

Unclassified

English - Or. English

24 August 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session III: Media mergers

- Contribution from Mexico -

27-28 September 2022

The attached document from Mexico is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 27-28 September 2022 to be held in Rio de Janeiro, Brazil.

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JT03501321

Session III: Media Mergers

- Contribution from Mexico -

Federal Economic Competition Commission (COFECE)

1. Introduction

1. In Mexico, as of the Telecommunications Reform of 2013, the Federal Economic Competition Commission (Commission or COFECE) is the competition authority in all sectors, except for telecommunications and broadcasting where there is a regulatory entity with powers to enforce the competition law: The Federal Telecommunications Institute (IFT). In this sense, both COFECE and IFT analyze mergers in the media industry, each according to its attributions.

2. The media industry is mainly based on the production and distribution of content of varied nature, as well as on the sale of advertising. Regarding production, the contents can be programs, series, songs, movies, news, among others. Once these audiovisual contents are produced, these can be licensed to third parties to appear in different channels and modalities. Parallel to the production and distribution of media, the media industry is also related to the sale of advertising.

3. Among the challenges detected by the Commission, some of the technical analytical and other legal challenges related to the analysis of media mergers stand out. Regarding the former, are: the possible existence of a market of audience attention or of different markets, novel theories of harm, technological evolution and cross-media strategies. Regarding the legal challenges, the distribution of competences between COFECE and IFT in industries that cover markets partially related to telecommunications and radiocommunication stand out.

4. This document presents COFECE's participation in media mergers, except for radio and television.

2. Conceptual and legal framework

5. The OECD (2019) defines media as those mass media that allow the distribution of information and data to large audiences; and considers that the "media industry" incorporates both the production of content, such as news, entertainment, education and research, as well as its distribution through mass media. Hence, mass media includes the press, radio and television broadcasting, film production, video streaming, video games, online advertising, social networks and podcasts, among others.¹

¹ 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), page 8 and UN (2008). International Standard Industrial Classification of All Economic Activities (ISIC), Rev. 4, https://unstats.un.org/unsd/publication/seriesm/seriesm_4rev4e.pdf, pp. 277 to 279.

6. The regulations applicable in the sectors under the Commission's responsibility do not establish any provision other than the general notification criteria regarding mergers carried out in the media industry.

7. Both COFECE and the IFT use the Federal Economic Competition Law (LFCE per initials in Spanish) as the main regulatory framework for their decisions on economic competition issues. Qualitatively, in the relevant market analysis, the elements indicated in article 58 of the LFCE and its Regulatory Provisions are considered. In addition, an analysis of barriers to entry is performed, which, in general, is carried out when, according to the same law (articles 59 and 64), it is evaluated whether the merger may give rise to an agent with substantial power or increase said power.

8. The regulations on economic competition in Mexico do not contemplate that elements such as plurality, diversity or others related to potential social damage, such as misleading information or disinformation be incorporated in the Commission's mergers analysis.

9. However, the regulations do contemplate aspects of cross-ownership. As part of the assessment of a merger, the Commission analyses not only the activities carried out by the companies directly involved in the transaction, but also all those carried out by persons related to the economic interest group to which they belong, as well as the links that said group may have with other agents or groups in related markets. Consequently, when an Economic Agent belongs to an economic interest group, the group can be considered the relevant economic unit for the purposes of the assessment of the operation being analyzed.²

10. In this regard, the Commission considers that the analysis of mergers contributes to promoting plurality and diversity, even if these objectives are not expressly established in the competition regulations. The identification of economic interest groups seeks to ensure that there is independence in business decision-making, which obviously contributes to maintaining economic competition. However, this independence is also expected to be transferred to other areas, so maintaining a competitive environment contributes to maintaining a plural and diverse environment.

3. Theory and cases

11. As mentioned, the media industry is mainly based on the production and distribution of content of various kinds. Next, the production and distribution of audiovisual entertainment and music content is studied in more depth, as well as some cases analyzed by the Commission.

3.1. Production and distribution

3.1.1. Audiovisual entertainment content

12. In the particular case of audiovisual content, the Commission has carried out a detailed analysis of the value chain. The first link refers to the own production of audiovisual content, that is: i) the production of programs such as contests or other types, or the so-called series or soap operas, among others; and ii) film production. In addition, a market for the licensing of rights for the video production of sporting events is identified.

² See Guía para la notificación de concentraciones 2021. Available in: https://www.cofece.mx/wp-content/uploads/2021/06/GUIACON_2021.pdf, p. 12.

13. Once these audiovisual contents are produced, it can be distributed through different modalities. Audiovisual content can be integrated into programming channels which, in turn, are distributed through broadcasting, restricted television and audio services (STAR), OTT services, movie theaters, digital formats and physical formats (increasingly in disuse).

14. A producer of programming channels can produce programs and not license them, so such programs are not part of a market. If the program is licensed to third parties for inclusion in another programming channel or for distribution through another modality, then it is part of a program market.

15. Films are distributed in different modalities and, in general, in a sequential way, in order to reduce or eliminate the overlap between the modalities. Distribution usually begins in the cinema, followed by pay-per-view channels and premium channels on restricted television service, other programming channels, programming channels that are broadcast. Today it has become more common that after its exhibition in cinemas, or even before, it moves to exhibition in OTT services.

