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Conglomerate effects of mergers – Note by Mexico

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm>

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Mexico

Contribution by the Federal Economic Competition Commission (COFECE)

1. Introduction

1. The most recent case analyzed by the Mexican Federal Economic Competition Commission (COFECE for its acronym in Spanish or Commission), that involved conglomerate effects, was the 2019 transaction between *Alpura* and *GEPP* – with possible portfolio effects in the market for beverages.
2. Two years before, in 2017, the Commission assessed the merger between *Essilor* and *Luxottica*, using both conglomerate and portfolio effects, in the market for ophthalmic lenses and frames.
3. Both cases are described below in the contribution.

2. Trends in conglomerate mergers

2.1. Changes in the assessment framework

4. In a limited number of cases the Commission has analyzed conglomerate mergers with possible portfolio effects. The assessment has been conducted using recent economic theory tools and in accordance with the best international practices.

2.2. Sectoral propensity

5. During the few assessments it has conducted, COFECE has not found evidence regarding the possibility of conglomerate effects arising more frequently in certain sectors relative to others.

2.3. External pressure

6. The Commission has never experienced pressures from the general public or policymakers to address any perceived conglomerate concerns.

3. Conglomerate merger assessment

7. The cases specified in the introduction of this contribution are described below.

3.1. GEPP / Alpura (Case file CNT-071-2019)¹

8. *GEPP* and its subsidiary companies manufacture, distribute and commercialize carbonated and flavored beverages in Mexico under the *Pepsico* brands and sub-brands.

¹ Public version of the resolution available at: <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6021/21/4986292.pdf>

9. *Alpura* and its subsidiary companies engage in the production, distribution and commercialization of dairy products, under the *Alpura* brands and sub-brands.

10. The transaction involved the creation of a joint venture that would allow *GEPP* and *Alpura* to sign contracts for:

- exclusive distribution by *GEPP* of *Alpura*'s products for the retail² and home³ channels in Mexico; and
- production of joint developments⁴ and their respective distribution through retail and home channels.

11. As a result of the transaction, *GEPP* would add *Alpura*'s products to its beverages portfolio in the traditional, HORECA⁵ and home channels. Furthermore, according to the notifying parties' statements, *GEPP* and *Alpura* could jointly set prices for the aforesaid products.

12. Both parties offer their products through the traditional and HORECA channels in Mexico, which could potentially lead to portfolio effects between products belonging to *Grupo GEPP* and those of *Alpura*. Therefore, possible portfolio effects were analyzed, and evidence of the parties' market power was gathered, as well as documents (i.e., studies) on the possible existence of products deemed as "must have", which could enable tying and product bundling.

13. Since this was a relatively simple transaction, it did not require an in-depth analysis. Basic tools such as the SSNIP test, market shares analysis and concentration indexes were used. Also, the parties' portfolios were compared with those already being offered by their competitors.

14. The transaction was approved by the Board of Commissioners in November 28th, 2019.

3.2. Essilor / Luxottica (Case file CNT-063-2017)⁶

15. *Essilor* is a French public company, vertically integrated in the production, distribution and commercialization of ophthalmic lenses and, to a lesser extent, ophthalmic frames and sunglasses.

16. *Luxottica* is an Italian public company with global participation in the design, manufacture and distribution of ophthalmic frames and sunglasses.

² The retail channel consists of the following distribution channels: a) traditional channel: which supplies grocery stores, convenience stores and non-established shops; and b) HORECA channel: supplying hotels, restaurants and cafeterias. On this subject, the notifying parties stated that they would only distribute to hotels, restaurants, cafeterias and coffee shops not belonging to a chain.

³ This channel includes direct doorstep sales to final consumers including e-commerce mechanisms developed by *GEPP*.

⁴ Jointly developed products.

⁵ Acronym for the sector of Hotels, Restaurant and Cafeterias.

⁶ Public version of the resolution available at: <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V5781/2/4057488.pdf>

17. In Mexico, both companies concur in the wholesale commercialization of ophthalmic frames and sunglasses. All of their products are imported into Mexico. It is worth noting that no competition harm was identified in this overlap.

