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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session III: Media
mergers**

– Contribution from Spain –

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The attached document from Spain 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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Session III: Media mergers

- Contribution from Spain -

1. Introduction

1. Changes in Spain's regulation of the television (TV) and telecommunications sector at the start of the new millennium¹ were brought about by technological advances and resulted in an intense process of mergers in the free-to-air and pay-TV markets.

2. The mergers led by the major audiovisual corporations during the 2010-2014 period (C/0230/10 TELECINCO/CUATRO and C/0432/12 ANTENA 3/LA SEXTA in free-to-air TV and C/0612/14 TELEFÓNICA/DTS affecting pay-TV) led the National Commission for Markets and Competition (CNMC) to carry out important forecasting on the role of new media and digital platforms in the competitive structure of the markets affected, and of the interconnection with electronic communications services. The Spanish market was characterised by a high degree of broadband penetration and bundled offers (contracting telephone and broadband services with pay-TV), in which pay-TV, especially football, played an important role in the competitive dynamics of the electronic communications markets.

3. At the time, the parties involved already argued that the growing importance of new digital media, in particular the development of Internet advertising, the streaming phenomenon and the emergence of over-the-top (OTT) platforms, guaranteed that competition would be maintained in the advertising and pay-TV markets. Mediaset and Atresmedia saw new digital media as powerful alternatives for advertisers, while Telefónica argued that OTT platforms would emerge as effective competitors in upstream content marketing markets, as well as in the pay-TV market. This would reduce the potential for conglomerate effects in the adjacent electronic communications market, where TV and premium content would no longer be a catalyst for contracting electronic communications services.

4. However, the Spanish authority concluded at the time that the actual and potential competitive pressure from these operators was insufficient, and imposed behavioural remedies to ensure competition in both free-to-air and pay-TV.

5. The situation following merger operations in the free-to-air TV market has shown that the introduction of new digital media did not sufficiently curtail the power of the traditional media. The competition problems in the context of the duopoly that followed

¹ Royal Decree-Law 1/2009 on urgent telecommunications measures enables operators to gain shareholder control of other TV service providers on the condition that the total sum of the average audience across the providers' channels does not exceed 27% of the total audience; Law 8/2009 of 28 August 2009 on the financing of the Spanish Radio and Television Corporation prohibits income from the sale of advertising or paid (premium) content; and General Audiovisual Law 7/2010 of 31 March 2010 on digital terrestrial TV in Spain provides for liberalisation of the audiovisual market, moving from a regime of administrative concessions to a regime based on licenses and authorisations.

the commitments/conditions of the merger were the subject of a decision sanctioning conduct that restricts competition (S/DC/0617/17 ATRESMEDIA/MEDIASET²).

6. Monitoring the operation of the pay-TV market, which remains ongoing, obliges the CNMC to continue its efforts to determine the competitive role that platforms such as Netflix, DAZN or Amazon play over traditional pay-TV media; the effective competition for the acquisition of premium content; and the structural relations with electronic communications markets.

7. The following is a summary of the main merger operations that have taken place in Spain in recent decades among major audiovisual media companies. This summary highlights aspects that may be of interest in relation to market definition, theory of damages and remedies. It also aims to provide an overview of how the audiovisual market has evolved and how the CNMC has faced the challenge.

8. The following merger operations have taken place:

- October 2010 – authorised in the second phase with commitments: the acquisition of the television operator Sociedad General de Televisión Cuatro SAU by Gestevisión Telecinco SA³ and initiation of surveillance proceedings⁴.
- July 2012 – authorised in the second phase with conditions: the acquisition of the television operator Gestora de Inversiones Audiovisuales La Sexta SA by Antena 3 de Televisión SA. In 2015, it was agreed to extend the commitments for a further two years⁵ and initiation of surveillance proceedings.⁶
- April 2014 – authorised in the second phase with commitments: the purchase of the operator DTS by Telefónica de España SA and initiation of surveillance proceedings.⁷

2. Legal framework

9. The merger control regime in Spain does not have specific provisions for the media sector but the general regulations apply. In this regard, the **Law on the Defence of Competition** establishes a mandatory prior control system for mergers that reach a certain market share (Article 8.1a) or turnover (Article 8.1b), provided that there is no obligation to notify the European Commission of them. Both thresholds are based on the impact of the merger on the markets affected (market share threshold) or the Spanish economy in general (turnover threshold).

