria y Comercio-Colombia (2019), *Guía de Integraciones Empresariales*, [https://www.sic.gov.co/sites/default/files/files/Proteccion_Competencia/Integraciones_Empresariales/2019/Gu%C3%ADa%20Integraciones%20Empresariales_agosto16_2019_%20\(1\).pdf](https://www.sic.gov.co/sites/default/files/files/Proteccion_Competencia/Integraciones_Empresariales/2019/Gu%C3%ADa%20Integraciones%20Empresariales_agosto16_2019_%20(1).pdf).

⁹⁷ As explained by the DoJ, “Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.” DoJ and FTC (2010), *Horizontal Merger Guidelines*, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c>.

they are restrained by their technical capacity in the medium or long term; (iv) can limit competitor's expansion or prevent entry of potential competitors.

80. Also, in media mergers, some competition authorities have considered the following expected effects in the analysis of unilateral effects (ACCC, 2017: 4 and 5).⁹⁸ In particular, if the merger results in the elimination of a significant source of competitive pressure between the merging firms, this may have the following effects in the relevant market:

- **Price increase.** An increase for example in the list price of an advertisement or an increase in subscription prices, among others.
- **Reduction in the quality of service.** For example, a decrease in the variety of content, or an increase in the number or duration of advertisements. This can result in a loss of choice for consumers, a reduction in a type of content that consumers value, or the loss of an important voice, for example by removing a quality local news provider.
- **Lower incentives to innovate.** Suppliers may have less incentives to invest in improving their products, as they are less afraid of losing customers to rivals.

Coordinated Effects

81. In the analysis of a horizontal merger, coordination risks among participants of a market are higher when, as a consequence of the merger, one of the following occur: (i) links between actual or potential competitors are generated or strengthened, through repeated interaction and access and exchange of information on their respective activities; (ii) a significant reduction in the number of competitors in the market, along with the emergence of the merging firm, results in a higher symmetry of market shares. (See the following Box for an example in media mergers.)

82. Also, for coordination to be sustainable, competition authorities shall consider that at least three conditions are necessary (European Commission, 2004⁹⁹): (i) firms are able to monitor the fulfilment of the agreement, observe deviations from it and retaliate; (ii) the existence of a credible deterrence mechanism that can be activated if a deviation from the coordination agreements is detected; (iii) actions of third parties, such as current and future competitors not involved in the coordination, as well as customers, must not jeopardize the expected results of the coordination.

83. The following box presents an example from the Latin American experience in horizontal media merger analysis.

⁹⁸ ACCC (2017), *Media Merger Guidelines* 2017, https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017_0.pdf.

⁹⁹ European Commission (2004), *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52004XC0205%2802%29>.

Box 3. Walt Disney/21st Century Fox -Argentina, Brazil, and Mexico

Between 2018 and 2019, 21st Century Fox Corporation (hereinafter Fox) and The Walt Disney Company (hereinafter Walt Disney) notified the merger transaction to several competition authorities around the world.¹⁰⁰ The merger implied the acquisition of Fox assets, that included, among others, film and television studios, licenses for pay TV programming channels, and other international TV businesses.

In Latin America, several authorities analysed the case, among them: Argentina,¹⁰¹ Brazil,¹⁰² and Mexico.¹⁰³ In these, it was determined that Fox and Walt Disney were competitors in several markets, some of which are: (i) production and distribution of films for theatrical exhibition; (ii) distribution of films for consumers to buy or rent and watch at their convenience, in physical and electronic formats; (iii) licencing of audiovisual content for pay TV programming channels; (iv) wholesale supply of TV programming channels, particularly Sports programming channels. The latter was particularly relevant in many Latin American countries because it included sport channels that were highly relevant for audience and pay TV providers, hence it will be explained in detail. Given the international scope of the merger, international cooperation between several competition authorities was conducted, in order to fully understand the potential anticompetitive risks of this merger. To do so, the entities authorised a waiver to access information of their economic activities and businesses in America and the European Union.

Economic assessment in the Provision of “sports” programming channels:

The market of **Provision of “sports” programming channels** raised competitive concerns, since Disney licensed “ESPN Channels” (namely, ESPN, ESPN 2 and ESPN 3) and Fox licensed “Fox Sports Channels” (namely, Fox Sports, Fox Sports 2 and Fox Sports 3) to pay TV providers. The ESPN and Fox Sports Channels programming channels were characterized by broadcasting highly relevant international sporting events, such as: (i) regional and continental soccer tournaments (e.g. Copa Sudamericana and the Recopa Sudamericana); (ii) European soccer cups such as UEFA Champions League and the European League; (iii) European soccer leagues: English, Spanish, Italian, French, among others; (iii) United States NBA basketball league; (iv) Tennis Grand Slams and ATP circuit; among others.

Consequently, several authorities expressed their concerns regarding the possible anticompetitive effects of the merger. In particular, authorities found:

¹⁰⁰ Some of which were: Australia, Brazil, Canada, Chile, China, Colombia, South Korea, Costa Rica, Ecuador, European Union, United States, Philippines, Honduras, India, Israel, Japan, Mexico, Russia, Serbia, South Africa, Taiwan, Turkey, and Ukraine.

¹⁰¹ National Commission for the Defence of Competition (CNDC)-Argentina (2020), *Merger case 1692*, <https://www.argentina.gob.ar/sites/default/files/2017/02/io-conc1692.pdf>; CNDC (2022), <https://www.argentina.gob.ar/sites/default/files/2022/01/conc-1692-dictamen-reso.pdf>.

¹⁰² CADE (2019), *Cade aprova compra da Fox pela Disney com restrições*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOcVK-n71Bwre7bTJYGLwRq9tJb100HRh87WxtBhK19dpmCaTT6P6Ep1ZHBbehjUQZD553LNcUyAbILson1ISDNc.

¹⁰³ IFT (2019), *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones autoriza, sujeta al cumplimiento de condiciones, llevar a cabo la Concentración radicada bajo el expediente No. UCE/CNC-001-2018, notificada por por Twenty-First Century Fox, Inc. y The Walt Disney Company.*, <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vppift110319122accuce.pdf>.

- **In Argentina**, the CNDC found that the merged entity would own 7 of the 9 Basic Sports channels in pay TV, and almost two thirds of the total rating of this programming category. Likewise, the HHI after the operation would reach 5,166 points and the variation of the HHI was higher than 2,000 points. Hence, it was concluded that the merger would lead to a potential increase in the bargaining power of the entity, and, consequently, the prices of channels for pay TV providers, and subscriptions paid by final consumers. Also, since the merging entity also participated in other relevant markets of pay TV channels, and these were sold in package, the higher bargaining power in Sports content would also lead to a potential leverage of market power to the rest of its pay TV channels, and in detriment of final consumers.
- **In Brazil**, CADE identified that in the market of Basic Sports programming channels, the merged entity would reach a market share of audience of 36%; the HHI after the transaction would be greater than 4,580 points with an IHH change of 648 points; and that the market structure would lead to a *de facto* duopoly in the Basic Sports channel market. In particular, the merged entity and Grupo Globo (the leader) would jointly, control more than 90% of the market share of audience; the authority also pointed out that there was historic evidence of cooperation between them and the different profile of sports content broadcasted by these agents. So, the post-operation scenario would hardly be followed by a rivalry between them. Consequently, the authority considered that the reduction from 3 to 2 players in the market had the potential to directly affect the well-being of end consumers, either by the loss of quality of the content broadcast on sports channels (commentators, for example), or by the reduction of content diversity (sports less demanded, apart from football), or by the increase in prices for access to these contents.
- **In Mexico**, the IFT concluded that in the Sports category, the merging entity would reach a market share of audience close to 80%, while its closest competitor share was less than 20%; in addition, the HHI after the transaction would be greater than 6,500 points. Hence, the IFT concluded, among other things, that the merging firm would have the ability to: (i) increase the price of the ESPN Channels and the Fox Sports Channels and those that may be offered in the future to pay TV providers, without the existence of a competitor that currently or potentially has the capacity to counter balance such power; (ii) deny or grant under discriminatory terms and conditions, or exclusively provide and license those channels, and those that may be offered in the future, to pay TV providers. In addition, IFT identified anticompetitive risks from conglomerate effects.

Sources: National Commission for the Defense of Competition of Argentina (2020 and 2022), CADE-Brazil (2019), IFT-Mexico (2019).