18. The deal consisted in stock exchange between *Luxottica* and *Essilor* in order to create a new company: *EssilorLuxottica* – each party holding 50% of stock ownership in this new undertaking, which would combine the parties' businesses worldwide.

19. Some of the elements used in the analysis of the transaction were:

- Evidence on the complementarity of products and services offered by the parties.
- Market shares of all the analyzed markets.
- Identification of competitors.
- Brand identity and awareness studies, particularly for the case of ophthalmic lenses.
- Information on the amounts of investment needed to enter the different markets involved.
- Information about entry barriers.

20. During the analysis for conglomerate and portfolio effects in this merger, no elements were found to determine that the transaction would generate adverse effects on competition. This, in accordance to the following facts:

1. *Essilor* faces competition from important participants in each of the three segments for ophthalmic lenses.⁷ For monofocal lenses, generic products from Asia are the main participants after *Essilor*. Also, for coated ophthalmic lenses, four competitors with shares larger than those of *Essilor* were identified. Lastly, in relation to progressive ophthalmic lenses, even though *Essilor* is the most important seller, there are other important market participants, such as *Carl Zeiss*, *Augen* and *Hoya-Vision Ease*.
2. The reduced relevance of brands for ophthalmic lenses is an indication that advertising is not an entry barrier in these markets.
3. A foreclosure strategy would not be feasible since some players could easily enter the market. Investment to acquire cutters and beveling machines is not significant, along with the possibility of buying finished ophthalmic lenses with the most common prescriptions used by consumers. Furthermore, in Mexico, ophthalmic lenses are not considered medical devices.
4. No legal, commercial, or financing entry barriers were identified.
5. The merged entity would be limited by some of its own clients that have buying power over them and are interested in maintaining the intensity of competition in the supply of both inputs.
6. Brand licensees for *Luxottica*'s ophthalmic lenses will tend to reject the bundling of any product that lead to a decrease in the sales of their frames.

21. Therefore, the transaction was approved by the Board of Commissioners in December 12th, 2017.

⁷ Regarding ophthalmic lenses, several markets were considered in accordance with the vision conditions sought the be corrected.

3.3. Theories of harm

22. The main concern in this type of cases lies in the parties' potential capacity to implement practices such as foreclosures – through tying, bundling or similar conducts.

23. COFECE has not yet identified any conglomerate theories of harm particular to digital sectors.

3.4. Effects on potential competition

24. COFECE has not yet analyzed the relationship between conglomerate effects and the effect on potential competition of a merger.

3.5. Useful empirical or theoretical evidence

25. The Commission's analyses have considered as theoretical evidence the following sources and documents:

- OECD (2002), “Portfolio *Effects in Conglomerate Mergers*”, OECD Journal: Competition Law and Policy, Vol.4/1.
- Massimo Motta (2018), *Política de Competencia. Teoría y Práctica (Competition Policy: Theory and Practice)*, Fondo de Cultura Económica
- “ICN Merger Working Group Teleseminar on Conglomerate Mergers” October 29, 2019, where foreign competition authorities described elements analyzed in mergers with portfolio effects.
- *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal of the European Union, 2008.⁸

26. With respect to the *GEPP-Alpura* merger – statistical information was used for market shares. Additionally, it was noted that there were positive portfolio effects since, as a result of the transaction, *GEPP* could now compete with the companies *Danone* and *Coca-Cola*, who have similar portfolios to those now owned by *GEPP*. *Danone* is an active economic agent in the distribution of dairy and yogurt products, while *Coca-Cola* recently bought *Santa Clara*, a company which is also active in the distribution of said products. It was also useful to have information on brand awareness or the importance of a product (to be considered as a “must have”).

27. With respect to the *Essilor-Luxottica* merger, besides what was stated above, it was useful to collect information from: i) the parties' clients, ii) *Essilor's* competitors and iii) *Luxottica's* retail clients and some of its competitors. Among these, third parties were optical chain stores, department stores and supermarkets. This was useful for the Commission in order to have a better understanding of the market and the possible effect of the merger. Moreover, the information that was useful for the *Essilor & Luxottica* case included:

- Sales in terms of value (in Mexican pesos)
- Market shares
- Imports and tariffs of the products that the parties sell in Mexico

⁸ Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018\(03\)&from=ES](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018(03)&from=ES)

- Operation of the production chain
- Type of brands sold to consumers and competitors and the format under which they are sold (i.e., non-exclusive agreements)
- Information on Ray Ban’s brand identity and awareness to be considered, or not, as a must have in Luxottica’s portfolio
- Advertising costs
- Distribution and commercialization costs
- Investment and time needed for opening a sunglass store (in terms of entry barriers)
- Possibilities to access other suppliers of optical products and their delivery times.