² See www.cnmc.es/expedientes/sdc061717.

³ See www.cnmc.es/node/331606.

⁴ See www.cnmc.es/expedientes/vc023010.

⁵ See www.cnmc.es/node/332216.

⁶ See www.cnmc.es/expedientes/vc043212.

⁷ See www.cnmc.es/expedientes/c061214 and www.cnmc.es/node/363512.

3. Technological and economic challenges of defining markets and theories of damage

10. The Spanish competition authority has faced a number of challenges in analysing the effects of the most recent TV operator mergers and imposing behavioural remedies. These challenges are due to the complexity of their effects on the entire **audiovisual sector value chain** and the **rapid technological developments** experienced in the sector (digital terrestrial TV, digital migration, streaming, social networks).

11. From a technological point of view, audiovisual content distribution has undergone significant change in recent years, with an increase in the number of platforms capable of delivering such content to end consumers and a multiplication of the services provided and the devices available for viewing such content. These changes are driving shifts in the industry's business models and in the strength of the various actors, changing the way in which profits are generated.

12. However, at the time media mergers in Spain were analysed (2010-2014), these developments had not yet translated into significant changes in the competitive structure of the TV and adjacent markets. The main challenge faced by the CNMC at the time was perhaps conducting the corresponding **forecast analysis** in such an uncertain context.

13. In so far as television merger operations were all approved with behavioural commitments, the duration of which has subsequently been extended during the monitoring process, the CNMC has been able to re-evaluate the changes in the competitive dynamics of the markets.

14. The following section outlines some of the most interesting points of the merger operations in terms of technological advances.

3.1. C/0230/10 TELECINCO/CUATRO and C/0432/12 ANTENA 3/LA SEXTA (free-to-air TV)

15. Audience fragmentation following the **launch of digital terrestrial television (DTT)** in Spain preceded the merger movements in the free-to-air TV market. Traditionally, the free-to-air TV market has been analysed in conjunction with analysis of TV advertising, since concessions holders only had one channel, which they operated on their own. But the development of DTT has blurred the link between ownership of concessions, broadcasting of free-to-air TV channels and TV advertising. This development led the competition authority to define the **existence of a free-to-air TV market distinct from the advertising market**. At the time, this was a novel issue and raises common issues with some Internet services that follow similar business models to free-to-air TV.

16. In the free-to-air TV market, operators sell programming and content to the audience in exchange for minutes of advertising space consumption. This would be an upstream market to the advertising market, in which TV operators sell advertisers minutes of advertising space consumption by their viewers. The market is therefore multi-faceted, with indirect network externalities, as advertisers value the medium with the largest audience. This leads to subsidising consumption of the medium (free-to-air TV is free) in exchange for the impact of advertising messages. Once this definition of the price element (consumption time of advertising messages) has been established, the standard methodology for defining the relevant market in terms of competition can be applied.

17. The increased free-to-air TV offer and the entrance of new competitors into the Spanish market due to the implementation of DTT and the loss of advertising in Televisión Española (TVE) (public television) offered a perfect scenario for the empirical analysis of the characteristics of the free-to-air TV market. It was therefore possible to analyse the elasticity of demand in the face of “price” variations and to evaluate other products that could belong to the same market by means of a demand-side substitutability analysis.

3.2. C/0612/14 TELEFÓNICA/DTS (pay-TV)

18. During the Telefónica/DTS merger in 2015, the CNMC already pointed out **two major technological changes experienced in the pay-TV market** in the period prior to the merger from a forecast perspective: the development of OTT pay-TV services, and the growth of pay-TV bundling strategies with electronic communications services.

19. In a simplified way, technological development has allowed Telefónica to leverage its leadership in pay-TV to the most lucrative segment of bundled offers in the electronic communications markets. This required an analysis of the vertical and conglomerate effects of the merger arising from the horizontal effects. On the other hand, technological developments also offered opportunities for new operators (especially OTT platforms) to challenge Telefónica’s position in the pay-TV market.