5 Vertical Mergers

84. Vertical mergers refer to those transactions in which the merging parties combine assets at different stages of a supply chain. The main purpose of vertical integration is to substitute market exchanges with internal exchanges within the boundaries of the firm (Coase, 1937¹⁰⁴), they can reduce costs, to make processes along the supply change more efficient, to create synergies on behalf of innovation and to improve quality of products or services and better prices to final consumers. This can either be achieved with forward integration in a downstream market (e.g. television broadcaster acquires telecom operator) or backward integration in an upstream market (e.g. computer manufacturer acquires producer of electronic components) (OECD, 2019: 5¹⁰⁵).¹⁰⁶

85. Vertical mergers are traditionally presumed pro-competitive, as they are generally driven by efficiency-enhancing motives. Nonetheless, renewed interest on vertical mergers has been due to an ongoing wave of high-profile cases that involve technology, media and telecom sectors. (OECD, 2019: 5-6).¹⁰⁷

Main and novel Theories of Harm

86. Previous OECD documents have been quite extensive on describing the typical theories of harm in vertical mergers. The OECD (2019: 21-22¹⁰⁸) has classified the vertical theories of harm as follows:

- **Unilateral effects (Foreclosure).** This occurs when the vertically integrated firm gains control over various stages of the supply chain and has the ability to foreclose the “upstream” or “downstream” by excluding competitors or raising rivals’ costs. Some cases are when the integrated firm refuses to supply rivals with the products (foreclosure) or increases or lowers the quality of the same (which produces a raise of rivals’ costs). The mergers in those cases may force competitors out of the market or reduce their ability to compete effectively. Examples of unilateral effects are input foreclosure, customer foreclosure, foreclosure through tying, and misuse of commercially sensitive information.

¹⁰⁴ Coase, R. (1937), “The Nature of the Firm”, *Economica*, Vol. 4/16, pp. 386-405, https://www.jstor.org/stable/2626876#metadata_info_tab_contents.

¹⁰⁵ OECD (2019), *Vertical Mergers in the Technology, Media and Telecom Sector*, [https://one.oecd.org/document/DAF/COMP\(2019\)5/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf).

¹⁰⁶ In this context, “upstream activities” refer to stages closer to the point of origin of a supply chain (wholesaler, manufacturer or supplier) and “downstream activities” as stages closer to the final consumer (distributor, sale-points or retailers).

¹⁰⁷ In particular, the AT&T the DoJ to bring the first litigated vertical merger case in 40 years. Wong-Ervin, K. (2019), “Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings”, *ABA Antitrust Source*, <http://dx.doi.org/10.2139/ssrn.3273344>.

¹⁰⁸ OECD (2019), *Vertical Mergers in the Technology, Media and Telecom Sector*, [https://one.oecd.org/document/DAF/COMP\(2019\)5/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf).

- **Co-ordinated effects.** This occurs when the vertically integrated firm enables interaction among firms that harm customers, such as tacit agreements between market participants, limit supply or detect cheating and punish market participants. Market share and the amount of sensitive information about competitors and the relevant market that the merging firm can access in a post-merger scenario may influence the ability to create coordinated effects, but those are not the only factors to consider. A horizontal merger assessment to determine coordinated effect is equally appropriate when it comes to vertical mergers, so the horizontal merger guidelines issued by competitions authorities may be helpful for interested parties to avoid incurring in anticompetitive conducts. Examples of coordinated effects are the elimination of a disruptive buyer/seller, exchanges of commercially sensitive information and changes in the cost structure.

87. According to ICN's survey on Vertical Mergers, all of the 41 competition agencies responding the survey, considered input foreclosure (total and partial) as a possible ToH, while 40 consider customer foreclosure; also, many analysed 'information sharing' (ICN, 2018: 7-10¹⁰⁹).

88. When it comes to assess the anticompetitive effect in a vertical media merger, the competition authorities may consider the following evidence:¹¹⁰

- Market share;
- Market concentration;
- Disruptive role of a merging party and non-merging firms;
- Using models to predict price changes;
- Quantitative economic techniques: merger simulations, diversion ratios, pricing pressure indices, critical loss analysis, econometric models, among others;
- Empirical methods to measure the effects on prices;
- Barriers to entry and/or elimination of potential competitors;
- Increase of bargaining power of the merged firm;
- Evade the regulatory framework in certain industry or use it advantageously;
- Alternatives for rivals at the upstream and/or downstream;
- Existing business and contracting practices among firms;
- Product differentiation;
- Essential facilities and inputs for downstream firms; and
- Profit margins of the input and final product.

89. The following box explains the economic analysis that was carried out by some Latin American authorities, in the vertical merger between AT&T and Time Warner.

¹⁰⁹ ICN (2018), *ICN Vertical Mergers Survey Report*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/10/MWG_SurveyreportVerticalMergers2018.pdf.

¹¹⁰ It is relevant to remember that many of the markets involved in the media industry sector are multi-sided platforms, for which standard economic tools and results do not directly apply (Evans, 2013). In these situations, the economic analysis can be very complex since it must consider the existence of multiple groups of consumers with interdependent demands; the calculations are significantly challenging and much more information is required. Evans, D. S. (2013), *The Consensus among Economists on Multisided Platforms and its Implications for Excluding Evidence that Ignores It*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249817.

Box 4. AT&T-Time Warner merger, analysis by Brazil, Chile and Mexico

In 2017, several competition authorities in America, and other countries around the world, were notified on the proposed transaction between AT&T, Inc. (hereinafter, AT&T) and Time Warner, Inc. (hereinafter, TW) The merger was valued in \$85 billion dollars and became one of the largest acquisitions in history.

The parties involved in the transaction held ownership of several subsidiaries across Latin America, among the most important: (i) TW, a provider and licensor of own and third party audiovisual content, mainly through: Turner (content producer and programmer of pay TV channels), HBO LAG (producer and content programmer of premium pay TV channels) and Warner Brothers (producer, licensor and programmer of content for television, home entertainment and games), also it was acknowledged that in some countries their subsidiaries were providing OTT services; (ii) AT&T, a telecommunications service provider (mainly mobile services) and shareholder of DIRECTV (Sky) a pay TV service provider via satellite, in Argentina, Brazil and Mexico, among others. The competition authorities concluded the merging entity would have participation in: upstream activities, production and licensing of audiovisual content and channels for TV providers, and downstream activities provision of pay TV services to final consumers. Hence, some analysed potential anticompetitive risks were analysed.

The main considerations of the analysis performed by each authority are presented below.

- **Brazil,**¹¹¹ CADE analysed the anticompetitive risks in the upstream and downstream markets. For the upstream, it was pointed out that TW's programming channels for pay TV providers held a relevant market share, considering the total number of channels and the total audience; its set of channels constituted a broad portfolio, it offered channels in all thematic categories (basic and premium); and had favourable contractual clauses compared to smaller programmers. For downstream (retail pay TV services), the authority recognized that the market was practically a duopoly, with Telecom Americas and AT&T/Sky totalling around 80% of the market share number of subscriptions, despite AT&T/Sky not being the leading pay TV operator nationwide, there were certain geographic locations where AT&T/SKY had high market shares. Considering these factors it concluded the need to analyse possible anticompetitive effects, since the merging entity would have the capacity and incentives to: (i) discriminate against other programmers, and (ii) foreclose the market of pay TV, by directing TW's contents to Sky, causing damage to other agents in the market. So, remedies were imposed for its approval.¹¹²

¹¹¹ CADE (2017), *Concentration Act No. 08700.001390/2017-14*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLu9u7akQAh8mpB9yOI1hYLduJjx4bEV7sWvxxsYdCXaTNXXfJ6dd7Y3z0U5q7Nih5GYOX4hDVoa96z0lqhgZxzwJIWfnKYGUMv-tm.

¹¹² In particular, (i) Structural: AT&T shall maintain Sky-Brazil and TW channel programmers as separate legal entities with their own management and governance structures, not being allowed to exchange competitively sensitive information or information that may imply discrimination between agents that were not part of the economic group; (ii) Behavioural: non-discrimination commitment, independent monitoring by a consultant appointment procedure; arbitration to discourage the adoption of discriminatory/exclusionary conducts; and penalties to encourage the fulfilment of established obligations.