4. Practical challenges

4.1. Notification thresholds (for transactions that may have substantial conglomerate effects)

28. The thresholds established in the Federal Economic Competition Law (LFCE for its acronym in Spanish)⁹ do not depend on the existence of overlaps, market shares or market power. These only depend on the amount of the transaction, assets, income and/or sales transfers and the share capital of the economic agents involved in the transaction

4.2. Sufficiency of information and sources

29. So far, enough evidence has been identified to analyze possible portfolio effects, although empirical evidence, such as that derived from a cross-elasticity analysis could be useful. However, and given the insufficient data in some industries, it has not been possible yet to carry out the aforesaid analysis.

30. Some sources of information useful for the Commission have been internal documents from the notifying parties about, for example, their market shares, brand identity or the importance of a products deemed as “must have”.

31. Another useful source for determining possible conglomerate effects has been third-party information requirements, mainly from the parties’ customers.

5. Efficiencies

32. In Mexico, efficiencies must be presented by the notifying parties. The burden of proof falls upon them.

33. To this day, the Commission has not performed an efficiencies analysis for this type of transactions.

⁹ See article 86 of the LFCE.

Contribution by the Federal Telecommunications Institute (IFT)

6. Introduction

34. This document aims to describe the Mexican legal framework for assessing conglomerate mergers, as well as some experiences related to this matter in the telecommunication and broadcasting sectors, in which the Federal Telecommunications Institute (IFT, for its acronym in Spanish) acts as the exclusive competition authority. It also aims to identify and describe some elements of digital markets that facilitate the existence of conglomerate effects on mergers.

35. Conglomerate mergers can be described as mergers between firms participating in closely related, but not competing or vertically integrated markets. In general, those markets involve complementary products or products that use similar inputs or that have a certain relation (neighboring markets).

36. Traditionally, the concern of competition authorities when assessing conglomerate mergers is if the post-merger firm will have the ability and incentives to foreclose competition, by leveraging a strong market position in one product market across to a complementary or related one, and in that way, implementing tying and bundling strategies.

37. Nowadays, conglomerate effects on mergers may have acquired a new relevance when assessing digital markets, such as OTT (over the top) services, including digital platforms.

38. For the purposes of this document, we will refer to OTT services as digital services provided over the internet, and not over managed facilities, including services that distribute content like Netflix, Spotify and similar ones, and digital platforms that enable the interaction of two or more user groups,¹⁰ among others.

39. The IFT has conducted competition analysis in the provision of digital services over the Internet when assessing mergers notifications procedures, as well in studies and workshops carried out by this competition authority.

40. Broadly speaking, conglomerate mergers in digital markets can potentially raise competition concerns, mainly because of the common elements among digital markets that facilitate the existence of related/neighboring markets, as well as their characteristics, such as market concentration, network effects, economies of scale, and common inputs and costumers. Nevertheless, as in traditional markets, conglomerate effects could result in market efficiencies; therefore the assessment of these mergers should be conducted on a case-by-case basis.

7. Legal framework for conglomerate mergers

41. The Mexican Federal Law of Economic Competition (LFCE, for its acronym in Spanish) empowers the Mexican Competition Authorities¹¹ to analyze horizontal mergers

¹⁰ Digital platforms' main features are: *i*) they serve two or more user groups, *ii*) user groups need each other in some way and cannot capture for themselves the value of their mutual interaction; and *iii*) they depend on the platform's catalyst to facilitate interactions between them that generate value.