20. These technological developments conditioned the definition of the relevant markets, the effects analysed and the commitments of the merger operation. In 2020, as part of the extension of commitments⁸, **the CNMC had to re-evaluate the competitive structure of the pay-TV market, and in particular the evolution of OTT platforms and bundling policies**. It concluded that Telefónica continued to lead this market and the adjacent electronic communications markets, with most of the commitments being maintained.

3.2.1. OTT development

21. Although it considered that on-demand and Internet pay-TV offers could be the most in-demand alternative to pay-TV in the future, at the time of assessing the merger and in light of the existing barriers, it was deemed to **exert insufficient competitive pressure to curtail the new market leader, Telefónica**, in the post-merger context. At the time, it considered that the entry and/or expansion of alternative operators would take time due to the need for large investments in infrastructure, content acquisition and subscriber acquisition.

22. Moreover, it was argued that Telefónica could, with its acquired position as market leader, have the **incentives and ability to impede their development** by limiting access to video on demand (VOD) content or making it difficult for customers to access such content through bundling. One of the commitments imposed on Telefónica: not to allow exclusivity in subscription video on demand (SVOD) content, was precisely to **provide a way for OTT platforms to enter the market and expand**.

23. In view of the extension of the commitments, the CNMC studied the role of OTT platforms in the competitive dynamics of the pay-TV market. According to the CNMC analysis, by the end of 2019 there were already [6 000 000-6 500 000] subscriptions to OTT platforms in Spain. However, despite their growth, it concluded that while new OTT services exerted competitive pressure, they were constrained by several factors, in particular their limited ability to satisfy customer demand for pay-TV on their own. The

⁸ Available in Spanish at www.cnmc.es/sites/default/files/3056051_1953.pdf.

different OTT providers' relative specialisation in certain content led to the opinion that they did not provide an interchangeable substitute for a more general content offer, for example, the one provided by operators such as Telefónica. Therefore, the data at that time showed that a minority of households subscribed to OTT pay-TV services only.

24. In conclusion, despite the significant expansion of pay-TV services provided through OTT platforms in recent years, data at the end of 2019 showed that Telefónica continued to lead the pay-TV market and was significantly ahead of the next competitor.

25. However, in relation to the market for non-sports premium content from third parties, whose series and movies content offer is much more flexible than the sports content offer, the CNMC eliminated the commitment that limited the exclusivity, term and operating period of the contracts that Telefónica could sign for SVOD content. This decision was justified by the vertical integration of several of the majors (which have become players in the pay-TV market, as well as content producers and marketers), the evolution of the services provided by OTT platforms in other countries and the rapid growth of these platforms in Spain in recent years.

3.2.2. Bundling

26. Although the Telefónica/DTS merger did not involve additional market shares in the electronic communications markets, the CNMC deemed that these markets would be affected by the transaction due to the strategies of bundling telephone and Internet services with pay-TV (especially by Telefónica).

27. It argued that Telefónica's growth in the pay-TV sector (access to a high value-added subscriber base and premium content) would carry over to the retail electronic communications markets where Telefónica was also leader. The parties argued, however, that **pay-TV was not a major catalyst in the electronic communications markets**, and more specifically in the contracting of bundled offers. However, prior to the merger and with the launch of Fusión offers (which includes pay-TV in its bundled Internet and telephone offers by default), **Telefónica turned pay-TV into a relevant competitive variable** in the electronic communications markets.

28. The penetration of bundled offers in Spain was unparalleled in the rest of the European markets (according to the data used to authorise the Telefónica/DTS merger, with commitments). Therefore, of the more than 12.6 million fixed broadband lines in the third quarter of 2014, more than half (7.6 million) were mobile-fixed bundled offers and more than 2.8 million also contracted TV (which means that 55% of pay-TV customers contracted this service bundled with electronic communications services).

29. To determine the possible effects, two issues needed to be resolved: i) whether there was a technical and/or contractual link between pay-TV services and retail electronic communications services and whether there was a large customer base that contracted telephone/Internet services together with pay-TV; and ii) whether Telefónica had a significant degree of market power in one or both markets and incentives to limit access to its competitors. It was concluded that the **market power gained by Telefónica would give it the incentive and ability to configure bundled offers that its rivals could not replicate**, closing off their access to content, particularly given its large customer base.