- **Chile**,¹¹³ FNE analysed upstream and downstream markets. For the upstream market, it concluded that TW's programming channels held different audience shares depending on the content category, ranging from 25 up to 60 percent; the authority also acknowledged that some TW channels were relevant for Chilean consumers. In the downstream market, FNE analysed the market shares of all participants in pay TV provision, regardless of the technology; and found that AT&T/Sky held 18.9% of the market share of retail pay TV. The FNE identified three risks: (i) customer foreclosure, (ii) input foreclosure and (iii) dealing with sensitive information between business units. The FNE developed different economic analysis and concluded that the merging firm would have the ability and incentives to perform partial and total input foreclosure of TW channels to all AT&T/Sky competitors. Hence, the acquisition was approved with remedies.
- **Mexico**,¹¹⁴ IFT analysed upstream and downstream markets. In the upstream market, it was acknowledged that TW's participation in the provision of pay TV channels was substantial, considering the number of channels it offered and its share of audience, which was only comparable to the leader GTV. Hence, threats of refusal to deal or unfair treatment would affect the ability of pay TV's competitors. In the downstream, GTV's position as a pay TV provider, with approximately 61% of users nationwide (including SKY Mexico and its subsidiaries that provide cable service), was sufficient to prevent AT&T/Time Warner from increasing the prices or restricting the sale conditions of the programming it supplies to it, however, no other economic agent would counterbalance the power from the merging firm. Hence, IFT's analysis focused on input foreclosure. The IFT estimated the income that the merging firm could obtain by carrying out this practice and contrasted it with the income that it would have obtained otherwise.¹¹⁵ From the results, the IFT concluded that it would benefit from implementing a foreclosure strategy. Consequently, the merger was approved conditioned on remedies.

Source: CADE (2017), FNE (2017), and IFT (2017).

¹¹³ FNE (2017), *Notificación de Operación de Concentración entre Time Warner. Inc. y AT&T Inc. Rol FNE F-81-17. Informe de aprobación*, https://www.fne.gob.cl/wp-content/uploads/2017/11/inap_F81_2017-2.pdf.

¹¹⁴ IFT (2017), *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones autoriza, sujeta al cumplimiento de condiciones, 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.*, <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vppift150817487.pdf>.

¹¹⁵ The quantitative exercise considered the following elements: (i) AT&T/Time Warner increases the licensing fees for its Pay TV channels by 10% (except to Sky México and GTV, due to AT&T and GTV's equity interest in Sky México); (ii) This increase in rates would cause an increase in the prices of the Pay TV packages offered to final consumers; (iii) The only ones that would have maintained their commercial offers with the same prices would be Sky México and GTV, so end users would change to these providers; (iv) Sky México, which provides Pay TV in the DTH (Direct to Home) mode, has national coverage; (v) Given the situation described, some end users would choose to change their Pay TV provider (they would move to GTV or Sky México, since they would not increase their prices) and others would definitively stop contracting the services; (vi) The analysis considered that, in some locations, depending on the presence of GTV, users could choose between GTV and Sky México, or have only Sky México as the best option.

6 Conglomerate Mergers

90. Conglomerate mergers involve merging entities that are not product/service market competitors, and which are not directly related in the supply chain, but are active in “closely related markets”. Thus, the products or services involved in conglomerate mergers are either: (i) complements: they can or could be used together; (ii) weak substitutes: “neighbouring goods”¹¹⁶, (Neven, 2005¹¹⁷); (iii) unrelated (independent demands), but its combined production generate economies of scope (OECD, 2020¹¹⁸).

91. In the media industry, as the ACCC (2017) has identified, these “*mergers involve parties that are present in multiple markets and supply products that are typically related to each other in some way, such as products which are complementary in demand or supply. Mergers that will result in cross-platform media ownership, for example between a television network and a newspaper publisher, are typically a form of conglomerate merger.*”¹¹⁹

Main and novel Theories of Harm

92. The most important conglomerate theories of harm that have been cited by competition agencies and have been analysed in academic literature are:

- **Unilateral effects:** risk that a post-merger firm with substantial market power use it to foreclose competition by using tying¹²⁰ or bundling¹²¹ strategies, sharing confidential information, or eliminating potential competitor;

¹¹⁶ This means that they can have similar characteristics or functions to final users, however, they are not sufficiently substitutable, do not exert competitive pressure, to be considered in the same product market for antitrust purposes.

¹¹⁷ Neven, D. (2005), *The analysis of conglomerate effects in EU merger control*. Graduate Institute of International Studies, Geneva and CEPR, <https://ec.europa.eu/dgs/competition/economist/conglomerate.pdf>.

¹¹⁸ OECD (2020), *Roundtable on Conglomerate Effects of Mergers*, [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf).

¹¹⁹ In: ACCC (2017), *Media Merger Guidelines*, <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>.

¹²⁰ Tying, is the practice where two separate products or services are sold in combination and customers are denied the choice of supplier for the tied product. For example, the seller of service A (the “tying” service) requires some or all purchasers of A also to purchase a separate service B (the “tied” service). ICN (2015), *Unilateral Conduct Workbook Chapter 6: Tying and Bundling*, <https://www.internationalcompetitionnetwork.org/portfolio/uc-workbook-tying-and-bundling/>.

¹²¹ Bundling, there are three types of bundling that have been identified relevant for competition analysis: (i) pure bundling: is the practice where a supplier of a service (product) supplies it only bundled with one or more other services and thus will not supply the components of the bundle on a stand-alone basis; (ii) mixed bundling: separate services are sold both as part of a package and separately, however, the price is lower, or the terms and conditions are otherwise more favourable, if the components are purchased as a bundle; (iii) incomplete mixed bundling: a firm offers some but not all of the services for sale separately. Nonetheless, in cases where the differences of prices or terms and conditions between bundled and stand-alone components is so high, then they can be treated as cases of pure

- **Co-ordinated effects**, specifically that the merger will facilitate collusive outcomes.

93. In order to analyse potential risks of tying or bundling, international experience shows that in order to be successful in foreclosing a market certain conditions have to be fulfilled: (i) **dominance of one of the merging parties in at least one market**; (ii) there should be a **considerable overlap in the customer base** for each of the products involved; (iii) **ability which depends on the characteristics of the products and markets in question**¹²² (OECD, 2020¹²³).

94. Some anticompetitive bundling and tying strategies in media mergers that could be relevant for competition agencies to look for are (OECD, 2020: 16-17¹²⁴; Church 2008¹²⁵): (i) bundling with complements in markets that are not perfectly competitive;¹²⁶ (ii) tying unrelated or substitute products in markets that are not perfectly competitive;¹²⁷ (iii) tying complements in the presence of competitive pressures in the origin market;¹²⁸ (iv) price discrimination through bundling and tying, among others.¹²⁹ For

bundling or tying. ICN (2015), *Unilateral Conduct Workbook Chapter 6: Tying and Bundling*, <https://www.internationalcompetitionnetwork.org/portfolio/uc-workbook-tying-and-bundling/>.

¹²² For example, if there are technical ties that are automatic then it would require significant investment or effort to undo them, so bundling and tying is more likely in markets where there are substantial ties or ties can be undone quickly. On the contrary, if consumers have buyer power and are able to exert some control over the terms of the sale or are able to credibly threaten to cease purchasing the monopoly product, if the tie is enforced, then the credibility of a firm's tying strategy could be undermined. Church (2004), *The Impact of Vertical and Conglomerate Mergers on Competition*, for the Directorate General for Competition Directorate B Merger Task Force European Commission, https://appliedantitrust.com/12_nonhorizontal_mergers/7_europe/church_impact_vertical9_2004.pdf.

¹²³ OECD (2020), *Roundtable on Conglomerate Effects of Mergers*, [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf).

¹²⁴ OECD (2020), *Roundtable on Conglomerate Effects of Mergers*, [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf).

¹²⁵ Church, J. (2008), "Conglomerate Mergers", *Issues in Competition Law and Policy, ABA Section of Antitrust Law, Vol. 2* American Bar Association, Antitrust Section, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280524.

¹²⁶ A firm with a monopoly in one product/service market (the "monopoly product") may find bundling with another product/service (the "non-monopoly product") profitable if there is imperfect competition in the latter (e.g. differentiated products); then bundling can be an effective strategy to increase market share and raise prices, with negative consequences for consumer welfare (Neven, 2005: pp. 26-27). Neven, D. (2005), *The analysis of conglomerate effects in EU merger control*. Graduate Institute of International Studies, Geneva and CEPR, <https://ec.europa.eu/dgs/competition/economist/conglomerate.pdf>.

