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

– Note by the Secretariat –

27-28 September 2022

This document was prepared by the OECD Secretariat to serve as material for the discussion under Session III on "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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Session III: Media Mergers

- Note by the Secretariat[*] -

1. The media sector is broad, complex and evolving rapidly. The term "media" refers generally to means of mass communication that enable the distribution of information and data to large audiences. The media sector 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, video streaming, video games, online publishing, social media, and podcasting, among others (OECD, 2019).

2. Economic activities developed within the media sector are interconnected in a complex supply chain, whose analysis is crucial to understanding the wide range of vertical relationships between the main players in the industry. The type of vertical relationships observed between different companies and end users may substantially vary along the supply chain, due to the existence of a wide variety of business models. Some media companies, software developers, and providers of online services supply their services directly to end users, including providers of over-the-top content and online booking platforms. Other media companies and software developers instead provide their products indirectly through intermediaries such as a telecom operators, online platforms, television operators or through a retailer of consumer electronics (e.g. preinstalled software) (OECD, 2019).

3. Altogether, the media, technology and telecoms sectors (TMT) have a high incidence of mergers and acquisitions. They account for around 30% of the total M&A activity around the world, exceeding the volume of transactions in any other sector.[1] The substantial number of mergers within the TMT sector can be explained by the dynamic nature of the sector, which is characterised by the constant entry of firms with innovative business models. Established incumbents may eventually acquire many of these new entrants (OECD, 2019). High concentration may pose different and greater concerns in media markets than in other industries. In particular, it may have a negative effect on diversity and plurality, which is of fundamental importance in media industries (OECD, 2013).

4. The volume of potentially anti-competitive mergers within the TMT sector is relatively high, corresponding to 14% of the total volume of merger intervention around the world.[2] The considerable volume of merger intervention within the TMT sector is particularly surprising given that many of these mergers are of a vertical or conglomerate nature and, as such, should have less scope to restrict competition and thus pose fewer issues for agencies. One possible explanation for the emphasis given by authorities to TMT mergers could be the fact that the sector has certain structural characteristics that increase the risk of anti-competitive effects, such as the prevalence of successive oligopolies along the supply chain, or the existence of market regulation (OECD, 2019).

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[*] This note was written by Daniel Segalovich, Intern at OECD Competition, with comments provided by Lynn Robertson, Antonio Capobianco and Ori Schwartz.

[1] Source: Allen & Overy (2021), "Global Trends in Merger Control Enforcement", https://www.allenovery.com/en-gb/global/news-and-insights/global-trends-in-merger-control-enforcement

[2] Ibidem.

5. Market definition in media markets is especially complex because of, a multiplicity of products; pervasive price discrimination (including versioning) and bundling; rapid change; and sometimes an absence of transactions (due to vertical integration) and prices (as in free-to-air broadcasting) (OECD, 2003).

6. Furthermore, the two-sided nature of many media markets presents special challenges for both market definition and merger assessment. In two-sided media markets, one cannot assess the impact of a merger on one side without taking into consideration effects on the other. In particular, competition authorities may be confronted with a merger having beneficial effects on one side of a media market while having harmful effects on the other (OECD, 2003).

7. As in other markets, media mergers combining different levels of the vertical value chain (vertical integration) offer efficiency gains but can also present threats to competition.

8. There are several reasons why vertical integration could produce real efficiencies in media markets. The main efficiency effects of vertical mergers result from enhanced vertical co-ordination, rather than arms-length contracts, and economies of scope, which generate cost savings that are likely to be passed through to consumers, at least partially, in the form of lower prices and better quality (OECD, 2019). Vertical integration can contribute to efficient price discrimination, an important factor in an industry where fixed costs are an unusually high percentage of total costs. In addition, vertical integration can increase economic welfare when it eliminates a double-marginalisation problem (OECD, 2003).

9. Vertical issues are particularly pertinent in the media sector because of pervasive links between content producers, packagers and infrastructure providers (OECD, 2003). In rare cases, vertical mergers may indirectly harm competition in particular when a dominant firm is involved by facilitating anti-competitive conduct post-merger. Most vertical theories of harm involve the merged entity excluding competitors (total foreclosure), raising rivals' costs (partial foreclosure) or enhancing horizontal collusion. The risk of competitive harm is potentially higher when foreclosure strategies enable a firm to create entry barriers, gain bargaining power or avoid market regulation (OECD, 2019). Remedies in problematic cases are often behavioural in nature as competition authorities try to eliminate anti-competitive effects while permitting the parties to reap substantial efficiencies (OECD, 2003).

10. Behavioural remedies are often a less restrictive solution to address the risks of vertical mergers than a full prohibition. While usually inadequate to deal with horizontal mergers, well-designed behavioural remedies might be better suited to prevent a vertically-integrated firm from behaving anti-competitively post-merger. Common behavioural remedies include supply obligations with non-discrimination clauses, mandatory licensing, interoperability provisions, prohibition of exclusivity contracts, and firewalls (OECD, 2019). In addition, media mergers can have other important effects on non-price dimensions of economic welfare such as advertising/content ratios content diversity, and general quality of the text, images, and/or presentation. Media mergers can also have significant non-economic effects on social welfare, e.g. on pluralism. A reduction in diversity could induce greater reliance on price competition that may benefit consumers even more than the lost diversity did. In addition, a decline in diversity could be inseparable from increases in general quality made possible through reaping greater economies of scale (OECD, 2003).