4. Market definition

4.1. Advertising market

30. The analysis of operations considered whether the advertising market contained a broader market encompassing the different media, particularly given the growth of Internet advertising and changes in audience habits.

31. However, based on national and regional precedents, and after conducting exhaustive market tests, the competition authority concluded that TV was an indispensable advertising modality for a significant number of advertisers, and therefore that **there was insufficient demand-side substitutability with other advertising modalities** to define a broader media advertising market. Also, the differences between the medium of TV and other media (such as coverage, impact, speed, marketing system) have allowed TV stations to set the price of their television advertising relatively independently.

32. In addition to the public and national channels, there are **regional television channels**, both public and private, with the capacity to conduct regional disconnections. At the time, market tests were conducted to determine that approximately 20% of the advertising broadcast by the regional channels competed with advertising broadcast by the national channels. However, since it did not affect the conclusions of the analysis, no such segmentation was carried out in the advertising market.

33. It was also deemed that **advertising on free-to-air TV and pay-TV** were part of the same product market. This is without prejudice to the limited competitive pressure that pay-TV operators exert on free-to-air operators in the advertising field, given their reduced coverage, the eminently qualitative nature of their advertising and the very specific content linked to a high portion of their advertising.

4.2. Television market

34. During the Telefónica/DTS merger, studies were conducted into whether the strong emergence of operators that distribute content over the Internet justified maintaining the **segmentation between free-to-air and pay-TV**.

35. It was concluded that, although free-to-air TV could exert competitive pressure on pay-TV, the differences in business models justified their consideration as two distinct markets. Free-to-air TV is mainly financed through advertising, while pay-TV is mainly financed by subscription fees. Therefore, one seeks to obtain an audience and the other seeks subscribers.

36. It was considered, particularly prospectively, that **OTT operators** who charge for TV services via the Internet through well-structured and quality platforms **could be included in the pay-TV market**. There have traditionally been two types of marketing in the pay-TV sector: linear and non-linear. However, the distinction between these modalities is becoming increasingly blurred, given that linear broadcasting has experienced a proliferation of systems (such as recording, catch-up) that allow specific content to be viewed at the time the user chooses, and that in non-linear broadcasting modalities flat rates are becoming more and more common, providing access to a wide range of content without the need to pay per content viewed.

37. It was not considered relevant to include other peer-to-peer file-sharing-based operators, such as YouTube, because they mainly focus on user-generated content, and movies and series are disseminated after TV broadcast. In addition, they are distributed free

of charge and at a lower quality. Although these considerations were not analysed at the time, they could be applicable to content generated on **social networks**.

4.3. Production and distribution of content and channels

38. The Telefónica/DTS merger was considered to have an impact on **several markets vertically related to pay-TV**, particularly the wholesale marketing of audiovisual content and channels. As neither Telefónica nor DTS were significant suppliers of individual content, the production markets were not analysed in depth, although they were considered separate from marketing, despite the existence of some vertical integration.

39. The various national and European Union precedents have distinguished **different wholesale markets for individual audiovisual content** depending on the nature of the content, its premium status, the different broadcasting windows and the different user types. The justification for this differentiation is primarily based on the different appeal of each content type for different users, without content being sufficiently interchangeable. In addition, each of these content types tend to have very different operating or tariff systems.

- wholesale markets for broadcasting rights of **movies and series premieres**, with movies and series marketed by majors differentiated from the rest, and differentiation made according to broadcasting mode (linear and non-linear), service provided (TVOD or SVOD) and also specific pay-TV segment
- wholesale markets for broadcasting rights of **catalogue films and series**, with differentiation made between linear and non-linear broadcasting and specific pay-TV segment
- wholesale market for broadcasting rights of the **Spanish football league (La Liga) and the Copa del Rey**
- wholesale market for broadcasting rights of the **UEFA Champions League and UEFA Europa League**
- wholesale market for broadcasting rights of **other sporting events**
- wholesale market for broadcasting rights of other **TV programmes** (such as documentaries, quiz shows, magazines).