¹²⁷ A firm could, in some cases, profitably tie the purchase of a monopoly product to an unrelated product or weak substitute, if the market for the latter product is not perfectly competitive. The strategy would only be feasible, if there are entry barriers that would prevent competitors from contesting the tied product market in response to price increases. For example, in the case of programming channels a provider of several channels would profitably benefit from merging with another firm to increase its portfolio, to increase its market power by bundling several channels.

¹²⁸ If there are alternative products that are imperfect substitutes for the origin product, and the firm do not have complete monopoly power, it may therefore have opportunities to increase profits through tying or bundling complements. (Whinston, 1990) For example, an ISP facing increasing competitive pressure, would have incentives to merge, and provide exclusively, a relevant OTT audiovisual service to increase its market power; or a TV-free-to-air that merges with a dominant OTT provider, could tie advertising in online advertising and traditional advertising, to increase its revenues in free-to-air advertising.

¹²⁹ Bundling and tying following a merger can also be used to increase profitability by setting differentiated prices closer to consumers' willingness to pay —price discrimination—. This strategy is useful in markets where firms can observe (gather data on patterns on consumptions) how consumers assign differing values to a product. Bundling can enhance price discrimination if the merging entity can bundle a good/service that is highly valued by consumers (e.g. in media: premium content or premiere release of books) with other that have more elastic demands or even are

example, in the Disney/Fox merger, authorities from Mexico and Brazil, analysed potential anticompetitive risks from the merging party due to enhanced market power due to which provided a better portfolio in programming channels.

95. As previously noted, media, broadcasting sectors, and digital platforms that offer audiovisual content, share: (i) similar characteristics and functionalities that permit the existence of a significant number of common costumers with the disposition to consume bundled services, and (ii) they use common inputs and technologies that can produce different services that permit the existence of scope economies. Furthermore, factors such as economies of scale and low marginal costs, economies of scope, network effects, feedback loops, technical tying, may increase the risks of traditional conglomerate merger theories of harm.

96. The following box describes a case analysed by the European Commission (Telia/Bonnier Broadcasting, 2017), the main theory of harm analysed was foreclosure through a bundling strategy.

negatively correlated, through bundling the merging firm can sell both products averaging out the consumers' willingness to pay for each product.

Box 5. Telia/Bonnier Broadcasting (2017) – European Union¹³⁰

The European Commission analysed the conglomerate effects of the merger between (i) Telia a telecommunication operator which provides fixed telecommunication services (telephone, broadband access and pay TV), mobile telecommunication services, and OTT on demand, in retail markets; and (ii) Bonnier Broadcasting a retail supplier of audiovisual services, and also through its over the top (OTT) video-on-demand serve; in Finland and Sweden.

Market structure: (i) Bonnier Broadcasting held a significant degree of market power in relation to OTT video-on-demand services; (ii) Telia's activities in the retail supply of fixed telecommunication services (internet access), and mobile telecommunications services, which are an input for Bonnier Broadcasting services; (iii) between them there was an important common pool of customers (video-on-demand services and telecommunication services).

Conglomerate ToH-Foreclosure: (i) to rival providers of telecommunications services by tying or bundling Bonnier Broadcasting's OTT audiovisual service with Telia's telecommunications services; (ii) to rival retail suppliers of OTT audiovisual services by tying or bundling Bonnier Broadcasting's OTT audiovisual service with Telia's telecommunications services or engaging in exclusionary practices.

Assessment and Effects: in both cases the authority considered the market shares, and also:

Foreclosure of rival providers of telecommunication services: (i) strategy would likely divert a significant number of mobile and fixed internet telecom customers to Telia; (ii) the merged entity would likely limit access by rival providers of telecommunications services to the merged entity's OTT applications, by making them exclusive to its fixed internet access and mobile customers; (iii) refusal to make these OTT services available to rival suppliers would have significant detrimental effect on the rivals' ability to compete; (iv) competing providers would also not be able to deploy counter strategies in a timely fashion in order to bypass the merged entity.

Foreclosure of rival retail providers of OTT audiovisual services: (i) the merged entity lacked the ability and incentive to pursue these strategies; (i) were unlikely to have a significant impact on competition; (iii) the Open Internet Regulation would protect the merged entity's competitors from discriminatory treatment.

Conclusion: Approved subject to commitments: (i) license standalone OTT rights to a market player and providers of telecommunications services could partner with the standalone OTT licensee and offer bundled services; (ii) the merged entity's standalone video-on-demand services would remain available to all end users, at the same quality conditions, and irrespective of the provider of the mobile or fixed broadband network of the end user.

Source: European Commission (2017), Commission clears Telia's acquisition of Bonnier Broadcasting, subject to conditions.

¹³⁰ European Commission (2017), *Commission clears Telia's acquisition of Bonnier Broadcasting, subject to conditions*, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6271.

7 Remedies

97. Remedies are used by competition agencies to prevent harms to the competitive process that may result as a consequence of a merger. As such, they play an essential role in the merger review process, and their careful crafting is of the utmost importance to the competition agencies carrying out the review. (OECD, 2011¹³¹)

98. In the context of media mergers, as well as other dynamic markets, mergers might entail static and dynamic anticompetitive effects; in these cases, remedies can provide solutions to eliminate competitive harms while still allowing the merger to realise the expected efficiency effects (OECD, 2020¹³²). Thus, remedies should be comprehensive, covering all risks, actual and potential, of anti-competitive effects identified (OECD, 2020¹³³).

99. In general, there are two main categories of remedies in merger control, structural and behavioural, which can either be applied in isolation, or combined into a hybrid remedy or set of remedies. This section provides details of these two categories of remedies in the context of media mergers, discuss their main potential benefits and limitations, and presents examples of each.

Structural Remedies

100. Structural remedies are divestiture measures through which the merging parties sell part of their assets to one or more third parties (OECD, 2011¹³⁴). In general, the main purpose of a structural remedy is to restore the level of competition that existed pre-merger, by enabling the competitor or entrant who acquires the divested assets to exert competitive pressure effectively post merger (ICN, 2016¹³⁵) (Motta, Polo and Vasconcelos, 2007¹³⁶).

¹³¹ OECD (2011), *Remedies in Merger Cases*, <https://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf>.

¹³² OECD (2020), *Merger Control in Dynamic Markets*, <https://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf>.

¹³³ OECD (2020), *Conglomerate Effects of Mergers*, [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf).

¹³⁴ OECD (2011), *Remedies in Merger Cases*, <http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf>.

¹³⁵ ICN (2016), *Merger Remedies Guide*, <https://centrocedec.files.wordpress.com/2015/07/mergerremedies-guide.pdf>.

¹³⁶ Motta, M., Polo, M. and Vasconcelos, H. (2007), "Merger remedies in the European Union: An overview", *The Antitrust Bulletin*, Vol. 52/3, pp. 603-631, <https://journals.sagepub.com/doi/pdf/10.1177/0003603X0705200310>.

101. These remedies are usually more effective in reducing the risk of harm in horizontal mergers (OECD, 2011).¹³⁷ In the case of vertical or conglomerate mergers it is not clear that structural remedies are always a well-suited solution, because structural remedies could forgo important vertical efficiencies (Kwoka and Moss, 2012¹³⁸). When this has been the case firms have been required to divest critical assets or economic activities that could enable the merging parties to foreclose competitors or to facilitate collusion (Salop, 2018¹³⁹).

102. When suitable, agencies require the merging firms to divest a standalone business unit with all the necessary assets for its operation, including tangible assets (e.g. radio stations) and intangible assets (e.g. know-how, intellectual property, licenses, permits, financial information). In other occasions, the merging firms must divest only a smaller subset of assets (e.g. Disney/Fox merger); such as the divestment of innovation resources or capabilities (Katz and Shelanski, 2007¹⁴⁰), to address specific concerns regarding dynamic dimensions.¹⁴¹

103. Designing a structural remedy is a challenging task, because competition agencies must ensure that divested entities are viable, in the sense that it enables the purchaser to integrate the divested components into its own operation and to effectively compete on a lasting basis (ICN, 2016¹⁴²). One difficulty is to determine the exact assets that should be divested, as it is often unclear what exact assets will be crucial for competitors to innovate in the future (Katz and Shelanski, 2007¹⁴³). Another is to identify a suitable purchaser who possesses the financial means and the expertise to become a viable competitor (ICN, 2005¹⁴⁴), which might be especially hard when future market developments are still uncertain.

104. The following box presents the structural remedies that were applied by different competition authorities in the case Walt Disney Co./21st Century Fox, whenever competition harms were identified.