16. One of the most prominent cases related to the exhibition of tapes in cinemas is the Reconsideration Appeal RA-029-2013³, analyzed by COFECE. This Appeal for Reconsideration is related to the merger file CNT-010-2013⁴, which was analyzed by the extinct COFECO, which objected the merger between Cinemex and Cinemark. In this Reconsideration Appeal, COFECE analyzed, among several others, the market for the exhibition of films in cinemas, with a geographical definition of local scope.

17. Another outstanding case is the file CNT-063-2021, in which the merger between Univision Holdings II, Inc. and the content creator of Grupo Televisa was authorized. The Commission analyzed the vertical relationship between: a) the production and licensing of music content for use in the production of audiovisual content; b) the production, licensing or distribution of audiovisual content and its distribution in: b.1) cinemas and physical formats of home entertainment, and b.2) distribution through digital platforms of audiovisual content by subscription or supported by advertising.⁵⁶

3.1.2. Musical content

18. The value chain associated with music content is similar to that of video content and can be summarized in the following links: i) creation of individual content; ii) production and edition of musical content and iii) dissemination and distribution of musical content.

³ <https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V80/12/1775312.pdf>

⁴ <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V485/37/1758950.pdf>

⁵ It is worth mentioning that on November 18, the IFT Board approved the presentation of a Constitutional Controversy against the resolution of the file CNT-063-2021 issued by COFECE <http://www.ift.org.mx/conocenos/pleno/sesiones/xix-extraordinaria-del-pleno-18-de-noviembre-de-2021>

⁶ It is worth mentioning that this last case generated a constitutional controversy. Which is a mechanism that is promoted before the Supreme Court of Justice of the Nation to resolve conflicts that arise between federal powers, states powers, governing bodies of Mexico City, or between the orders of federal, state, municipal or Mexico City government, by invasion of competences or by any type of violation of the Federal Constitution, by the aforementioned bodies. Specifically, the IFT requested the invalidity of the resolution considering that when analyzing OTT services, the IFT's sphere of competence in telecommunications was invaded.

19. Within this value chain, three core activities are identified: i) music licensing (primary licensing of compositions and arrangements to businesses); ii) music recording and iii) live music.

20. The licensing of compositions, arrangements and recording of musical content constitute activities that are distinct and distinguishable from distribution activities. In particular, recorded works constitute a product that can be distributed through various channels, such as sound broadcasting or through OTT audio services such as Spotify, iTunes, among others.

21. In these markets, COFECE has analyzed two mergers: CNT-090-2019⁷ and CNT-113-2021.⁸ In both cases, the operation analyzed consisted of the acquisition by Live Nation of a part of the share capital of OCESA Entretenimiento. In these cases, the Commission analyzed various of markets, among which the online transmission via the internet (streaming) of live and pre-recorded shows and events on a pay-per-view basis stands out.

3.1.3. *Print media and social media*

22. As mentioned before, other media in which the Commission has competence are the print media. Print media, such as newspapers, magazines, and comics, have also transitioned to digital formats. In both cases, digital formats and physical formats, it is observed that the main business model is based on advertising. Another common business model is one in which the main income of companies is through a subscription. In some cases, the subscription allows access to print and digital versions of the media. Digital content is often hosted on websites or applications owned by the media that generates the content.

23. In other cases, access to news, other content and advertisements is through third-party platforms. For example, it is common to see news published by various media on Facebook or Twitter. The media monetizes this content as if it were advertising, through what is called "programmatic advertising".⁹

24. The most important social networks such as Facebook, Instagram or Twitter are offered for free and are financed by advertising. Some other social networks are offered as "freemium" models, that is, the service is offered free of charge supported by advertising, and additional functionalities can be accessed if you pay for them; an example of this case is LinkedIn.

25. In file CNT-046-2017 that analyzed the acquisition by 5M Holding of a part of Grupo Expansión, which is the editor of a magazine of the same name,¹⁰ the Commission identified a "market for editing and publishing in print media", and a market for "advertising in print media";¹¹ it also identified a market for the "development of platforms and publications in digital media" and a market for "digital media advertising". This

⁷ <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6042/6/5125450.pdf>

⁸ <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6080/12/5580487.pdf>

⁹ "Programmatic advertising" consists of the electronic sale of advertising by means of software and algorithms that allow to identify the interests of a user of a Website, and so that advertisers can compete in real time to acquire an advertising space on that website.

¹⁰ <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V5627/4/3870721.pdf>

¹¹ Resolution of the file CNT-046-2017, p. 3.

practice has been consistent with the literature suggesting that, in so-called non-transactional markets, two interrelated relevant markets are defined.¹²

3.2. Advertising

26. The Commission has also addressed cases involving audiences and commercialization of advertising; in the latter, it has identified different wholesale and retail markets.

27. In file CNT-126-2018¹³, where The Walt Disney Company was authorized to acquire 100% of the share capital of Twenty First Century Fox, Inc., elements were found that indicate that advertising on programming channels transmitted through the STAR belongs to a different market than advertising on the Internet.¹⁴

28. In the file CNT-063-2021 (Univision-Grupo Televisa), the Commission identified several elements to define a market for "retail distribution of audiovisual content through digital platforms for subscription-based or advertising-backed audiovisual content" and a market for "sale of online advertising". This reaffirms the fact that the Internet advertising market is different from any other.