¹¹ In Mexico, there are two federal-level competition agencies with legal jurisdiction separated by sectors, the IFT for the telecommunications and broadcasting sectors; and the Federal Economic Competition Commission (COFECE) for the rest of the economy sectors.

in which the effects occur in relevant markets, where the acquired economic agent participates and overlaps its activities with the purchasing economic agent. However, it also enables the analysis of vertical and conglomerate mergers when they involve related markets (neighboring markets in the case of conglomerate mergers), in which the acquired or acquirer economic agent participates.

42. The legal standard for the merger review is settled in articles 58, 59, 61, 63 y 64 of the LFCE. The assessment of related markets regarding vertical and conglomerate mergers are based in the articles 61 and 63 subsections III and IV of the LFCE and the article 6 of the Regulatory Provisions of LFCE for telecommunication and broadcasting sectors (Regulatory Provisions).¹²

43. Article 61 of LFCE establishes the definition of merger and states that the IFT “shall not authorize or, as the case may be, shall investigate and punish the concentrations having as purpose or effect to reduce, damage or prevent competition and free market access as to equal, similar or **substantially related goods or services.**” (Emphasis added).

44. In addition, article 63 subsections III and IV establishes:

“Article 63. In order to establish whether a concentration should be authorized or must be punished in terms provided for in this Law, the following elements shall be considered:

(...)

III. The effects of the concentration in the relevant market as to all other competitors and those demanding such good or service, as well as in other related markets and Economic Agents;

IV. The equity participation of those involved in the concentration in other Economic Agents and participation of other Economic Agents in those involved in the concentration, provided such Economic Agents directly or indirectly participate in the relevant market or in related markets. When such participation is not possible to identify, this circumstance must be fully justified;” (emphasis added).

45. In this context, article 6 of the Regulatory Provisions establishes:

“6. Related markets are those that involve goods, services, or geographic areas other than those that are part of the relevant market, but which influence or are influenced by the competition conditions and free competition prevailing in it.

To determine related markets, the goods or services that are inputs in the production, distribution or production chain may be considered; those that are complementary goods or services and, in general, those economic activities that influence the conditions of competition and free competition of the relevant market, or vice versa.”

46. Considering the above, the LFCE empowers the IFT to determine whether the merger’s purpose or effect is to hinder, harm or impede competition and free market access regarding identical, similar or substantially related products or services, therefore, including horizontal, vertical and conglomerate mergers. If those mergers could hinder,

¹² The LFCE mandates each competition authority in Mexico for the issuance of Regulatory Provisions, independently (these provisions, consists of legal dispositions that regulate the interpretation of the LFCE or give some specifics about certain procedures and details provided by the law). That is the reason why there are specific Regulatory Provisions for the Telecommunications and Broadcasting sectors issued by the IFT. The LFCE’s Regulatory Provisions issued by COFECE, may differ from IFT’s in certain aspects.

harm or impede competition they must be challenged and be subject to structural or behavioral remedies.

47. In addition, the Mexican competition law establishes a mandatory previous notification regime, applying to transactions that surpass certain legal thresholds that are set in the article 86 of the LFCE. The IFT considers that those thresholds are accurate to capture transactions that may have substantial conglomerate effects, because they take into account financial monetary data of assets and capital stock from all the companies involved in the merger within the Mexican territory, as well as the income originated in the domestic territory of the acquired companies. Article 86 of the LFCE states the following:

“Article 86. The following concentrations are to be authorized by the Commission¹³ prior to their occurrence:

When the act or successive acts originating them, independently of the place of execution, directly or indirectly, import into domestic territory an amount exceeding the equivalent to eighteen million times the general daily minimum wage in force in the Federal District;

When the act or successive acts originating them imply the accumulation of thirty-five percent or more of assets or shares of any Economic Agent, whose annual sales originated in domestic territory or assets in domestic territory represent more than the equivalent to eighteen million times the general daily minimum wage in force in the Federal District, or

When the act or successive acts originating them imply the accumulation in domestic territory as to assets or capital stock exceeding that equivalent to eight million four hundred thousand times the general daily minimum wage in force in the Federal District; and two or more Economic Agents are party to such concentration, the annual sales of whom originated in domestic territory or assets in domestic territory, whether jointly or individually, represent more than forty eight million times the general daily minimum wage in force in the Federal District.”