¹³⁷ The main competition risk posed by horizontal mergers is that they directly increase the market power of the merging parties, by causing a permanent change in the structure of a market. By their nature, structural remedies can often address this problem effectively, having the advantage of being clear for the parties, fast and easy to implement, and inexpensive for authorities, as they do not require on-going monitoring (OECD, 2016) (Kwoka and Moss, 2012).

¹³⁸ Kwoka, J. and Moss, D. (2012), "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement", *The Antitrust Bulletin*, Vol. 57/4, pp. 979-1011, <https://journals.sagepub.com/doi/pdf/10.1177/0003603X1205700410>.

¹³⁹ Salop, S. (2018), "Invigorating Vertical Merger Enforcement", *The Yale Law Journal*, Vol. 127/7, pp. 1962-1994, https://www.yalelawjournal.org/pdf/Salop_uidpngq1.pdf.

¹⁴⁰ Katz, M. and Shelanski, H. (2007), "Mergers and Innovation", *Antitrust Law Journal*, Vol. 74/1, pp. 1-85, http://www.gis-larsen.org/pdf/lecture4_Katz_Shelanski_Mergers_Innovation_Final.pdf.

¹⁴¹ Indeed, by requiring the merging firms to divest overlapping assets for which there are few substitutes available, structural remedies are often a less intrusive intervention than a full prohibition decision (OECD, 2020).

¹⁴² ICN (2016), *Merger Remedies Guide*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

¹⁴³ Katz, M. and Shelanski, H. (2007), "Mergers and Innovation", *Antitrust Law Journal*, Vol. 74/1, pp. 1-85, http://www.gis-larsen.org/pdf/lecture4_Katz_Shelanski_Mergers_Innovation_Final.pdf.

¹⁴⁴ ICN (2005), *Merger Remedies Review Project*, https://www.academia.edu/18694209/MERGER_REMEDIES_REVIEW_PROJECT.

Box 6. Walt Disney/ 21st Century Fox merger (2017)

The merger between Walt Disney Co. and 21st Century Fox, as explained in Box X, was reviewed by several competition authorities around the world and for its approval some competition agencies concluded the need of remedies. In particular, to eliminate the foreclosure and portfolio risks found in the provision of basic sports programming channels the authorities of Argentina, Brazil, and Mexico considered appropriate to impose structural remedies. For example:

- Argentina, CNDC¹⁴⁵ conditioned merger's approval to the divestiture of "Fox²²²²²²²² Sports Argentina", which included all the transmission rights related to sports competitions of which Fox was the licensor at the time of notification of the merger operation. According to the competition agency, this measure would restore effective competition in the pay TV market for basic sports channels. On February 15, 2022, Disney announced it sold Fox Sports Argentina to Mediapro.
- Brazil, CADE¹⁴⁶ conditionally approved the acquisition if Disney divested all interests in pay TV channels "Fox Sports", which included all its sports events broadcasting rights, all active contracts with pay TV operators, all properties and broadcasting equipment and all key employees. However, given the economic conditions the divestment did not occur and instead behavioural remedies have been imposed.
- Mexico, IFT conditionally approved the acquisition, among others, subject to the condition that Disney divested all interests in pay TV channels "Fox Sports", which included all its sports events broadcasting rights, all active contracts with pay TV operators, all properties and broadcasting equipment and all key employees. The divestiture was completed in 2021.¹⁴⁷ It also imposed other behavioural remedies.

Sources: CNDC (2022), CADE (2018 and 2020), IFT (2018).

105. Although structural remedies are a powerful tool to address anticompetitive risks, and do not require monitoring by agencies, they do have some limitations, some of which are: (i) as a result of their one-off nature, structural remedies do not adapt to market circumstances (which make them less suitable for dynamic markets, in which cases agencies cannot accurately predict the evolution of the market)¹⁴⁸

¹⁴⁵ CNDC (2022), *Fusión Disney-Fox: la CNDC dictaminó la desinversión y puso condiciones para garantizar la competencia en el mercado de señales deportivas*, <https://www.argentina.gob.ar/noticias/fusion-disney-fox-la-cndc-dictamino-la-desinversion-y-puso-condiciones-para-garantizar-la>.

¹⁴⁶ CADE (2019), *Cade aprova compra da Fox pela Disney com restrições*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yOcVK-n7lBwre7bTJYGLwRq9tJb100HRh87WxtBhK19dpmCaTT6P6Ep1ZHBhjUQZD553LNcUyAbILson1ISDNc; and CADE (2020), *Processo: 08700.004494/2018-53, Cade approves the acquisition of Fox by Disney with restrictions*, <https://www.gov.br/cade/en/matters/news/cade-approves-the-acquisition-of-fox-by-disney-with-restrictions>.

¹⁴⁷ IFT (2021), *Acuerdo P/IFT/EXT/070621/11*, http://apps.ift.org.mx/publicdata/VP_EXT_070621_11_Acc.pdf.

¹⁴⁸ In these cases, authorities could implement a conditional remedy, such that "regulators could arguably accept to make merger remedies conditional on the realisation of certain events within a certain timeframe" (Bure and Bary, 2017). In this way, the remedy would only take place if and when the competitive concerns become clearer, at which point the authority and merging parties could eventually renegotiate the most appropriate divestment measure. Nonetheless, structural remedies conditional on future market events have also some important limitations. Firstly, may increase legal uncertainty for the merging parties, who do not know whether they will be subject to future remedies.

and, once implemented, a divestment might be very costly or even impossible to reverse; (ii) potential collusion risks might increase given the resulted symmetry between competitors after the asset sale (Kwoka and Moss, 2012¹⁴⁹).

Behavioural Remedies

106. Behavioural remedies, also known as non-structural or conduct remedies, aim at regulating certain business conducts of the merged entity, either by obliging or by prohibiting specific actions that might constitute or could potentially harm competition (OECD, 2019¹⁵⁰) (OECD, 2011¹⁵¹). Behavioural remedies act ex-ante before harm to the competitive process takes place (i.e. allow agencies to address the risks to competition), while preserving the efficiency benefits of the merger.

107. Due to their nature, behavioural remedies are generally more appropriate to address the competitive risks of vertical and conglomerate mergers, for example for bundling and tying concerns. In the first case, because they address underlying concerns regarding that the merged entity takes advantage of its position upstream or downstream to behave anti-competitively. In the latter, because they can address concerns regarding full-line forcing and incomplete bundling, technical tying and portability (e.g. data portability). These remedies have also been considered to deal with uncertain dynamic effects of horizontal mergers.

108. There are two main classes of behavioural remedies: access measures and firewalls.

109. The first can be described as commitments to grant competitors' access to an asset, such as an essential input or a customer network, hence they reduce the risk of unilateral effects from input and customer foreclosure, and minimise co-ordinated effects associated to the elimination of a disruptive buyer/seller (ICN, 2016¹⁵²). Regarding to access measures in media mergers, the following list present some of which have been adopted by agencies:

- **Supply obligations with non-discriminatory clauses:** the obligation to supply an input or grant customer access to competitors in a non-discriminatory way. For example, requiring the merging entity to supply certain channels or content to all market participants. (e.g. CADE, 2017¹⁵³)

Secondly, they may be harder to implement when the merger has been consummated and the merging parties are fully integrated. Thirdly, conditional remedies may raise regulatory costs for the parties and the competition authority, who has to review the merger twice.]

¹⁴⁹ Kwoka, J. and Moss, D. (2012), "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement", *The Antitrust Bulletin*, Vol. 57/4, pp. 979-1011, <https://journals.sagepub.com/doi/pdf/10.1177/0003603X1205700410>.

¹⁵⁰ OECD (2019), *Vertical Mergers in the Technology, Media and Telecom Sector*, [https://one.oecd.org/document/DAF/COMP\(2019\)5/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf).

¹⁵¹ OCDE (2011), *Remedies in Merger Cases*, <http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf>.

¹⁵² ICN (2016), *Merger Remedies Guide*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

¹⁵³ CADE (2014), *Ato de Concentração nº 08700.001390/2017-14*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BFPLlu9u7akQAh8mpB9yOI1hYLduJix4bEV7sWvxxsYdCXaTNXXfJ6dd7Y3z0U5q7NihT5GYOX4hDVoA96z0lqhgXzwJIWfnKYGUMv-tm.