40. Another alternative for configuring the TV programming schedule is to acquire the broadcasting rights of a **TV channel edited by a third party**. Almost all the operators consulted during the Telefónica/DTS merger unanimously agreed that the publishing and wholesale market for television channels should be broken down into two different markets, depending on whether the channels are to be broadcast on free-to-air TV or pay-TV. Among other factors, they highlighted the different content, audience levels (much lower in pay-TV) and financing formulas.

41. They also agreed that the wholesale market for TV channels should be broken down according to whether channels are premium. Premium pay-channels have a greater capacity to attract subscribers, base their differentiation on the exclusivity of their content and have a much higher cost. In addition, basic channels are sold to the consumer in packages rather than individually, while premium channels are usually marketed a la carte at a specific price. Some operators also claimed that football should be separated from the other premium channels given the lack of demand-side substitutability; however, it was not necessary to evaluate the existence of different markets as it did not affect the conclusions of the analysis.

42. The following markets were therefore analysed:
- the wholesale market for **premium pay-TV channels**⁹
 - the wholesale market for **basic pay-TV channels**.

5. Market analysis tools

43. In free-to-air TV operations, the TV advertising market had unique operating characteristics. This meant that, in practical terms, the simple sum of the shares was not adequate to assess the effects of the operations. The tools used were the **gross rating point (GRP) and power ratio**.

44. The ability to capture TV advertising revenues depends on two specific factors: the audience and the target audience. The direct relationship between audience and the value of advertising space is clear. The target audience, or social group to which the advertising message is addressed, is conditioned by the content of the programming and the time slot in which the advertising message will feature. The GRP, a relative measure of desired advertising impacts, is commonly used to measure the relationship between audience and advertising.

45. The price per GRP for each target audience is different and is higher for more specific groups with higher purchasing power. On the other hand, the price of a GRP for each target audience is not directly proportional to the audience but increases at a higher rate than the increase in audience.¹⁰

46. The measure of the relationship between audience and advertising price is obtained using the **power ratio**, which is defined as the ratio of the market share of the channel's revenues to its audience share. In short, it measures the channel's ability to monetise its audience. This ratio is also influenced by audience fragmentation, as advertising investment is concentrated in the channels with the highest audience share, and this difference increases as the audience gap widens between the channels with the highest audience share and the remaining market operators.

47. In this scenario, traditional broadcasters have adopted strategies of bundled advertising on their channels (and other media channels) through joint marketing agreements, which seek to increase the value of the power ratio of their main channel to the new DTT channels they manage, or even apply models that involve aggregating the audiences of all their channels in order to increase the total power ratio of the channel.

⁹ Premium channels (in addition to the channels that broadcast major sports competitions) are those that include all non-sports premiere content from majors, understood as titles that are shown for 24 months from their first broadcast in Spain

¹⁰ For example, an advertiser with a product targeting children aged up to 12 years wishes to achieve an advertising impact of 100 GRP (equivalent to 100% of children). To achieve this objective, the advertiser could contract five ads in children's programmes on a channel with a children's audience of 20%, or ten ads on a channel with a children's audience of 10%. If a purely proportional criterion were applied to the audience, the price of both campaigns would be identical. However, in practice, the price of the first campaign would be higher because reaching a broader base of individuals is more valuable for raising awareness of your product and avoiding advertising saturation.

6. Damage theories and effects analysis

6.1. C/0230/10 TELECINCO/CUATRO (free-to-air TV)

48. The following effects were analysed in the Telecinco/Cuatro merger operation:

49. Given the total audience of the channels whose advertising would be managed by Telecinco after the Telecinco/Cuatro merger, if the advertising of these channels were marketed jointly, it could become essential for advertisers (**unilateral horizontal effect**).

50. Likewise, with the resulting configuration of the TV advertising market, the tacit co-ordination of the resulting entity with its main competitor, Antena 3, could be made possible and encouraged (**co-ordination effect**).

51. As regards the acquisition of audiovisual content, this would strengthen the negotiating power of the resulting entity, which would affect Telecinco's competitors in the free-to-air TV market and smaller content providers (**verticals**).