48. The minimum wage in the Federal District,¹⁴ which is mentioned in the article 86, has been changed for a measure that is called “Unit of Measure and Update” (UMA, for its acronym in Spanish). The National Institute of Statistics and Geography (INEGI, for its acronym in Spanish) updates this measure annually. In the year 2020, this unit value has been set at 86.88 Mexican pesos (approximately, 3.53 US dollars); so the lower amount threshold, corresponding to the first part of subsections III of this article, is equivalent to 729.79 million of Mexican pesos (approximately, 29.68 million of US dollars).

49. Furthermore, for those transactions that do not surpass the thresholds mentioned above, the LFCE provides in the same article 86 a voluntary regime to notify mergers. In addition, those transactions, if not notified, can be investigated up to one year after their completion.

¹³ The LFCE refers to both competition authorities as “the Commission”, which also applies to the IFT.

¹⁴ Now, Mexico City.

8. Experience assessing conglomerate mergers in the telecommunications and broadcasting sectors

50. The telecommunications and broadcasting sectors are comprised of a large number of markets, including licensed and non-licensed services, with similar characteristics and functionalities, which use of common inputs and technology. Therefore, in several merger cases it is necessary to assess if the markets, in which the economic agents in the transaction are involved, incorporate substitute services or services belonging to neighboring markets under a conglomerate analysis.

51. Among the licensed services, we identify the following: fixed telephony, mobile telephony, fixed internet access, mobile internet access, pay television, broadcast television and radio. Among the non-licensed services, we identify the following: the licensing of content for its distribution on pay television, broadcast television radio and over the internet; the distribution of content through internet (OTT content distribution services), including through digital platforms; and the sale of advertising times and spaces on pay television, broadcast television, radio, and over OTT platforms,¹⁵ among others.

52. Having considered the foregoing, when assessing a merger, it is necessary to determine whether the products or services offered by the parties involved (without being substitutes), can belong to related/neighboring markets. For example:

- if fixed telephony, fixed internet access and pay television (without being substitutes) may belong to related/neighboring markets, as they use similar inputs, like telecommunications networks, technologies and sales channels;
- if content distribution services and/or sale of advertising times and spaces by operators of pay television, broadcast television and radio may belong to related/neighboring markets to those corresponding to OTT distribution of content or the sale of advertising spaces on OTT platforms, as they can share common users and clients; or
- if the different kind of digital platforms, although they can be differentiated by the activities and the type of users they serve, may belong to related/neighboring markets, as long as they have common users, inputs and technologies.
- Thus, some important items to take into account when approaching a conglomerate analysis are, for example, to identify:
 - the links between two or more products and services in order to determine if those are considered as related/neighboring markets;
 - if any of the parties involved in the transaction could have substantial market power in the relevant market or related markets; and
 - the possible strategies conducted by the parties that may harm or lessen competition.

¹⁵ Recently, the IFT and COFECE claimed jurisdiction over a merger case involving digital platforms in which users are engaged in the sale and purchase of goods and services. This conflict is currently under review by specialized court in competition, broadcasting and telecommunications. The court would issue a decision in order to determine if those kind of digital platforms, are part of the telecommunication sector, or if they belong to other economic sector.

8.1. Televisa-Acir Merger.

53. In the broadcasting sector, in the year 2000, a conglomerate merger was reviewed, in which Grupo Televisa (Televisa) and Grupo Acir Comunicaciones (Acir) participated. The main elements analyzed were the following:

- Televisa, a company that, at that time, participated, among other markets, in the sale of advertising times and spaces in broadcast television and radio, acquired Acir, one of the most important radio broadcasting group in Mexico with presence in a significant number of cities throughout the national territory.
- The authority identified that the transaction could cause harm to competition in the relevant market of sales of advertising spaces in broadcast radio at the local and even national level, on the grounds that Televisa represented the economic group with the largest number of licenses and the largest market share in terms of audience in Mexico in the related market for the sale of advertising spaces on broadcast television. This company could, by means of packaging practices, close the relevant market to competitors and displace them, transferring its high position in the related market to the relevant market.
- The effects mentioned above, were identified because Televisa had a substantial participation in the related/neighborhood market at a local and national level, and in both markets, the relevant and the related one, the parties had an important number of common clients.
- The parties did not provide any proof of efficiency gains that could favorably affect the process of economic competition and free market access, and they only argued administrative and sales savings.