- **Mandatory licensing:** requires the merged entity sell licenses to its competitors at fair, reasonable and non-discriminatory terms (commonly known as FRAND terms), especially when an important technology or intellectual property right is at stake (e.g. FNE, 2018¹⁵⁴).
- **Prohibition of exclusivity agreements:** requires to eliminate exclusivity clauses that prevent competitors from buying or selling to a third party; in some cases, it has been imposed to eliminate an already existing exclusivity contract and not introducing new exclusivity clauses for an established time period after the merger (e.g. FNE, 2020¹⁵⁵).
- **Firewalls:** they are provisions that are designed to restrict the flow of commercially-sensitive information between the downstream and upstream units of the merging entity (CMA, 2008¹⁵⁶) (ICN, 2016). The main purpose of firewall remedies is to prevent the merging entity from accessing and misusing confidential information in order to foreclose competitors, or from exchanging such information in a way that enhances horizontal co-ordination (e.g. IFT, 2017¹⁵⁷).

110. In order to be successful, behavioural remedies implementation require the introduction of ancillary clauses that give competition agencies the powers to monitor and enforce compliance.¹⁵⁸ Most important ancillary clauses are: (i) transparency provisions requiring systematic information provision to the authority; (ii) anti-retaliation provisions which prevent merging entity from retaliating against competitors who report anti-competitive conduct to the authority; and (iii) arbitration provisions, an arbitration mechanism, in case of disputes about the proper implementation of the remedy (OECD, 2013¹⁵⁹). In the case of rapid evolving markets, review or adjustment clauses might be required in order to remain effective, so agencies might require to determine in advance the trigger events that would automatically modify the remedy provisions or fully release the parties from the obligations imposed by the remedy (Bure and Bary, 2017¹⁶⁰).

¹⁵⁴ FNE (2018), *Aprobación de adquisición sobre Adquisición por parte de Turner International Latin América, Inc.*, https://www.fne.gob.cl/wp-content/uploads/2018/12/inap_F116_2018.pdf.

¹⁵⁵ FNE (2020), *Resolución de aprobación sobre adquisición de control en HBO Ole Partners por parte de HBO Latin America Holdings LLC*, https://www.fne.gob.cl/wp-content/uploads/2020/04/aprob54b_F222_2019.pdf.

¹⁵⁶ CMA (2008), *Merger Remedies: Competition Commission Guidelines*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510513/cc8.pdf.

¹⁵⁷ IFT (2017), *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones autoriza, sujeta al cumplimiento de condiciones, 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.*, <https://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/vppift150817487.pdf>.

¹⁵⁸ In the design of behavioural remedies authorities should also consider the following: (i) should be easy to monitor, (ii) simple and clear, (iii) should be proportional, not imposing more restrictions than those that are deemed absolutely necessary; (iv) should seek to preserve the competitive process, (v) should be merger specific.

¹⁵⁹ Maier-Rigaud, F. (2016), "Behavioural versus Structural Remedies in EU Competition Law", in *European Competition Law Annual 2013*, Chapter 7, pp. 207-224, Hart Publishing, https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf.

¹⁶⁰ Bure, F. and Bary, L. (2017), "Disruptive Innovation and Merger Remedies: How to Predict the Unpredictable?", *Concurrences* 3, pp. 1-9, <https://www.concurrences.com/en/review/issues/no-3-2017/articles/disruptive-innovation-and-merger-remedies-how-to-predict-the-unpredictable>.

111. The main advantage of behavioural remedies is that they can be tailored to address a specific theory of harm and adapted to rapid changes in the market environment (OECD, 2016). However, they have some limitations, such as: (i) might not suffice to address the competition concerns associated with a structural change in the market (horizontal mergers); (ii) they require constant monitoring from agencies, since they do not remove incentives to behave anticompetitively (Lahbabi and Moonen, 2007¹⁶¹); (iii) it is hard to design behavioural remedies that anticipate all future eventualities, so they “*usually require ongoing revision and adaptation in order to avoid becoming ineffective and/or detrimental to the competitive process*” (Maier-Rigaud, 2016¹⁶²).

¹⁶¹ Lahbabi, P. and Moonen, S. (2007), “A Closer Look at Vertical Mergers”, *Competition Policy Newsletter*, http://ec.europa.eu/competition/publications/cpn/2007_2_11.pdf.

¹⁶² Maier-Rigaud, F. (2016), “Behavioural versus Structural Remedies in EU Competition Law”, in *European Competition Law Annual 2013*, Chapter 7, pp. 207-224, Hart Publishing, https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf.

8 Conclusions

112. Media industry has evolved substantially since OECD's 2003 report, mainly driven by technological innovations that have promoted changes on content production, distribution and user's access, and, consequently, in media industry competition dynamics. In particular, online content distribution has allowed new participants (OTT providers) to take an active role in the media industry, it has also led to changes on how audience consume content and how they interact with it.

113. As the industry has evolved, incentives for mergers and acquisitions in the industry have also changed. As more media content is provided over the Internet, some content producers have taken advantage of internet broadband networks, to reach final consumers by increasing the channels for publishing and distributing content. Also, participants of telecommunications, digital markets and service providers of technological sectors are participating in media content distribution to final consumers, either through mergers or by creating their own businesses.

114. In particular, according to Latin American experience, some factors to consider in the assessment of media mergers are: (i) barriers to entry and expansion, structural and legal, e.g. regulations; (ii) absolute and relative size of the undertakings, their business models, (iii) if they control or could control infrastructures or assets not easily duplicated by competitors, e.g. data or exclusive licencing rights; (iv) distribution and commercial advantages, e.g. technologies to reach consumers; (v) countervailing buying power, e.g. degree of countervailing power from intermediate providers or consumers; (vi) product/services diversification strategies, and the importance of bundled services; (vii) relevance of economies of scale, economies of scope, and direct and indirect network effects.

Remedies

115. Remedies shall be used in order to prevent harms to the competitive process that may result as a consequence of a merger. In any case, they should be carefully crafted in order to address any potential anticompetitive risk. As explained, the two main categories of remedies in media merger controls that authorities have used are: structural and behavioural, which have been applied in isolation, or combined into a hybrid remedy or set of remedies

116. **Structural remedies:** When suitable, agencies require the merging firms to divest a standalone business unit with all the necessary assets for its operation, including tangible assets (e.g. radio stations) and intangible assets (e.g. know-how, intellectual property, licenses, permits, financial information). In other occasions, the merging firms must divest only a smaller subset of assets, such as the divestment of innovation resources or capabilities, to address specific concerns regarding dynamic dimensions. Although structural remedies are a powerful tool to address the risks, they have some limitations such as they do not adapt to market circumstances, once implemented they might be very costly or even impossible to reverse, and they raise concerns of potential collusion risks given the resulted symmetry between competitors after the asset sale.

117. **Behavioural remedies:** There are two main classes of behavioural remedies: access measures and firewalls that have been used by authorities in Latin America. Some access remedies in media mergers that have been implemented are: supply obligations with non-discriminatory clauses, mandatory licensing, interoperability provisions, prohibition of exclusivity agreements and firewalls. In order to be successful, behavioural remedies implementation require the introduction of ancillary clauses that give competition agencies the powers to monitor and enforce compliance.

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Appendix

118. The following table presents some of the most relevant cases in media mergers in Latin-American countries in the last 10 years.

Year	Parties	Sectors	Remedies
Argentina			
2013	Indalo Media Group/ C5N Channel ¹⁶³	Indalo Group media companies & radio broadcasting. C5N Channel pay TV news channel.	Structural: Indalo had to divest two FM stations in the metropolitan area of Buenos Aires.
2015	Cablevision/ Multicanal ¹⁶⁴	Cablevisión and Multicanal were the two largest cable TV operators, the merger included acquisition of Teledigital Cable (pay TV provider) and PRIMA (ISP).	Regulatory: Commit to invest in improving the quality of service.
2016	Viacom/ Telefe ¹⁶⁵	Viacom: US media group; Telefe media: main free-to-air channels in the country, leader in production, distribution and sale of content in Argentina and in the Americas, also owned OTT: Mi Telefe & UPlay.	None.
2017	Telecom Argentina/ Cablevision	Telecom Argentina second biggest fixed telephone and third mobile operator; ISP fixed and mobile. Cablevision biggest pay TV provider, also fixed ISP and mobile.	Structural: Divest ISP fixed in 28 cities; Access to poles and masts for ISP services; Return spectrum frequencies above spectrum cap; Refrain from price increments in big cities and small towns.