3.3. Cross-ownership

29. As mentioned, the Commission analyzes aspects related to cross-ownership mainly when studying the formation of Economic Interest Groups. For the analysis of economic competition, the Commission requires knowing the identity of the direct or indirect shareholders who are in control of the companies involved in the merger or who could have any relevant or significant influence on the management of the companies. In this way, the parties that present the notification of the respective transaction before the competition authority must provide the information that allows to know the structure of the economic groups at all levels above direct shareholding. The Commission seeks to identify at least those shareholders who ultimately hold shareholdings of 5% or more, provided that this information is available to the parties.¹⁵

30. In file CNT-126-2018 (Disney – Fox), the Commission identified aspects of cross-ownership that led economic agents to provide additional elements for the analysis of the operation. In this regard, as indicated in the public version of the resolution, The Walt Disney Company (TWDC) and Twenty-First Century Fox, Inc. filed a brief by which they informed about the transfer by TWDC, in favor of Sony Pictures Releasing International Corporation, of its participation in the capital stock of Walt Disney Studios Sony Pictures Releasing Mexico, S. de R.L. de C.V.

¹² OECD (2018) Rethinking Antitrust Tools for Multi-Sided Platforms, pp. 12-13. <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

¹³ <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V5963/2/4693359.pdf>

¹⁴ Pages 30 and 31 of the notice to the IFT (folio 5332).

¹⁵ Guía para la notificación de concentraciones 2021, p. 39.

4. Challenges

31. Among the challenges identified by the Commission, some of a legal nature and other technical related to the analysis of media merger stand out.

4.1. Analytical

32. One of the analytical challenges to highlight in media mergers is the notion of "a market of audiences attention".¹⁶ The information gathered in different cases suggests that there are different audience markets and advertising markets associated with those audiences. However, the Commission is working on reviewing the literature and gathering information that contributes to clarify these aspects in the cases it handles.

33. In cases of media mergers, the Commission has not considered theories of harm that can be classified as novel because the cases have not required it. However, in other cases within the digital environment, the Commission has resorted to theories of harm that could eventually be taken up in media mergers.¹⁷

34. One of the main challenges arising from technological evolution and cross-media strategies of competitors in media markets is the delimitation of relevant and related markets, as well as the assessment of the substantial power and effects of a transaction in those markets.

35. So far, the information available to the Commission indicates that there is no substitution between audio or audiovisual programming channels and print media or social networks, or different types of media with each other. That is to say, of the cases analyzed by this Commission, there are no elements to suggest the existence of a single market of audiences attention.

4.2. Legal

36. In the legal field, when there is a conflict of competence, as has happened with respect to certain media markets in the digital economy, the definition of the activities or cases that must be dealt with by the Commission is resolved by the Specialized Collegiate Courts, through a mechanism contemplated in the LFCE.

37. Conflicts of competence between the IFT and the Commission to resolve a merger in a given market delay the assessment and resolution of the respective transactions, since when the Commission and IFT consider that they have jurisdiction over a particular market, the procedure must be suspended and it is the specialized courts that determine which authority has competence and sometimes such a decision has been issued beyond the period provided for in the norm.

38. Given the growing interrelationship between the digital economy and the economy in general, this Commission believes that the discussion on the markets to be evaluated by COFECE and the IFT in the digital environment could continue. This represents a challenge for this Commission, given that its power to analyze the effects of a merger on the digital

¹⁶ The attention market involves competition in which platforms acquire time from consumers, with content and advertising packages, and sell the ads to agencies to deliver messages during that time. Evans, David S., *The Economics of Attention Markets* (April 15, 2020). Available at SSRN: <https://ssrn.com/abstract=3044858> or <http://dx.doi.org/10.2139/ssrn.3044858>.

¹⁷ For example, in Uber/Cornershop, conglomerate theories were explored in the context of the creation of an integrated platform, as well as the theory of reverse killer acquisition.

media market could be limited by the markets determined by the specialized courts. However, the Commission is in the best position to engage in dialogue with the IFT and reach consensus.

39. So far, the most important precedents in terms of media are the conflicts of competence: C.C.A. 1/2017, C.C.A. 1/2022, C.C.A. 3/2022 and C.C.A 4/2022.

40. In the Conflict C.C.A. 1/2017, derived from the operation between AT&T. Inc., and Time Warner, it was determined that: i) the same operation can be analyzed by both the Commission and the IFT, taking into account the constitutional framework of powers; ii) activities which could, under certain circumstances, belong to markets related to the telecommunications and broadcasting sectors, if such activities can operate autonomously from those sectors, fall within the competence of the Commission and not of the IFT, iii) markets which could have effects, as they are potential inputs, in the telecommunications and broadcasting sectors are the competence of the Commission and not of the IFT ; iv) activities which, although part of the telecommunications and broadcasting production chain, function autonomously from those sectors are the responsibility of the Commission and not of the IFT; and v) markets other than the telecommunications and broadcasting sectors fall within the competence of the Commission and not the IFT, including where they involve economic agents providing services or participating in said sectors.

41. On the file C.C.A. 1/2022, the First Collegiate Court concluded that under no possible interpretation cloud computing services, social networks and online search services affect the telecommunications and broadcasting sectors and that they are therefore markets belonging to the Commission. On the other hand, the Court determined that the market for mobile operating systems should be known to the IFT. Although this conflict of competence stemmed from an investigation that the IFT opened in various markets, the precedent may influence the future if any merger operation in media includes social networks.