6.2. C/0432/12 ANTENA 3/LA SEXTA (free-to-air TV)

52. The following effects were analysed in the Antena 3/La Sexta merger operation:

53. The first effect, which is **unilateral and horizontal**, is the loss of the competitive pressure exerted on the market by La Sexta (**maverick**, third-party operator), which pushed prices down and served as a significant basis for the grouping of advertising offers of the smaller television channels. The second effect, which is **unilateral**, is the strengthening of Antena 3's market power. In particular, as the audience managed by this operator increases, its essential nature is reinforced for many large advertisers, who cannot stop advertising on Antena 3 channels without irreparably damaging the coverage of their advertising campaigns, especially after the exit of the public operator from the TV advertising market.

54. This effect is magnified by the bundled marketing strategies developed by Mediaset (Telecinco) and Antena 3, which reinforce the irreplaceable nature of their advertising offers. Marketing policies based on the advertising bundling (the same advertisement broadcast simultaneously on the group's channels) are particularly damaging.

55. The third effect is **co-ordinated in nature** and stems from the reduction in the number of operators in a market that facilitates tacit co-ordination between Mediaset and Antena 3 due to its real-time transparency and the simultaneous contracting of advertising to the main operators. This resulted in a fairly symmetrical duopoly, which captured more than 85% of the value of the TV advertising market and significantly favoured the ability and incentive of both operators to tacitly co-ordinate.

6.3. C/0612/14 TELEFÓNICA/DTS (pay-TV)

56. During the Telefónica/DTS merger operation, the effects of its position as leader in both pay-TV and electronic communications were analysed. Given its large subscriber base in both markets, Telefónica would have the ability and incentive to limit competition in all markets in the value chain.

57. It was considered that the merger could lead to **severe horizontal effects in the pay-TV market**. First, Telefónica's market power would give it the incentive and ability to configure offers that its rivals could not replicate, closing off their access to content, particularly given its large customer base. Second, the resulting entity could hinder the entry or expansion of pure OTT providers. Third, it was considered that the resulting entity would have the ability and incentive to increase the retail price of pay-TV services as the

only provider with premium content, or to reduce consumer choice, either by reducing the variety of packages or by ceasing to offer linear and OTT platform products outside of bundles.

58. Although there was no addition of market shares in the **retail electronic communications market**, the analysis showed that the merger had **conglomerate effects**, as pay-TV is a key strategic variable for attracting and retaining customers, particularly given the growing importance of bundled offers. Strengthening Telefónica's place in the pay-TV market gave it a competitive advantage in bundled offers, which meant it improved its position in the electronic communications markets.

59. The merger introduced risks of **vertical exclusionary effects in the wholesale audiovisual content market**, as Telefónica had the capacity and incentive to exclusively monopolise content, removing access for its competitors in the pay-TV market.

60. In the **publishing and wholesale channel markets**, there was first a risk of **vertical exclusionary effects**, as the resulting entity would have incentives to reduce the ability of its pay-TV rivals to compete by using its position as a supplier of premium pay-TV channels, worsening the conditions under which it marketed them or closing access to these channels.

7. Specific analysis of certain content

61. In the Telefónica/DTS merger, **football and the content of the majors** (premium content) were considered **strategic content** to compete in the pay-TV market. The commitments set out that Telefónica would make available a wholesale offer of premium channels to other pay-TV operators (those with exclusive premiere content from the so-called majors or live sporting events of the first-division football league, Copa del Rey, Champions League, Europa League, Football World Cup, Basketball World Cup, Formula 1, MotoGP and Olympic Games).

62. On the other hand, it was argued that **TV was a catalyst** for attracting and retaining high value-added customers (high average revenue per user) in electronic communications markets, and that competition problems in the pay-TV market did not stem solely from the accessibility of audiovisual content.

8. Analysis of aspects beyond the scope of competition

63. In the media mergers analysed by the Spanish competition authority to date, no social damages derived from such mergers have been taken into consideration. The competition authority has so far only analysed the effects of the mergers on effective competition in the affected markets and their effects on the consumer in terms of price and variety (in line with European Commission guidelines).

64. However, any such potential social damages could be covered by Article 60 of Law 15/2007 on the Defence of Competition, according to which the Council of Ministers may authorise a merger prohibited by the CNMC or modify the conditions imposed by the CNMC when authorising a merger. This article states that the Council of Ministers may use this course of action "for reasons of general interest". Article 10 provides non-exhaustive examples of certain criteria that could be associated with the general interest. These are sufficiently generic to (at least potentially) accommodate a wide variety of scenarios.