¹⁶³ Enacom (2013), *Resolución 292 AFSCA/13*, <https://www.enacom.gob.ar/multimedia/resoluciones-afsca-comfer/pecfr/2013/R20130292.pdf>.

¹⁶⁴ CNDC (2007), http://www2.mecon.gov.ar/cndc/archivos_c/637.pdf; and PJN (2015), *Causa n° 2054/2010AMI Cable Holding LDT y otros s/apel Resol ComisionNac Defensa de la Compet*, <https://www.cij.gov.ar/nota-18015-Revocan-resoluci-n-del-Ministerio-de-Econom-a-que-ordenaba-el-cese-de-los-efectos-de-la-autorizaci-n-a-la-fusi-n-de-Cablevisi-n-y-Multicanal.html>.

¹⁶⁵ Enacom (2017), *RESOL-2017-2062-APN-ENACOM#MCO*, <https://www.enacom.gob.ar/multimedia/normativas/2017/res2062.pdf>.

2018*	Walt Disney/ 21st Century Fox ¹⁶⁶	Walt Disney Company's acquisition of certain assets of 21st Century Fox, including the Twentieth Century Fox Film and Television studios and the cable and international TV businesses.	Structural: -Divestiture Fox Sports: transfer all broadcasting rights and related assets (essential content per sport); stop broadcasting transmission of 3 out of 7 sports channels. (18 months) Behavioural: if structural remedies are not completed within 18 months, behavioural remedies will be extended for five years.
2020-	HBO/Ole ¹⁶⁷	Warner Media agreed to acquire Ole Communication's minority stake in HBO Ole partners in Latin American countries.	Pending.
Brazil			
2014	Claro/Net/ Embratel	Merge NET, Embratel and Claro, into Claro controlled by AMX. NET: fixed telecom (pay TV and fixed ISP); Embratel: fixed telecom (long-distance voice and wholesale data services); Claro: mobile telecom services.	Structural and behavioural: Access remedies; Tariff review control; Functional and accounting separation of Embratel; creation of an arbitration board to deal with wholesale products access.
2014	AT&T/ DirecTV	DirectTV: 93% ownership of Sky Brasil, leading satellite pay TV provider. AT&T: mobile provider (previous owner of 8% stakeholder shares in AMX, whom owned in Brazil Claro, Embratel and Net).	None.
2015	Claro/BrTel	Claro of the shareholding control of Brasil Telecomunicações (BrTel): pay TV provider, multimedia communication services and VoIP.	None
2017	AT&T/ Time Warner ¹⁶⁸	AT&T: stakeholder (and controller) of DirecTV (owner of Sky, satellite pay TV);	Structural and behavioural: Keep Sky Brazil and Time Warner as separate entities, not sharing "sensitive information"; non-discriminatory access to other pay TV providers to all channels licensed to Sky Brazil; ensure Sky Brazil will carry channels distributed by third parties

¹⁶⁶ CNDC (2021), *IF-2021-125063932-APN-CNDC#MDP*, <https://www.argentina.gob.ar/sites/default/files/2022/01/conc-1692-dictamen-reso.pdf>.

¹⁶⁷ CNDC (2021), *RESOL-2022-356-APN-SCI#MDP*, <http://cndc.produccion.gob.ar/sites/default/files/cndcfiles/CONC1755.pdf>.

¹⁶⁸ CADE (2014), *Ato de Concentração nº 08700.001390/2017-14*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOI1hYLduJjx4bEV7sWvxxsYdCXaTNXXfJ6dd7Y3z0U5q7Nih5GYOX4hDVoa96z0lqhgzXzwJIWfnKYGUMv-tm

		Time Warner: owner media programming companies (HBO, TNT and CNN, and the content production and distribution company Warner Brothers.).	(i.e. not by Time Warner) on a non-discriminatory basis, if no agreement with third parties on the pricing conditions for content distribution ANATEL will determine conditions; independent consultant will report any violations of these commitments to CADE.
2018	Walt Disney/ 21st Century Fox ¹⁶⁹	Walt Disney Company's acquisition of certain assets of 21st Century Fox, including the Twentieth Century Fox Film and Television studios and the cable and international TV businesses.	Structural: Divestiture of Fox Sports: all related assets, contracts, rights and key personnel be made through an independent trustee to a third-party with enough expertise and resources to preserve effective competition, exerting competitive pressure in the market. Not to sign new agreements with the sports leagues that have agreements with Fox Sports, not to try to reacquire those rights, and to offer to license the Fox brand to the buyer of Fox Sports. (On 6 May 2020 CADE modified some remedies, following several frustrated attempts to sell Fox Sports).
Chile			
2016	Turner/CNN Chile	Turner acquires 50% of shares of VTR on CNN Chile TV channel (which completes its takeover of CNN).	None.
2017	GCO Televisión /UCV-TV ¹⁷⁰	GCO Televisión: owner of exclusive licences to Disney Media Distribution in Chile. UCV-TV: Pontificia Universidad Católica de Valparaíso, FTA provider. GCO acquired 90% of UCV-TV.	None.
2017	AT&T/ Time Warner ¹⁷¹	AT&T: stakeholder (and controller) of DirectTV (owner of Sky, satellite pay TV). Time Warner owner media programming companies (HBO, TNT and CNN (Turner), and the content production and distribution company Warner Brothers.	Structural: (i) obligation to keep the operation of HBO independent from Time Warner's; (ii) AT&T would not jointly license HBO Latin America channels (among them HBO, A&E, SyFy, History, Warner, Universal, Cinemax, E!, Telemundo and Lifetime) and Time Warner channels, for five years.

¹⁶⁹ CADE (2018), *Opinion No. 11/2018/CGAA4/SGA1/SG*, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yMgdB_4wIEMWA4X4bJP9yTBZda3tjGw65R0AAzzNLT32GXBfB1uW1XjhV2Pj5utQdMTwhKaH2UJaKKvHvIMk4Q.

¹⁷⁰ FNE (2017), https://www.fne.gob.cl/wp-content/uploads/2017/03/lpr_010_2017-600-17.pdf.

¹⁷¹ FNE (2017), *Aprobación de operación entre Time Warner Inc. y AT & T Inc.*, https://www.fne.gob.cl/wp-content/uploads/2018/01/aprob54b_F81_2017.pdf.

2018	Turner International Latin America (TILA) / Chile's football channel (CDF) ¹⁷²	TILA: (i) operates the Latin American channels of Turner (controlled by AT&T); (ii) licenses the distribution of CNN-Chile and FTA Chilevisión channels. CDF: channel especially created to transmit football matches.	Structural: (i) obligation to implement an arbitration mechanism to solve possible disputes with pay TV operators (other than DirectTV); (ii) abstain from refusing to sell to competing pay TV operators; and (iii) keep all relevant information of the competitors of the merged entity as confidential.
2019	Walt Disney/ 21st Century Fox ¹⁷³	Walt Disney Company's acquisition of certain assets of 21st Century Fox, including the Twentieth Century Fox Film and Television studios and the cable and international TV businesses.	Behavioural: (i) prohibition of tying and bundling between Disney's and Fox's channels; (ii) prohibition of technical bundling or content transfer, from Disney's to Fox's channels or vice versa, of the most relevant sport's content offered by the parties; (iii) two arbitration instances, to solve controversies regarding: (1) the negotiation of new licensing deals or their renewal, and (2) as a consequence of substantial deterioration on the commercialization conditions of the live-sport channels. Parties were fined for providing false information when it notified the acquisition of 21st Century Fox and breaching one of the commitments it offered to obtain the FNE's conditional merger clearance.
2020	HBO/Ole Communications ¹⁷⁴	WarnerMedia (Ole is a subsidiary) agreed to acquire Ole Communication's minority stake in HBO Ole partners in Latin American countries.	Structural and Behavioural: (i) HBO will not bundle the sales of HBO channels with other channels, including those of CDF; (ii) obligation to implement an arbitration mechanism to solve possible disputes regarding the licensing of HBO channels to other pay TV operators than DirectTV; (iii) abstain from refusing to sell to competing pay TV operators; (iv) Limiting HBO and WarnerMedia's access to sensitive business information of Newco Básica or Ole Basic channels; (v) will not discriminate competing pay TV operators in favour of DirectTV in Chile; among others. The commitments will be valid for five years.
Colombia			
2012	Colombia Telecomunicaciones (Cotel)/	Colombia Telecomunicaciones: public fixed provider of telecommunications services (fixed telephone, internet access) and satellite TV services.	None.