54. In the Televisa-Acir Merger, the authority identified elements indicating conglomerate effects that could cause damage to competition. These elements, among others, were:

- the identification of a relationship between the relevant market and the related market, considering the presence of a significant number of common clients;
- a substantial participation of Televisa in the related market; and
- the capacity and incentives of Televisa to carry out packaging practices and, by using those practices, to close the relevant market to competitors (foreclosure).

55. Those elements lead to the conclusion that, because of the transaction, the process of competition would be a harmed, by a potential displacement of competitors and the transfer of market power from the related market to the relevant market. Consequently, the Televisa-Acir Merger was blocked.

56. The IFT has recently evaluated mergers involving technology economic agents that participate in digital markets. However, in the cases studied, no elements have been identified to carry out a conglomerate analysis; the reasons are described below.

8.2. AT&T-Time Warner Merger.

57. One of those cases is the merger between AT&T-Time Warner, authorized by the IFT in August 2017.¹⁶ In this case, the IFT identified that AT&T, a mobile carrier, had a

¹⁶ The evaluation conducted by the IFT on this merger was focused on the capacity and incentives that the economic agent resulting from the merger would possess to implement foreclosure practices in upstream and downstream

minority interest in Sky Mexico, the leading pay television carrier in Mexico, whose majority shareholder is Televisa. On the other hand, Time Warner was a major provider of audiovisual content and an OTT distributor of audiovisual content.

58. In this regard, despite the fact that AT&T and Time Warner had complementary activities (provision of pay television services and OTT distribution services for audiovisual content), in the assessment of the merger, it was not necessary to evaluate conglomerate effects because:

- AT&T did not control Sky Mexico; therefore, despite the possible existence of common users, it was unlikely they implemented a bundling strategy; and
- the merger had vertical and coordinated effects that would harm competition in the relevant markets of licensing of audiovisual content to pay television providers, and in the related market of pay television service; therefore, conditions were imposed on AT&T's participation on both markets.

8.3. Disney-Fox Merger.

59. Another case is the merger for which The Walt Disney Company acquired some Fox Corporation assets, authorized by the IFT in March 2019.¹⁷ In the merger analysis, the IFT identified that Disney and Fox coincided in ten activities, one of them was licensing of programming channels to pay television providers in different categories. In this activity, Disney and Fox overlapped in the relevant markets corresponding to the categories of children, factual and sports. In this case, in addition to the analysis of horizontal effects, there was the possibility of analyzing conglomerate effects in all the programmatic categories that integrate the licensing of programming channels to pay television providers. However, when assessing this merger, it was not considered necessary to evaluate conglomerate effects, since:

- the market share of Disney and Fox, considering all the programmatic categories, was not substantial;

markets where the parties participated, considering AT&T's minority shareholding in Sky Mexico. The IFT also assessed whether the merger could facilitate the agent's commission of collusive conduct, due to the possibility that after the merger, AT&T could have access to information of Time Warner's competitors' operations. The IFT identified competition risks derived from the vertical integration, and also regarding coordinates effects, therefore remedies were imposed, mainly related to: i) ensure that AT&T/Time Warner replies to all requests for access to its restricted television channels by third-party providers of Pay TV services, offering similar terms and conditions; and ii) independence is maintained, in terms of decision-making and information flow, between Sky Mexico and Time Warner; and between HBO LAG and the rest of AT&T/Time Warner's interest group.

¹⁷ The concentration involved various economic activities, and competition risks (horizontal, vertical and of coordination) were identified in two markets that correspond to the provision and licensing of channels for Pay TV in the sports and factual programmatic categories. The Institute imposed behavioral conditions that counteract these risks in the market of "factual" channels and structural conditions in the sports channels market, through the sale of the Fox Sports business.