11. Another growing concern related to media mergers arises from zero-price markets in the media markets. Business models centred on the zero-price provision of products are not new: media companies have long made radio, television or even newspaper content available free of charge to consumers, funded by advertising revenues. The provision of free goods to attract consumers' attention, which can then be directed towards advertisements, is an established business model in media sectors (OECD, 2018).

Box 1. Media merger decisions in Latin America and the Caribbean

When assessing mergers in the media, technology and telecoms sectors (TMT), competition authorities and sector regulators face challenges that are not usually encountered in more traditional industries. Apart from the rapid changes observed in the TMT sector, authorities may struggle to define relevant markets, quantify non-price effects and perceive potential efficiencies arising from vertical integrations. As a result, media mergers may often require a tailored approach to address concerns of plurality and quality, as well as the adoption of remedies.

In **Brazil**, CADE cleared the *AT&T/Time Warner* merger subject to behavioural remedies. The merger raised concerns about the vertical integration of a programmer and a pay TV operator that could lead to foreclosure and co-ordinated effects. Besides higher prices for pay TV consumers, CADE was also concerned about non-price effects, such as a decrease in diversity and plurality of pay TV content. The remedies included mechanisms to avoid discrimination by the parties, a system of arbitration, and the imposition of a “Chinese Wall” between the companies to avoid the sharing of sensitive information.

In **Chile** the *AT&T/Time Warner* merger was also approved subject to remedies, the FNE assessed the merger without defining relevant markets in a strict way but rather examined effects directly and addressed the competitive pressure exerted by Over-the-Top (OTT) platforms in the market of traditional paid television. Regarding the competitive assessment, an input foreclosure strategy was identified as the main risk, since it could result in an increase in entry barriers in the downstream markets and lead to harmful consequences to end-consumers, such as an increase in price or a decrease in quality that could not be impeded by current regulation. Among the imposed remedies, there was the obligation to submit any dispute that could arise in the context of negotiations between Time Warner and any paid-TV distributor, to a baseball-style arbitration, as well as an obligation to grant access and a prohibition to discriminate arbitrarily between downstream competitors.

In 2019, in **Mexico**, the IFT Board approved the merger by which The Walt Disney Company acquired assets of Twenty-First Century Fox, Inc., subject to conditions, such as the divestment of the Fox Sports Business, the preservation of independence, in terms of decision-making and the flow of information, between Disney/Fox and Group A&E. The Mexican authority determined that the merger could generate risks due to horizontal effects with respect to the markets of provision and licensing of sports channels to pay TV providers and provision and licensing of factual channels (i.e., documentary and realities) to pay TV providers. The IFT considered that the high participation that the economic agent Disney/Fox would obtain in the acquisition of international audio-visual sports content would also affect the conditions of competition in the downstream market of the provision and licensing of sports channels to pay TV providers.

In **Costa Rica**, the transaction between the Millicom Cable Costa Rica, S. A. and Cable Zarcero companies was eventually approved on the condition that the parties modified their non-competition clause.

For the latter company to purchase the commercial operations, client portfolio, network, and assets from the former, SUTEL conducted an assessment on whether the operation would generate an incentive and the capacity to exclude current or potential competitors from the relevant markets that were affected both at the wholesale and retail level for the buyer. Although the parties did not substantiate the efficiencies in accordance with the existing regulations, the available information made it possible to determine that the merger could bring a series of positive effects and benefit the end-users of telecommunications services, such as by enabling a more modern subscription television service and residential access to fixed Internet at greater speeds. This was due to the buyer's commercial supply in juxtaposition to what had been provided up to that point by the seller. In addition, the transaction would imply a new landline and the supply of business telephone connectivity services.

Source: https://www.oecd.org/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm

Issues for Discussion

1. Which entity regulates technology, media and telecom (TMT) sector mergers in your jurisdiction: the competition authority or another agency or both? What tools, tests or methods are used to assess a merger in this sector? Describe any difficulties encountered.
2. What are the most important challenges regarding the assessment of mergers in the TMT sector?
3. What theories of harm do you usually consider in the assessment of vertical mergers in the TMT sector? Can you provide one or two examples of vertical merger cases from the technology, media and telecom sector, to illustrate the theories of harm?
4. What kind of efficiencies have you identified in the assessment of TMT mergers?
5. Describe the types of remedies - structural or behavioural - your authority has implemented to address competition concerns in a TMT merger.
6. In the analysis of media mergers has the agencyevaluated elements such as cross-ownership rules, plurality, diversity or others related with potential social harms, such as misinformation and disinformation? How do you incorporate online media distribution services (platforms or OTT content distributors) in a cross-ownership analysis?
7. Does your authority focus on other considerations such as pluralism when reviewing media mergers? Is consideration given within the context of the merger review or separately, by another authority?

References

OECD. (2003). *Media Mergers.* Retrieved from https://www.oecd.org/daf/competition/mergers/17372985.pdf

OECD. (2013). *Competition Issues in Television and Broadcasting – Background Note.* Retrieved from https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2013)2&docLanguage=En

OECD. (2018). *Quality considerations in digital zero-price market.* Retrieved from https://www.oecd.org/daf/competition/quality-considerations-in-zero-price-markets-2018.pdf

OECD. (2019). *Vertical Mergers in the Technology, Media and Telecom Sector – Background Note by the Secretariat.* Retrieved from https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf