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COMPETITION COMMITTEE

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Media Mergers – Call for contributions

27-28 September 2022

This document is circulated in preparation of the discussion under Session III of the Latin American and Caribbean Competition Forum (LACCF) that will take place during 27-28 September 2022 in Rio de Janeiro, Brazil. Delegates are requested to submit their written contributions to the Secretariat by 1 July 2022 at the latest. Advance notice of your intention to submit contributions before or by 25 April 2022 would be useful.

In case you need additional information related to this session, please contact:
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Session III: Media Mergers – Call for contributions –

Introduction

1. This year's LACCF will feature a session on "Media Mergers", co-organized and moderated by both of Mexico's competition authorities: the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT). This call for contributions aims to provide some background information on the topic, and to invite all delegations to make a written submission for the session. It will be especially valuable if a discussion of relevant enforcement and advocacy cases from multiple jurisdictions are included.

2. This call for contributions aims to identify some topics that agencies may wish to address during their written contributions. To further assist in the preparation of contributions, please refer to (i) the background paper which will be circulated in the next months and can be used as a starting point for discussions during this session, (ii) the more detailed list of questions included in the Annex and (iii) the suggested bibliography included at the end of this call. Please note that the list of questions in the annex is neither prescriptive nor exhaustive, and you are free to raise other relevant issues that reflect your experiences.

3. In order to ensure an effective preparation of the discussion, we would be grateful if you could advise the Secretariat by **Monday 25 April 2022** at the latest if you will present a written contribution on the topic. Written submissions are due by **Friday 1 July 2022** and failure to meet this deadline may result in your contribution not being distributed in a timely fashion in advance of the meeting.

4. All communications regarding the documentation for this roundtable should be sent to Ms. Angélique Servin (Angelique.Servin@oecd.org). Please address all substantive queries relating to this discussion to asuntosinternacionales@ift.org.mx and international@cofece.mx, always coping both email addresses.

5. The contributions themselves should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Angélique Servin (Angelique.Servin@oecd.org) and copied to asuntosinternacionales@ift.org.mx and international@cofece.mx by **1 July 2022** at the latest. Country contributions will be circulated to participants on O.N.E and through the LACCF website www.oecd.org/competition/latinamerica/ (short url: oe.cd/laccf) and www.oecd.org/competition/latinamerica/2022forum/.

Background

6. The media industry is very broad and includes several services. For this session, in line with previous definitions used in the OECD Competition Committee, the term "media" refers to the main means of mass communication that enables 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.[1] Media mergers refer to any merger[2] in which there is a complete union of two or more companies, a more one-sided takeover or the transfer of parts of one firm to another, and the parties involved carry on activities within the media industry, like those defined previously as "mass media" or "means of mass communication", including activities such as content aggregation, content licensing, retail and wholesale content distribution, among others.

7. As it has been witnessed, the media industry is constantly evolving, driven recently by the digital economy, new and disruptive digitization technologies, the emergence of global and local market participants, and new distribution channels, propelled by technological convergence or evolution, all of which have had impacts in media value chain dynamics. The technological evolution has permitted the access to media content, that were tied to specific communications media channels, just by accessing the internet or Over-The-Top content applications through a digital device. This change has allowed media organizations to develop new business strategies such as cross-media content (to distribute the same content through different means of mass communication).

8. In this context, media mergers can lead to the entrance and/or consolidation of vertical integrated participants (such as content producers and distributors) that can result in efficiency effects such as vertical co-ordination between upstream and downstream activities and cost savings through economies of scope. However, this may also raise competition concerns and challenges to the competition authorities 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,[3] mainly by the role played by online distributed content.

9. Some of these concerns were analysed by the OECD Competition Committee in 2003: "Media Mergers"[4], where issues like the two-sidedness of media platforms, media plurality, content diversity and the efficiencies gained by vertical integration in this industry, were discussed. Additionally, in 2019, the OECD Competition Committee held a roundtable on "Vertical Mergers in the Technology, Media and Telecom Sector"[5], where it was recognized that whilst vertical mergers could produce multiple efficiency effects, under certain market circumstances firms might be able to harm competition indirectly.

[1] Definition taken from Vertical Mergers in the Technology, Media and Telecom Sector, Background Note by the Secretariat, p. 8. available at: https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf

[2] As defined by the OECD in https://www.oecd.org/competition/mergers/.

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

[4] https://www.oecd.org/daf/competition/mergers/17372985.pdf.

[5] https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf.