42. Finally, with regard to files C.C.A. 3/2022 and C.C.A 4/2022, arising from the Transaction between AT&T, Inc. and Discovery, the Court determined that for that case, the IFT had to analyze the markets: i) the service of distribution of audiovisual content through Over The Top (OTT) platforms of audiovisual content; (ii) the production, acquisition and licensing of the content generated for distribution through such platforms, since these activities are phases prior to distribution, directly related, whose purpose is the generation or acquisition of inputs for subsequent transmission through OTT platforms of audiovisual content; and iii) the sale of advertising times and spaces on OTT platforms for audiovisual content.

Federal Telecommunications Institute (IFT)

1. Introduction

43. The IFT is the competition authority and regulator in the telecommunications and broadcasting (T&B) sectors in Mexico. In the exercise of its powers, it has analyzed various media mergers, and in some of them, it has determined the imposition of structural and/or behavioral remedies. Below, there is a general description of the legal framework of the IFT to analyze mergers, and some relevant cases of media mergers where remedies were imposed: (i) TFCF Corporation and TWDC Enterprises 18 Corp.; (ii) AT&T Inc. and DIRECTV, (iii) Grupo Televisa/TVI, and (iv) AT&T Inc. and Time Warner Inc.

2. Legal Framework

44. The purpose of merger control is to provide a framework for the IFT to analyze structural changes in the markets that may result in a significant impact on competition and free concurrence. Merger evaluation is carried out in accordance with the notification procedure provided for in articles 90 or 92¹⁸ of the Federal Economic Competition Law (LFCE).¹⁹

45. Article 86 of the LFCE establishes the thresholds for mergers that must be authorized by the IFT before they are carried out. Any merger that does not exceed these thresholds is exempt from requesting prior authorization from the IFT; however, parties may submit the notification voluntarily, mainly when they have doubts about the possible effects on the competition process.

46. The IFT has 60 days to issue its ruling, starting from the day of the presentation of any missing information or any additional information request. Articles 58, 59, 63 and 64 of the LFCE establish as an analysis standard the relevant market definition, the market power analysis, the possible effects of the merger and its efficiency gains.

47. In accordance with the article 90 of the LFCE, when possible risks to the competition process are identified in the analyzed markets, the risks are notified to the parties at least 10 days prior to the vote of the IFT's Board, so that the parties can propose a set of remedies that would allow correcting any identified risks. Likewise, the parties can propose remedies, from the moment they submit their written notification and up to one day after the matter is listed to be voted by the Board. The IFT can only impose or accept remedies directly linked to the correction of the risks posed by the merger, and they must be proportionate to the intended correction.

¹⁸ Article 92 of the LFCE establishes a simplified process, while article 90 of the same law empowers the IFT to resort to mechanisms (including requests for information from the parties involved and/or third parties, as well as the notification of risks identified in the operation), that allow to evaluate the merger's effects.

¹⁹ Article 89 of the LFCE establishes the elements that must be presented in the merger notification, including, among others: (i) identification of the notifying parties and of those who participate in it directly and indirectly; (ii) description of the merger, including non-compete clauses and their reasonableness; (iii) object and reasons for the merger; (iv) financial statements of those involved; (v) description of the capital structure of those involved (direct and indirect participations, before and after the merger); (vi) market share (including competitors'), and (vii) description of goods and services produced or offered by those involved.

3. IFT's analysis

48. According to the Political Constitution of the United Mexican States (CPEUM) and the LFCE, the IFT is responsible for the analysis of mergers with effects on the T&B sectors in Mexico, while the Federal Economic Competition Commission (COFECE) analyzes those mergers in any other sectors.

49. Since there are two competition authorities in Mexico, Article 5 of the LFCE establishes a procedure to set jurisdiction in matters in which both the IFT and COFECE consider that they are or are not competent. In these situations, the Specialized Courts, after analyzing the specific case, must confer the jurisdiction to the corresponding authority. However, before summoning the Specialized Courts, the IFT and COFECE maintain communications to request comments regarding specific matters, and thus have the opportunity to express their point of view and agree on the jurisdiction of said procedures.

50. Considering the Specialized Courts' decisions²⁰ and precedents ruled by the IFT and COFECE, the IFT is the authority on media mergers that involve, among others, the following markets:²¹

- Production, acquisition, provision and licensing of audiovisual content (programmes, programming channels and programming channel packages) for transmission on systems and platforms of pay TV, of broadcast television and of OTT (over the top) distribution of audiovisual content.
- Distribution (retail) of audiovisual content through systems and platforms of pay TV, of broadcast television and of OTT distribution of audiovisual content.
- Provision and sale of advertising times and spaces in systems and platforms of pay TV, of broadcast television and of OTT distribution of audiovisual content.

²⁰ Redacted version available in Spanish at:

Administrative Competence Conflict number 1/2017, resolved on March 2, 2017, derived from the merger between AT&T Inc. and Time Warner Inc.: http://sise.cjf.gob.mx/SVP/word1.aspx?arch=1305/13050000204166870004004.pdf_0&sec=Jorge_Alberto_Ram%C3%ADrez_Hern%C3%A1ndez&svp=1.

Administrative Competence Conflict number 3/2022, resolved on March 24, 2022, derived from the merger between AT&T, Inc. and Discovery, Inc.: http://sise.cjf.gob.mx/SVP/word1.aspx?arch=1305/13050000294348360002002002.pdf_1&sec=Jaime_Sevilla_Ag%C3%BCero&svp=1.