The remedies in the market of factual channels includes, maintaining independence in terms of decision-making and the flow of information between Disney/Fox and A&E Group, including the obligation that the provision and licensing of the factual channels of the parties (National Geographic and Nat Geo Wild) be kept separate from the "factual" channels currently sold by A&E Group (A & E, History, H2 and Lifetime). On the other hand, the structural remedy in the market of sports channels was the divestiture or sale of the Fox Sports channels and all the assets of the business.

- the Disney-Fox Merger implied anticompetitive effects in factual and sports categories; and
- conditions were imposed on factual and sports markets, which would avoid possible displacement of competitors and transfer of domain in the other categories.

60. Although in the cases mentioned above, a conglomerate analysis was not performed, the IFT identified certain elements and characteristics of the production and the provision of OTT services, including digital platforms, which made it possible to foresee that a significant number of future cases will require a conglomerate analysis. The common elements and characteristics in these markets give rise to a significant number of related/neighboring markets, and could facilitate the implementation of strategies and allow situations that could cause damage to competition and free market access.

9. Characteristics of Digital Markets (Over The Top Services)

61. OTT services, including digital platforms, use applications (interfaces —mobile applications and websites—), data centers, dedicated lines that permit connectivity to telecommunications networks and Internet, cloud computing and algorithms, among others, as well as an important amount of know-how and skills to employ those resources. All OTT services providers use these elements, and without them, it is impossible to provide them. Therefore, if an economic agent that offers a specific OTT service has obtained a large expertise, this could facilitate the production of another kind of OTT service.

62. Another element employed by OTT services is data, since all of them are intensive in data, meaning that data has an important value to them, because it serves the following purposes:

- It is an input of production that enables a business to improve its service offerings and increase its returns;
- It is a strategic asset that allows an OTT provider to maintain a leading edge over rivals and to limit entry into its market, and
- It is a commodity that the firm could sell to other businesses unable to collect the data themselves.

63. Data can represent a competitive advantage in digital markets due to the creation of feedback loops. For example, OTT providers with large datasets are able to improve services constantly and to make them more targeted for users, while improving its advertising targeting.

64. OTT services are intensive in technology and innovation too. They can develop specialized technical knowledge in data processing, artificial intelligence, including machine learning or deep learning, and in the use of specialized logical-mathematical functions (e.g. algorithms). The utilization of those resources can drive improvements in products or services and expand their activities into new areas.

65. Digital markets have strong network effects and economies of scale, as well as economies of scope.

66. Many digital markets are prone to tipping because of their winner-takes-all or winner-takes-most dynamics. The elements identified that could contribute to this situation are the following: economies of scale; direct and indirect network effects; switching costs; lock-in, and single-homing.

67. As pointed out earlier, services in the telecommunications and broadcasting sectors, particularly digital OTT services, encompass a significant number of markets with:

- similar characteristics and functionalities that allow the existence of a significant number of common costumers with the disposition to consume a bundle of services; and
- the use of common of inputs and technology that, when they are shared to produce different services, enable the existence of economies of scope.

68. In that regard, economic agents in the provision of digital OTT services have high incentives to sale several of them in bundles, creating product ecosystems.

10. Conglomerate Merger Effects in Digital Markets

69. Mergers in digital markets, such as OTT services are prone to exhibit conglomerate effects, which can cause harm to competition, like:

- **Foreclosure.** In digital markets, the existence of strong network effects and economies of scale, as well as tipping elements strengthened by data processing, facilitate market concentration, the emergence of market power, and leverage strategies. Transfer of dominance from one market to another related/neighborhood market is possible by committing practices like tying, bundling, and predatory pricing, or even by obtaining control of inputs and technology of the acquired company. In markets with common costumers, a dominant provider in one of these markets can leverage its customers to the market of the acquired company, tying both services and exploiting large network effects; therefore foreclosing the market of the acquired company to competitors who cannot respond with a similar portfolio of services and cannot obtain comparable network effects.

In addition, the acquisition of a company that participates in a related/neighborhood market could allow an economic agent to obtain control of essential inputs and technology, and exploit economies of scope, by which it could foreclose competition in that market.