¹⁷² FNE (2018). *Aprobación de adquisición sobre Adquisición por parte de Turner International Latin América, Inc.*, https://www.fne.gob.cl/wp-content/uploads/2018/12/inap_F116_2018.pdf.

¹⁷³ FNE (2019), *Aprobación de adquisición de Twenty First Century Fox, Inc. por parte de The Walt Disney Company*, https://www.fne.gob.cl/wp-content/uploads/2020/04/aprob54a_F155_2018.pdf; <https://www.fne.gob.cl/en/fne-aprueba-con-medidas-de-mitigacion-la-adquisicion-de-fox-por-parte-de-disney/>.

¹⁷⁴ FNE (2020), *Resolución de aprobación sobre adquisición de control en HBO Ole Partners por parte de HBO Latin America Holdings LLC*, https://www.fne.gob.cl/wp-content/uploads/2020/04/aprob54b_F222_2019.pdf.

	Telefónica ¹⁷⁵	Telefónica: mobile operator.	
2014	UNE/Tigo ¹⁷⁶	UNE: fixed telecommunications state owned provider (broadband, fixed line telephone, and pay TV). Tigo: Colombia's mobile unit of the global telecoms and media group Millicom.	Regulatory: Return 50 Megahertz of International Mobile Telecommunications spectrum.
2017	AT&T/ Time Warner ¹⁷⁷	AT&T: stakeholder (and controller) of DirectTV (owner of Sky, satellite pay TV), main satellite pay TV operator. Time Warner owner media programming companies (HBO LAG, TNT and CNN (Turner Colombia), and the content production and distribution company Warner Brothers.	None.
2018	Walt Disney/ 21st Century Fox ¹⁷⁸	Walt Disney Company's acquisition of certain assets of 21st Century Fox, including the Twentieth Century Fox Film and Television studios and the cable and international TV businesses.	None.
Mexico			
2011	Televisa/Cablemas	Televisa (AEPR) acquires 100% of Cablemas. Cablemas is a fixed telecommunication provider (pay TV, telephone and broadband access provider).	Regulatory and behavioural: (i) must carry and must offer obligations; (ii) no Televisa board member can also be board member in other concession holder.
2014	Televisa/ Cablecom ¹⁷⁹	Televisa (AEPR) acquires 100% of Cablecom. Cablecom is a fixed telecommunication provider (pay TV, telephone and broadband access provider).	None.

¹⁷⁵ SIC (2012), https://www.sic.gov.co/recursos_user/documentos/Competencia/Integraciones/Resoluciones/Integraciones/2012/Mayo/12-68333-3.pdf.

¹⁷⁶ SIC (2014), *Resolución* N° 24537, https://www.sic.gov.co/recursos_user/documentos/normatividad/Decisiones_Superintendente_2014/Anos/2014/RESOLUCION_24527_DE_15_ABRIL_DE_2014%20CONDICIONA_INTEGRACION_UNE_COLOMBIA_MOVIL_TIGO.pdf.

¹⁷⁷ SIC (2017), *Expediente 17-38927*, https://www.sic.gov.co/sites/default/files/files/Proteccion_Compentencia/Integraciones_Empresariales/2017/17-38927.pdf.

¹⁷⁸ SIC (2018), *Resolución* N° 92709, <https://www.sic.gov.co/sites/default/files/estados/032020/RESOLUCI%C3%93N%20No.%2092709%20-%2021%20DE%20DICIEMBRE%20DE%202018%20-%20INTEGRACI%C3%93N%20-%20WALT%20DISNEY%20y%20FOX%20-%20P%C3%9ABLICA.pdf>.

¹⁷⁹ IFT (2014), *Acuerdo P/IFT/EXT/101214/273*, http://apps.ift.org.mx/publicdata/P_IFT_EXT_101214_273_Version_Publica.pdf.

2015	Televisa / Cablevision Red ¹⁸⁰	Televisa (AEPR) acquires 100% of Telecable. Telecable is a fixed telecommunication provider (pay TV, telephone and broadband access provider).	None.
2016	Televisa / Televisión Internacional (TVI) ¹⁸¹	Televisa (AEPR). TVI: was 50% owned by Grupo Multimedios, in 2006 Televisa acquired 50% participation in TVI. Televisa and Multimedios (through TVI), participate in the provision of telecommunications and broadcasting services.	Regulatory and behavioural: the previous conditions imposed (RA-29-2006) are maintained: (i) must carry and must offer obligations; (ii) no Televisa board member can also be board member in other concession holder. And Multimedios will not have participation in the capital stock or rights in the decision-making bodies or positions of CVQ or members of the economic interest group to which it belong.
2017	AT&T/Time Warner ¹⁸²	In Mexico: AT&T: (i) was the third largest mobile operator; (ii) through DirecTV, holds a minority stake (43.1%) in Sky Mexico (controlled by Televisa).	Structural and Behavioural: (i) DirecTV Mexico's board members must be independent from Time Warner/AT&T's committees that make decisions regarding channel selection (such as for the Star channel owned by Televisa); (ii) HBO Latin America must be separate from Time Warner's operations in the provision of pay TV channels in Mexico; (iii) fair treatment of all pay-TV providers in Mexico, to prevent the creation of potential entry barriers in the industry (i.e. the merged company must respond to all requests for access to channels that Time Warner receives from pay TV providers); (iv) merged parties must answer reporting and verification requests defined by IFT.
2019	Walt Disney Company / 21st Century Fox ¹⁸³	Disney and Fox participate in businesses related to the provision and licensing of audiovisual content to providers of pay TV services, free-to-air broadcasted TV and OTT content distribution.	Structural and Behavioural (IFT): Divest Fox's sports business (Fox Sports) in Mexico In factual channels, the preservation of independence, in terms of decision-making and the flow of information, between Disney/Fox and Group A&E.
2021*	Grupo Televisa, S.A.B. (Televisa) / US Univision Holdings, Inc (Univision) ¹⁸⁴	Televisa and Univision announced an agreement whereby Televisa's content and media assets will be merged with those of Univision.	None.

¹⁸⁰ IFT (2015), *Acuerdo P/IFT/EXT/200415/85*, http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_EXT_200415_85.pdf.

¹⁸¹ IFT (2016), *Acuerdo P/IFT/EXT/190216/7*, http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_EXT_190216_7.pdf.

¹⁸² IFT (2017), *Acuerdo P/IFT/EXT/150817/487*, <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliqa/vppift150817487.pdf>.

¹⁸³ IFT (2019), *Acuerdo P/IFT/110319/122*, http://apps.ift.org.mx/publicdata/VP_P_IFT_110319_122_AccUCE.pdf.

¹⁸⁴ IFT (2021), *Acuerdo P/IFT/080921/445*, http://apps.ift.org.mx/publicdata/VP_080921_445_CT.pdf.

2021*	Grupo Lauman acquires Fox Sports Mexico ¹⁸⁵	Lauman is an international consortium with operations in media, telecommunications, and construction in Mexico, Brazil and Central America. The acquisition of Fox Sports Mexico by Grupo Lauman was a direct result of remedies IFT imposed on the Disney-Fox merger it approved in March 2019.	None.
Peru			
2012	Enfoca Group/ Latina	Enfoca Group: investment company, Latina: FTA provider.	None.
2017	Telefónica Perú/ Star Global ¹⁸⁶	Telefónica Perú: mobile telecommunications provider. Star Global: pay TV operator (Arequipa and Tacna regions).	None.
2017	Telefónica Peru/Telefónica Multimedia ¹⁸⁷	Telefónica Perú (telecom) and Telefónica Multimedia (pay TV provider) operated under Telefónica group, which through the merger started operating as a single Company.	None.

¹⁸⁵ IFT (2021), *Acuerdo P/IFT/EXT/070621/11*, http://apps.ift.org.mx/publicdata/VP_EXT_070621_11_Acc.pdf.

¹⁸⁶ Available in: <https://busquedas.elperuano.pe/normaslegales/declaran-aprobada-transferencia-de-concesion-otorgada-a-star-resolucion-vice-ministerial-no-1286-2017-mtc03-1597275-1/>.

¹⁸⁷ Available in: <https://busquedas.elperuano.pe/normaslegales/declaran-aprobada-transferencia-de-concesion-otorgada-a-tele-resolucion-vice-ministerial-no-1287-2017-mtc03-1594369-1/>.