²¹ COFECE is the authority on mergers that involve, among others, the following markets:

- Distribution of films for their exhibition in movie theaters.
- Audiovisual content licensing for home entertainment in physical and digital formats for direct purchase and download.
- Intellectual property rights' licensing for the development of interactive media and video games.

51. Analyzing media mergers, the IFT has determined the following elements regarding the relevant markets analyzed:²²

- Distribution services (retail) of audiovisual content, as well as the provision and sale of advertising times and spaces, offered by systems and platforms of pay TV, of broadcast television and of OTT distribution of audiovisual content, are not considered to be substitutes, that is, they belong to different relevant markets. This, among other reasons, due to its technical characteristics, demand behavior and its differentiated business models.

The IFT has considered that these relevant markets are related markets, since they share similar characteristics, including that they are content transmission activities, use common terminal equipment and the same operators of a specific system and/or platform (for example pay TV) incorporate services offered by the other systems and/or platforms.

On the other hand, the IFT has identified other different markets, such as the distribution (retail) of audio content, as well as the provision and sale of advertising times and spaces, through sound broadcasting systems and platforms.

- The programming channels that are provided and licensed to pay TV providers (Restricted Channels) can be subdivided into various programmatic categories: entertainment, children, movies and series, factual, music, news, sports and broadcast television. It is considered that the different programmatic categories that are offered in systems and platforms of pay TV are not substitutes, but complementary to each other.
- The provision and licensing of Restricted Channels in each programmatic category constitutes, generally, a different relevant market.
- The provision and licensing of Restricted Channels, in each programmatic category, corresponds to different and distinguishable markets from the provision and licensing of broadcast television channels (which are transmitted on systems and platforms of pay TV). This, mainly because the broadcast television channels do not offer specialized programming, as the Restricted Channels do.

52. The IFT has analyzed media mergers with horizontal, vertical and conglomerate effects, identifying possible risks of unilateral and coordinated effects. In various media mergers where the IFT has identified possible risks to competition in the analyzed markets, it has imposed structural and/or behavioral conditions.

²² Redacted version available in Spanish at:

Resolution P/IFT/150817/487, corresponding to the merger notified by AT&T Inc. and Time Warner Inc.: http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf.

Resolution P/IFT/110319/122, corresponding to the merger notified by TFCF Corporation (formerly Twenty-First Century Fox, Inc.) and TWDC Enterprises 18 Corp. (formerly The Walt Disney Company): <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliiga/verpubpift110319122canxuce.pdf>.

4. Relevant Case Studies

53. The following case studies show some of the remedies that the IFT has imposed on some media mergers.

4.1. Case Study 1: TFCF Corporation & TWDC Enterprises 18 Corp.

54. On August 6, 2018, TFCF Corporation (formerly Twenty-First Century Fox, Inc., hereinafter 21CF) and TWDC Enterprises 18 Corp. (formerly The Walt Disney Company, hereinafter TWDC) notified the IFT the merger consisting of the acquisition by TWDC of assets of 21CF, which included film and television studios, Restricted Channels and international television businesses (Transaction). In the T&B sectors in Mexico, the IFT identified that the parties coincided in 10 activities, with risks to competition in the markets for the provision and licensing of audiovisual content (programming channels and programming channel packages) to pay TV providers in the Programmatic categories of Sports and Factual (**Relevant Market of Sports** and **Factual**, respectively).

55. In the Relevant Market of Sports, TWDC provided and licensed (and currently licenses) the channels ESPN, ESPN 2 and ESPN 3 (ESPN Channels)²³ to pay TV providers, while 21CF provided and licensed the channels Fox Sports, Fox Sports 2 and Fox Sports 3 (Fox Sports Channels).²⁴ The resulting economic agent from the Transaction would reach a share of close to 80%, while its closest competitor would be around 20%;²⁵ as a consequence, the IFT identified risks to the competition process in that market, and concluded, that the resulting economic agent from the Transaction would have:

- The ability to increase the price of ESPN Channels and 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 such power.
- The ability to deny or grant, under discriminatory terms and conditions, or to exclusively provide and license those channels, and those that may be offered in the future.
- A greater portfolio of sports' audiovisual content, increasing its ability to acquire those transmission rights, which would increase the barriers to entry for new competitors.

56. In the Relevant Market of Factual, the resulting economic agent from the Transaction would reach a share of close to 45%, while Discovery, the leading competitor at that time, had a similar share. The IFT identified the following risks: (a) The Transaction would confer market power on the resulting economic agent, considering Discovery, and (b) The number of competitors would be reduced mainly to 2, with symmetrical shares, increasing the probability of coordination.

²³ Additionally, TWDC provided and licensed (and currently licenses) the channel ESPN+, however, during the analysis of the Transaction, TWDC reported that this channel reached a small subscriber base, and that it did not have a representative sample for its measurement, therefore they did not have information about their audience.

²⁴ During the analysis of the Transaction, the parties informed the IFT that 21CF had planned launched the Fox Sports Premium channel in Mexico. However, this occurred until the FSM Business was divested, when the purchaser of that business launched that channel.

²⁵ Participation in terms of audience for the year 2018.