- **Products within the same ecosystem.** In digital markets, economic agents seek to expand their activities, through investments or mergers, to the provision of other services belonging to related/neighborhood markets, creating product ecosystems. In mergers, considering some advantages like one-stop shopping, product ecosystems give rise to differentiation when consumers may consider the services involved in the transaction as high-quality, contrary to the different services of the competitors that may be perceived as low-quality, because they are offered individually and not as a portfolio. Therefore, competitors may tend to rise their prices too high, bringing about a decrease in consumer surplus.
- **Reduction in innovation incentives.** An economic agent that acquires another that participate in a related/neighborhood market may lose incentives to innovate, and abandon the project to invest in order to enter in the market of the acquired. In addition, a merger that leads to the acquisition of a company in a related/neighborhood market and facilitate a bundling strategy may rise the entry cost of a start-up, which, in this case, needs to enter not only in the market of the acquired but also in the market of the acquirer. This strategy would deter the entry of the new company, having as a result, a reduction in innovation.

- **Killer acquisitions.** The possible existence of the phenomenon of “killer acquisitions” in conglomerate mergers should not be discarded. Although this phenomenon is commonly raised as a concern in horizontal mergers, this could also be an additional element that competition authorities can take into account when assessing and analyzing digital OTT markets. In conglomerate mergers (considering the existence of an acquiring company that has built a product ecosystem) killer acquisitions could also occur when the target entities (start-ups) participate in markets where the acquiring company does not have market power or when, both the acquiring and the target entities participate in different related/neighboring markets.¹⁸ In these cases, considering the absence of market power of the acquiring entity in one or more of these markets, where the target entity operates, a competition authority could not be able to challenge these kinds of acquisitions by arguing the existence of horizontal effects. Nevertheless, the possibility to raise conglomerate effects concerns, may take place. In such situations, an acquiring entity could have the incentives to purchase any startup just to “kill” their projects and prevent a successful development in any of the markets that comprise the product ecosystem of the acquiring entity or in any other related/neighboring market where the start-ups are involved. The above could have as a result for the acquiring entity the avoidance of successful entrance by potential competitors to the rest of the markets that comprise its products or services portfolio.

In digital OTT services, allowing the emergence of different and several startups could threaten, in the future, the portfolio of an economic agent by different means; one of them could be through forwarding integration of several successful start-ups, including integration caused by mergers. Even a successful start-up in a non-monopolized market by the potential acquirer may have the incentives to enter a different related/neighboring market where the potential acquirer participates, looking to exploit economies of scope, which could jeopardize the future of the entire product ecosystem for the latter. In these cases, rather than having efficiency reasons for seeking a merger, an economic agent that has constructed a product ecosystem may have strong incentives to acquire start-ups with the sole purpose of disappearing the projects that could threaten its portfolio. In that regard, competition authorities could consider evaluating conglomerate effects in cases that implicate the acquisitions of start-ups.

70. The elements identified above should be considered by the IFT to evaluate conglomerate effects in mergers involving digital OTT services, including digital platforms.

71. Nevertheless, when assessing a merger, it is necessary to consider that conglomerate effects could also result in market efficiencies; therefore, the assessment of these kind of mergers should be conducted on a case-by-case basis, considering the rule of reason.

72. The Mexican competition legal framework establishes some criteria that guide the authority when identifying gains in efficiency that may be derived from a merger (including

¹⁸ In cases where an economic agent seeks to acquire a start-up that participates in a service not offered by that acquirer, the common strategy is to integrate the projects developed by the acquired startup into its portfolio and benefit from economies of scope. However, in some specific cases, the potential acquirer may not be interested to develop a service belonging to a related/neighboring market but one outside of its product ecosystem, so this possibility should also be contemplated.

conglomerate mergers). For example, among others, the law identifies as efficiency gains, the following events or conditions:

- Obtaining savings in resources that allow an undertaking to produce the same quantity of the good or service at a lower cost or a greater quantity of them at the same cost, without diminishing their quality;
- Cost reductions by producing two or more goods or services jointly;
- Transferal or development of technology that improves the production or provision of goods or services;
- Production or trading costs reduction, derived from the expansion of infrastructure or a distribution network.

73. Finally, in order to consider the efficiencies above mentioned in its assessment, the parties involved should demonstrate to the authority that the transaction would have the potential to make a net contribution to consumer welfare, outweighing any anticompetitive effects that may be raised.