65. When authorising the merger between Antena 3 and La Sexta, the Council of Ministers decided to significantly lower the conditions imposed by the competition authority. It did so under an Agreement of 27 August 2012, exercising the powers granted to it by Article 60 of the Law on the Defence of Competition and in accordance with the general interest criteria set out in Article 10.4. Specifically, it relied on two reasons of general interest, the plan to liberalise the digital dividend and the assurance of information pluralism, as well as on the alleged asymmetry in the treatment of the merger operation between Telecinco and Cuatro.

66. On the other hand, Title III of General Law 7/2010 of 31 March 2010 on audiovisual communication contains a set of articles aimed at guaranteeing pluralism and free competition in the radio and TV market. It recognises the right to hold significant shares in several state-owned media service providers, but this right is limited if, at the time of the merger or purchase of shares, more than 27% of the audience is accumulated. Likewise, a single holder may not have significant shares in audiovisual communication service providers that accumulate more than two multiplexes (eight channels). In all cases, a minimum of three private state-owned operators must be guaranteed. Mergers notified to the CNMC must comply with the General Law on audiovisual communication before being notified.

67. This law prevents the merger of two major operators, but other combinations are possible. Therefore, Grupo Mediaset reached an agreement with Sogecuatro (Sociedad General de Televisión Cuatro), which belongs to Grupo Prisa, to purchase the Cuatro channel. On the other hand, a year later, Atresmedia (owned by Planeta) and Gestora de Inversiones Audiovisuales La Sexta signed a merger that incorporated La Sexta into Atresmedia.

9. Efficiency analysis

68. As regards free-to-air TV operations, the alleged efficiencies claimed by the parties were deemed insufficiently quantified, not true efficiencies and would not be passed on to consumers.

69. In the case of pay-TV, given the structure of the market, even if the merger could produce cost savings, it was considered that there were no incentives to pass these savings on to consumers, precisely because of insufficient competitive pressure on the resulting entity.

10. Remedies

70. The Spanish competition authority has considered behavioural remedies in the three audiovisual media mergers, both in the TV market and in the other affected markets of the value chain.

71. In all three mergers, the term of the remedies was extended to the maximum permitted. The monitoring process by the CNMC has proved to be very resource intensive due to the amount of information handled, the constant need to make requests for information and market tests, and the various breaches corroborated (and sanctioned¹¹) by the parties involved.

¹¹ Telecinco/Cuatro: www.cnmc.es/node/345977; Antena 3/La Sexta: www.cnmc.es/node/345986.

10.1. C/0230/10 TELECINCO/CUATRO (free-to-air TV)

72. The behavioural commitments in the Telecinco/Cuatro merger are **intended to limit its commercial autonomy in managing TV advertising and acquiring audiovisual content**, thereby offsetting the competition concerns generated by the merger.

73. A first block of commitments is directly related to the **TV advertising market** and is intended to encourage the real possibility that advertisers may continue to advertise separately on the resulting entity's main TV channels. The maximum size of the TV advertising packages offered by Telecinco are limited to a level adequate to prevent its TV advertising from becoming indispensable for a significant number of advertisers.

- Telecinco may not sell advertising on its two free-to-air TV channels with the highest audience through the same commercial package, with the additional condition that the combined audience of the TV channels included in each commercial package does not exceed 22%.
- Telecinco is not permitted to develop tied-selling policies for marketing its various commercial TV advertising packages to advertisers.
- Telecinco undertakes to terminate its agreements for the joint management of advertising on third-party free-to-air DTT channels and not to sign new agreements of this type.

74. A second block of commitments limits the strengthening of Telecinco in the **free-to-air TV market**, which also indirectly guarantees competition in the TV advertising market. Specifically, it undertakes not to expand its offer of free-to-air TV channels by leasing DTT channels from third-party operators.

75. Finally, a third block of commitments is aimed at offsetting the **vertical effects** derived from strengthening the resulting entity as a demander of **audiovisual content**. It is committed to limiting the duration of its exclusive content acquisition contracts to three years, without including preferential acquisition or extension rights.