10. The media industry has a major importance not only for the consumer's entertainment but also in the way information and news are distributed. Hence, some authorities have stressed the importance of carefully assessing mergers in the production, provision, licensing and distribution of content that could lead to a reduction or harm of competition, as well as affect pluralism and potentially other social harms, such as misinformation[6] and disinformation.[7]

11. This session will focus on the assessment of media mergers considering the new configuration of the media industry driven by the technological evolution 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.[8]

[6] False or inaccurate information not disseminated with the intention of deceiving the public. Definition taken from OECD (2021), "Competition issues concerning news media and digital platforms", Directorate for Financial and Enterprise Affairs Competition Committee, https://one.oecd.org/document/DAF/COMP(2021)16/en/pdf.

[7] False, inaccurate, or misleading information deliberately created, presented and disseminated to deceive the public- Definition taken from OECD (2021), "Competition issues concerning news media and digital platforms", Directorate for Financial and Enterprise Affairs Competition Committee, https://one.oecd.org/document/DAF/COMP(2021)16/en/pdf.

[8] In this framework, the session will address challenges faced by competition authorities, such as new theories of harm raised from horizontal, vertical and conglomerate mergers, as well as the tools, methods and elements of analysis considered in evaluating aspects such as: a) market definition; b) production and access to audio-visual content, its exclusivities and the use of cross-media content; c) distribution channels; d) network economies and economies of scope; e) bundling or tying products and services that could bring the analysis of foreclosure, portfolio or conglomerate effects; f) vertical integration, that enables a firm to gain control over important resources to produce content and could foreclose the market upstream or downstream and g) the imposition of structural or behavioural remedies.

Annex A. Suggested Questions for Consideration in the Country Contributions

Session III on "Media Merger"

Legal framework

12. Does the merger control regime in your country contain provisions that oblige participants in a merger in the media industry to notify it to the competition authority, regardless of generally applicable thresholds (for example, turnover), or does it consider a particular threshold (including non-turnover-based criteria) over which merging parties are required to notify?

Market definition and theories of harm

- What are the most important challenges regarding the assessment of media mergers?
- What were the principal elements used in the analysis of traditional media mergers with regard to market definition, related markets, network externalities, economies of scale and scope, entry barriers and efficiencies?
- Has technological evolution resulted in particular challenges in this analysis, for example, in the relevant and adjacent (related) markets; determining if one of the parties has substantial market power; novel theories of harm; or evaluating effects and negotiating remedies?
- Have you reached any conclusions as to the degree of substitution among different media services (e.g. newspapers, radio and free TV, pay TV, and online media services, including OTT content distribution and social media services)? Please provide the main characteristics with which these services are provided in your country (e.g. regional or national networks, bundling of services, content production and distribution supply chain). Have you distinguished between content production, TV channel production and several distribution channels?
- What tools or methods have you applied in the assessment of media mergers, e.g. SSNIP test, own price or cross-price elasticities of demand, diversion ratios, upward pricing pressure test (UPP), gross upward pricing pressure index (GUPPI)upward pricing pressure test (UPPI), merger simulations? What were the difficulties you find in applying or trying to apply those tools? Have you considered new tools or methods?
- Have you analysed media mergers involving data collection and algorithms? What effects, if any, were identified on competition?
- From your experience in assessing media mergers, which theories of harm have you mostly used: horizontal, vertical, or conglomerate? Unilateral or coordination? Others? Have you identified risks of foreclosure, or elements that jeopardized incentives to innovate? Are there any novel theories of harm that have been explored?
- When assessing media mergers, have you identified any media content as an essential or a highly relevant input i.e. an input conferring a strong competitive advantage? What was the relevance of this consideration in the merger case analysed?

- In the analysis of media mergers has the agency evaluated 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?
- Does your authority apply a media plurality test?[9] Is this test applied in the context of merger control review or in a parallel review conducted by a separate authority? Are the current (and often platform-specific) media rules addressing issue of plurality fit for purpose?
- In mergers that involve the analysis of several related markets (for example, programming channels in various categories -films and series, sports, factual, etc.-), has your authority carried out a conglomerate analysis? What elements and evidence did you use in the analysis?
- What kind of efficiencies have you identified in the assessment of media mergers?

Remedies

- What type of remedies, structural or behavioural, has your agency implemented when it has identified competition problems in media mergers, including those imposed to address potential harms related to cross-ownership or conglomerate effects?
- What advantages has your agency identified in the imposition, enforcement, and monitoring of such remedies?
- What difficulties has your agency identified in the imposition, enforcement, and monitoring of such remedies?
- In the case of a blocked media merger, what elements did you consider relevant to reach that decision? What remedies did you consider and rule out in those cases?

9 References regarding plurality measurement:

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Suggested References

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OECD (2019), "Vertical Mergers in the Technology, Media and Telecom Sector", Directorate for Financial and Enterprise Affairs Competition Committee, https://www.oecd.org/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm.

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