57. On March 11, 2019, through resolution number P/IFT/110319/122 (Resolution),²⁶ the IFT authorized the Transaction subject to structural and behavioral remedies aimed to counteract the identified risks in the Relevant Markets of Sports and Factual, respectively. On March 15, 2019, TWDC and 21CF accepted the remedies established in the Resolution and, on March 20, 2019, they closed the Transaction.

58. The structural remedy imposed on the Relevant Market of Sports consisted of divesting the ongoing business (including all of its assets), meaning the production, provision and licensing of the Fox Sports Channels to pay TV providers in Mexico, as well as the related services that, among others, include those offered in the OTT service and the acquisition of sports event transmission rights -sports rights- (FSM Business), in a period of 6 months, extendable for another equal period (Divestment Period). While the divestiture occurred, the assets of the FSM Business would remain separate, independent of the parties, and in viable conditions, to preserve the competition conditions in the market. If the divestment was not achieved in the Divestment Period, the ownership of the FSM Business would be transferred to a trust, in order to transfer it to a third party as an ongoing business or, as a last resource, liquidate it.

59. To achieve the remedies' purpose, the following agents were appointed: (i) an Independent Administrator, to manage the operations of the FSM Business, separately and independently of the parties and under viable conditions; (ii) an Independent Auditor, to monitor, supervise and report to the IFT on compliance with the remedies, and (iii) a Divestiture Agent, to carry out the sale expeditiously.²⁷ Additionally, the Resolution established that potential buyers should meet, among others, the following requirements: (a) independence from the parties; (b) not having had a previous business relationship or link with the parties that puts at risk the purpose of the divestiture and/or the competition process in the relevant market; (c) having the financial capacity and incentives to acquire and operate the FSM Business; (d) having the capacity and incentives to compete independently, in a viable and competitive manner, and (e) that the acquisition does not create competition risks.

60. The Divestiture Agent was appointed on May 1, 2019, beginning the Divestment Period. The first 6-month period, together with the planned extension prolonged that period to May 1, 2020.²⁸ However, on March 18, 2020, prior to the conclusion of the Divestment

²⁶ Redacted version available in Spanish at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/verpubpift110319122canxuce.pdf>.

²⁷ The remedies established eligibility criteria for these positions. Among other elements, independence from the parties, having the necessary qualifications and experience and not having a conflict of interest. In addition, they had to carry out their functions of their assignment independently from the parties, and in collaboration with the IFT and the other designated agents. In addition, in accordance with the conditions, the parties were obliged to cover the costs and considerations related to the appointment and hiring of these figures, in conditions that guarantee the effective fulfillment of their assignment and functions.

²⁸ During this period, two potential buyers, AT&T and Fox Corporation, expressed interest in acquiring the FSM Business. However, they warned that the income and costs assigned to the operation of FSM Business did not correspond to a profitable and viable business; furthermore, they faced an unwillingness on the part of TWDC and 21CF to negotiate commercial terms to achieve divestiture.

Due to the effects of the COVID-19 pandemic, AT&T and Fox Corporation stopped negotiations with the Divestiture Agent and TWDC since March 2020. In June of the same year, AT&T reiterated its interest in acquiring the FSM Business (and presented an updated offer), while Fox Corporation indicated that it was no longer interested in that acquisition. Negotiations with AT&T continued until the end of July 2020,

Period, and considering the effects caused by the SARS-CoV2 virus (COVID-19) pandemic, the parties requested a suspension for that period (3 months). The IFT granted this suspension, due to a notorious impossibility of the parties to attend their interests in the divestment process and to carry out the necessary actions to give continuity to that process, without this being attributable to them, but caused by the impact and effects of the COVID-19 pandemic on the parties, and on potential buyers.²⁹

61. However, on June 8, 2020, prior to the conclusion of the first period of suspension of the Divestment Period, the parties requested to the IFT the following: (i) Modify the condition that established that if the divestment was not achieved in the Divestment Period, the ownership of the FSM Business was to be transferred to a trust, and (ii) Allow TWDC to retain ownership and take control of the FSM Business.³⁰

62. On July 9, 2020, through resolution number P/IFT/EXT/090720/22,³¹ the IFT determined not to grant the request of the parties. In addition, based on the statements made by the parties, the IFT considered it necessary to include various clarifying precisions to the Parties respect the Resolution, since it was observed an erroneous interpretation by the parties of the conditions established in the Resolution.

63. One of the essential elements in order to continue with the divestiture process was that, in compliance with the remedies, the parties had the obligation to maintain and sell the FSM Business in viable, competitive and independent terms, that is, with an income allocation that allows it to cover at least all its costs, to preserve all its assets, as well as the competition conditions prior to the closing of the Transaction.

64. This was consistent with the Resolution and with the FSM Business's situation prior to the closing of the Transaction since, regardless of the criteria that TWDC said 21CF had to allocate revenues and costs among its units and, therefore, of the results that it attributed to each unit, 21CF maintained the operation of the FSM Business in viable and competitive terms; that is, with income that at least allowed it to cover its costs, but also as a business in a leading position in the Relevant Market of Sports. An allocation of income that does not cover its costs would prevent it from maintaining and selling a viable, competitive and independent business from the parties, since it would prevent it from having enough resources to even maintain its operation as an independent competitor.

65. These elements were also observed during the first year of the Divestment Period, where the possible buyers (who reviewed the information pertaining to that business), noticed that the income and costs assigned to their operation did not correspond to a profitable and viable business. This situation was also identified by the Independent Auditor.

however, given the impossibility of reaching agreements with TWDC and considering the period that the negotiations had lasted, AT&T withdrew its interest in acquiring the FSM Business.

²⁹ The granting of others requested suspensions extended the Divestment Period to May 7, 2021. On May 5, 2021, the IFT determined not to extend the suspension requested by the parties, since it considered that the circumstances caused by the COVID-19 pandemic were already different (the resumption of economic activities and sporting events was observed, advances in vaccination processes and the possibility of carrying out work activities -including negotiations- remotely).

³⁰ The parties based their request, among others, on: (i) The financial situation of the FSM Business and the effects of the COVID-19 pandemic on its results; (ii) The selling efforts of the Divestiture Agent and the Parties; (iii) The possible results of the trust, and (iv) The failing firm defense.

³¹ Redacted version available in Spanish at: apps.ift.org.mx/publicdata/VP_EXT_090720_22.pdf.

66. The IFT observed that, prior to the Transaction, the FSM Business did not operate as a separate entity in Mexico, but rather as part of the entire 21CF business, in which internal revenues and costs were significantly linked, considering contracts with rights to transmit sports events with a pan-regional scope, as well as contracts involving the provision and licensing of Fox Sports Channels and other entertainment channels of 21CF, without there being a separate fee for those channels. There was no separate accounting or audited income statement for the FSM Business.

67. Considering these links between the FSM Business and the entire 21CF business, the parties argued that in identifying the assets, costs and income that corresponded to the FSM Business, and therefore, those that they considered acceptable for the offers of the potential buyers, the parties used the historical practice that 21CF implemented in the course of its business.

68. However, said historical practice resulted in an FSM Business with excessive losses, where its income did not allow it to cover its costs. These results did not adequately reflect the value of the FSM Business, which in recent years has remained the leader in the Relevant Market of Sports, compared to its main competitors.

69. Considering the elements specified by the IFT in resolution number P/IFT/EXT/090720/22, and based on the recommendation by the Independent Auditor, on July 27, 2020, the IFT issued an indication to the parties which stated that in order to comply with the remedies they had to respond to offers from potential buyers no later than 5 days after receiving them (with income allocations that allow covering the costs).

70. After resolution number P/IFT/EXT/090720/22 and the indication of July 27, 2020, and to the extent that the effects of the pandemic caused by COVID-19 were reduced, a more active process began in the negotiation between the parties and potential buyers.

71. Thus, on April 26, 2021, the Divestiture Agent presented Grupo Lauman Holding, S.A. de C.V. (Grupo Lauman) for IFT's approval, as a potential buyer of the FSM Business. On May 14, 2021, the IFT, considering the opinion of Divestiture Agent and of Independent Auditor, concluded that Grupo Lauman met the eligibility criteria established in the remedies. On May 21, 2021, the Divestiture Agent submitted for IFT's approval the final purchase agreement signed by 21CF and Grupo Lauman. On May 27, 2021, Grupo Lauman and 21CF notified merger consisting of the acquisition by Grupo Lauman of the FSM Business (Divestment Operation).³²

72. On June 7, 2021, through resolution number P/IFT/EXT/070621/11, the IFT approved the final purchase agreement and authorized the Divestment Operation. The closing of the Divestment Operation occurred on November 10, 2021. On January 12, 2022, through resolution number P/IFT/120122/7, the IFT considered that the established

³² On May 10, 2021, the Divestiture Agent also submitted MediaPro for IFT approval as a potential purchaser of the FSM Business. However, considering that on May 14, 2021, the IFT concluded that Grupo Lauman met the eligibility criteria, and on May 21 of the same year, the Divestiture Agent presented the final purchase agreement signed by 21CF and Grupo Lauman, MediaPro, who had not finished negotiating the terms of the acquisition of FSM Business, was unable to proceed with the acquisition process.

Other potential buyers also expressed interest in acquiring the FSM Business, however, due to the Divestiture Agent not identifying them with sufficient economic capacity and/or arriving late in the divestment process (when there were already potential buyers, Grupo Lauman and Mediapro, with commercial terms agreed with TWDC and the Divestiture Period soon to conclude), the Divestiture Agent informed them of this situation. The Divestiture Agent informed them that, in the event that the divestment with these potential buyers was not achieved, they could be incorporated at a later stage of the process (the trust).

conditions that applied until the closing of the Divestment Operation had been fulfilled by TWDC and 21CF.³³

4.2. Case Study 2: AT&T Inc. & DIRECTV

73. On June 10, 2014, AT&T Inc. (AT&T) and DIRECTV notified the IFT the merger consisting of the indirect acquisition by AT&T of DIRECTV. From the analysis of the merger, the following elements were identified:

- (a) AT&T in Mexico through its subsidiaries: (i) had a shareholding of approximately 8% in América Móvil, S.A.B. of C.V. (AMX), which allowed AT&T to appoint 2 members of AMX's board of directors, and (ii) had a relationship with AMX since 2002 (in force for more than 10 years).
- (b) DIRECTV in Mexico indirectly owned 41% of the capital stock of Innova, S. de R.L. of C.V. (Sky México), a company that participates in the media industry, particularly in the provision of satellite pay TV. The remaining 59% is owned by the group headed by Televisa, S.A.B. of C.V. (Grupo Televisa).

74. During the analysis of the merger, the IFT identified risks generated in the mobile telecommunications (mobile phone, internet access, short messages or SMS) and fixed telecommunications (fixed phone and internet access) relevant markets, as well as wholesale services. The competition risks identified were informed by merger area, through different meetings during the merger process, to AT&T and DIRECTV as coordination risks in the relevant markets. The above, considering that, on the one hand, AT&T participated in the capital stock of AMX and had the ability to appoint members of its board, and, on the other hand, AT&T would acquire an indirect participation of 41% in Sky México, a company in which the majority shareholder is Grupo Televisa.

75. AMX participated in the relevant markets, having shares of more than 50% in most of the localities where it participates; meanwhile, Grupo Televisa is the second competitor in most of those markets, so the IFT considered that AT&T/Sky México could have become a coordination vehicle. During the merger process, AT&T agreed to divest its stake in AMX, and withdraw the members it had appointed in AMX's board of directors.

76. Despite the divestiture of AT&T's stake in AMX, the links between AT&T and AMX (of more than 10 years) were considered to have allowed AT&T to acquire and develop contacts with people with influence on AMX's decision-making.

77. Thus, on November 13, 2014, and considering that AT&T, during the merger notification process divested its holdings in AMX, the IFT's Board authorized the merger, subject to compliance with behavioral remedies (for a period of 3 years); these remedies were aimed at requesting prior authorization from the IFT of any acts, contracts, agreements or others that AT&T enters into with any party who has or may have influence on AMX's decisions, in order to avoid coordination effects.³⁴

³³ Remaining untouched, among others, the non-competition clause regarding sports channels and sports rights, as well as a clause of non-recruitment of personnel, both for a period of 3 years after the closing of the Divestment Operation.

³⁴ Redacted version available in Spanish at: http://apps.ift.org.mx/publicdata/P_IFT_EXT_131114_225_Version_Publica.pdf.

4.3. Case Study 3: Grupo Televisa/TVI

78. On October 27, 2015, the IFT received a merger notification consisting of the acquisition, by Corporativo Vasco de Quiroga, S.A. of C.V. (CVQ), a subsidiary of Grupo Televisa, of 50% of the capital stock of Televisión Internacional, S.A. of C.V. (TVI), owned by Grupo Multimedios, as well as the acquisition of a minority stake by Grupo Multimedios in CVQ, which would give it the power to appoint a member of CVQ's board of directors.³⁵

79. The merger involved Grupo Televisa and Grupo Multimedios, which participate, directly or indirectly, in the provision of commercial broadcast television and radio services. The first service includes the relevant markets for the retail distribution of audiovisual content through broadcast television systems, as well as the provision and sale of time for commercials or advertising through broadcast television systems; in said first service, these economic agents are the most important competitors in the northeast of the country, since Grupo Multimedios with a market share of close to 20% and Grupo Televisa around 50%, in terms of the number of stations with coverage in each locality.

80. Considering the structural link between Grupo Televisa and Grupo Multimedios in CVQ, as well as the position that these agents have in the relevant markets, the Plenary of the IFT determined that the merger generated coordination risks in the provision of services in the relevant markets in the northeast of the country.

81. On February 19, 2016, the IFT authorized the merger, subject to the remedy of terminating the structural links between Grupo Televisa and Grupo Multimedios. The parties decided that Grupo Multimedios would not acquire shares of CVQ or of companies belonging to Grupo Televisa, nor would it acquire rights to appoint members of the board of directors of those companies.

4.4. Case Study 4: AT&T Inc. & Time Warner Inc.

82. On August 15, 2017, the IFT, within the scope of its powers, authorized, subject to remedies, the total acquisition by AT&T, of Time Warner Inc. (Time Warner).³⁶

83. Time Warner is a U.S. company that produces, provides and licenses audiovisual content, in particular Restricted Channels. AT&T provides mobile telecommunications services in Mexico and satellite pay TV services, through its participation in Sky México, a company in which it is a partner with Grupo Televisa.

84. The IFT's Board determined, among other elements, that this merger posed risks to competition, since AT&T's participation in Sky México and its association with Grupo Televisa would create incentives for AT&T/Time Warner to: (i) unilaterally prevent access to third parties to the provision and licensing of Restricted Channels and Restricted Channels packages, other than Sky México and Grupo Televisa, establishing barriers to entry and displacing those third parties in the related market for the provision of pay TV services, and (ii) coordinate or exchange information with Grupo Televisa in the provision and licensing of Restricted Channels.

85. The IFT authorized the merger, subject to conditions aimed at:

³⁵ Redacted version available in Spanish at: http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_EXT_190216_7.pdf.

³⁶ Redacted version available in Spanish at: http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf.

- Maintaining independence in decision-making and flow of information, between Sky Mexico and Time Warner; and between HBO Latin America and the rest of AT&T/Time Warner and, therefore, with Sky Mexico. Among other elements, the conditions seek to prevent the sharing of information related to Time Warner's and HBO Restricted Channels contracts, as well as related business strategies, with Sky Mexico and Grupo Televisa.
- Ensuring that AT&T/Time Warner attend all access requests to its Restricted Channels made by third party pay TV service providers, offering similar terms and conditions in negotiations with comparable requests.

5. Conclusions

86. The IFT, as the competition authority in the T&B sectors, has analyzed various media mergers, and in some of them it has identified the need to impose structural and/or behavioral remedies.