10.2. C/0432/12 ANTENA 3/LA SEXTA (free-to-air TV)

76. When setting out the conditions for the **Antena 3/La Sexta** merger, the CNMC took into account a series of circumstances that meant that the merger would lead to reduced competition in markets with a greater scope than the preceding merger, especially in the TV advertising market in Spain.

77. The market situation was different: going from three to two major operators instead of from four to three, resulting in greater bargaining power for both operators regarding advertisers. In addition, the only competitive alternative to Antena 3 and Mediaset (Telecinco and Cuatro) disappeared and there was a risk of collusion as a symmetrical duopoly was created.

78. Consequently, the remedies imposed by the competition authority varied from those imposed on Telecinco/Cuatro, mainly in the area of TV advertising. The first significant difference concerned the **obligation to maintain two separate companies and teams to market advertising for the Antena 3 and La Sexta channels**. The competition authority considered it essential to enforce any other non-tie-in obligation in the marketing of channel blocks.

79. The second significant difference related to the **limitations on TV advertising offers** that Antena 3 could make by bundling several TV channels, which would only be possible when the combined average half-yearly audience of these bundled channels did not exceed 18% (instead of the 22% figure established for Mediaset).

80. However, as mentioned above, the Council of Ministers intervened in the third phase of the merger and modified the obligations imposed by the competition authority, making them more or less equal to those set for Telecinco/Cuatro.

10.3. Joint assessment of remedies in the free-to-air TV sector

81. **The creation of a symmetrical duopoly** limited the effectiveness of the remedies imposed on free-to-air TV operators. However, they systematically failed to comply with these remedies, as the Board's resolutions show. The extension of advertising bundling (the same advertisement broadcast simultaneously on different channels) to La Sexta channels, together with marketing policies of channel bundling and price negotiation formulas, such as the minimum investment quota, worsened the competitive pressure in this market.

82. In view of the above, the CNMC Board urged the Competition Directorate to investigate effective competition in the TV advertising market (case S/DC/0617/17¹²). In 2019, the CNMC sanctioned Mediaset and Atresmedia for anti-competitive practices in the marketing of TV advertising for EUR 77 million.

10.4. C/0612/14 TELEFÓNICA/DTS (pay-TV)

83. Telefónica presented a series of commitments. The most relevant commitments for solving the previous competition problems were in **relation to the wholesale markets for individual audiovisual content and television channels in Spain**:

- Telefónica would make a wholesale offer of premium channels available to other pay-TV operators. Each pay-TV operator could have access to a maximum of 50% of the channels included in the wholesale offer. The prices of the wholesale offer would ensure the replicability of Telefónica's retail offer and prevent margin squeeze situations.
- On the other hand, the exclusive use of the content acquired by Telefónica would be limited to two years and to certain types of broadcasting windows, while in other windows (such as VOD broadcasts of movies and catalogue series) the resulting entity would not be able to acquire content on an exclusive basis. As a general rule, Telefónica may not acquire exclusive broadcasting rights that it will not use.
- In addition, the resulting entity should limit the duration of its content acquisition contracts to three years and waive its first refusal rights for content acquisition.

84. **The commitments for OTT operators are also noteworthy**, as to compete effectively in the pay-TV market, in addition to adequate access to audiovisual content, OTT operators need access to the Internet network of providers operating in Spain. Telefónica is therefore committed to providing an access service to its Internet network in Spain with sufficient capacity and quality assurance to provide OTT pay-TV services by third-party operators to its Internet and mobile customers.

¹² Telecinco/Cuatro: www.cnmc.es/node/345977; Antena 3/La Sexta: www.cnmc.es/node/345986.

85. **The commitments approved in 2015 were extended in 2020 for an additional three years**, with the exception of limitations on Telefónica's acquisition of SVOD content.

11. Conclusions

86. The relevant experience in media mergers accumulated by the CNMC (with two mergers in free-to-air TV and one in pay-TV) has allowed it to gain knowledge of the sector. The three mergers were approved in the second phase, which led to an exhaustive analysis of the markets and the different theories of damage. All three mergers involved remedies (one of them conditions and the other two commitments), which again implies additional lessons learned.

87. This experience and knowledge is useful for the future, both for behavioural analysis (as shown by the CNMC sanctioning resolution in the free-to-air TV sector) and for merger analysis (in these and related markets).