

Unclassified

English - Or. English

8 November 2023

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

Working Party No. 2 on Competition and Regulation

Competition and Professional Sports – Note by Chile

4 December 2023

This document reproduces a written contribution from Chile submitted for Item 4 of the 76th meeting of Working Party 2 on 4 December 2023.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/competition-and-professional-sports.htm.

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1. The National Economic Prosecutor's Office (hereinafter, “FNE”) has assessed a group of cases related to competition in the organization of sport leagues, allocation of sports broadcasting rights and the provision of sports content. In this submission, we present two cases reviewed by the Antitrust Division and two cases reviewed by the Merger Division.

2. The first case refers to a ruling that accepted the complaint filed by the FNE against the Chilean National Association of Professional Soccer (Asociación Nacional de Fútbol Profesional, hereinafter “ANFP”) for the creation of an artificial barrier to entry consisting in the establishment of an incorporation fee charged to soccer teams promoted to a higher division. A disputed aspect in the trial was the definition of the relevant market, for the purpose of determining the ANFP's market power. It was established that it consisted in all the soccer matches organized by the ANFP, whose demand was characterized as inelastic.

3. Secondly, we will describe a complaint analyzed by the FNE, regarding the allocation of TV broadcasting rights of the 2023 Pan American Games. This allocation, which would be done directly, exclusively and free of charge to the state-owned free-to-air channel, besides being contrary to the principle of competitive neutrality presented other objections, such as the lack of ex-ante delimitation of the process and the use of criteria that would not ensure the widest broadcasting of this sport event.

4. The third case refers to the merger regarding the acquisition of the “Soccer Channel” (‘Canal del Fútbol’ hereinafter, “CDF”) by Turner International Latin America, Inc (hereinafter “Turner”), which was reviewed and approved with remedies by the FNE. The competitive analysis focused on the segments of wholesale provision of pay TV channels and retail provision of pay TV services in which the operation generated a vertical integration, as well as on the importance of CDF's content for pay TV operators, especially the Chilean professional soccer league.

5. Finally, we will address the acquisition of Twenty First Century Fox by the Walt Disney Company, also approved by the FNE with remedies. In this case, the main aspect considered was the effects that the transaction would generate in the wholesale provision of pay TV channels, in particular, the greater bargaining power in relation to live sports channels, where the parties were close competitors.

1. Organization of soccer leagues: Incorporation Fees for promoted teams from third to second division in Chilean soccer (Ruling No. 173/2020 Antitrust Court Confirmed by ruling No. 94.189-2020 Supreme Court)

6. The ANFP is the institution that organizes professional soccer for men and women in Chile. The ANFP is made up of professional soccer teams constituted as joint-stock companies or sports joint-stock companies and has organized men's soccer into three divisions: First, Second and Third Division.

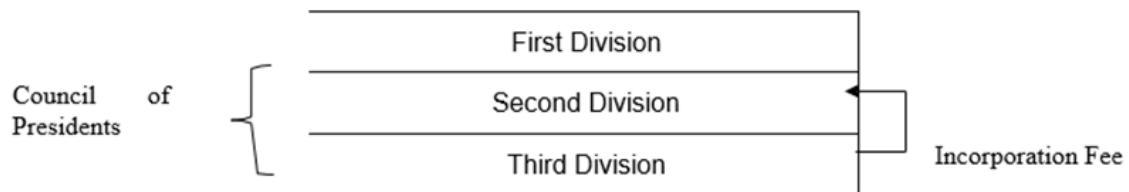
7. The First Division is the most important category and, together with the Second Division, they are the ones who receive all the income from soccer television rights¹. The

¹ The income distribution from sales of television rights is determined by the Board of Directors, where each first division club holds two votes and each second division club, one. The distribution is not

Third Division Teams compete to be promoted to the Second Division, since each year the champion of the Third Division is promoted to the Second Division. The decisions of the ANFP are determined, mainly, by the Council of Presidents, which is made up of the presidents of the First Division and Second Division Teams (33 teams).

8. The ANFP, as of 2014², required teams promoted from the Third Division to the Second Division (hereinafter, "**Promoted Teams**") to pay an 'incorporation fee' (hereinafter, "**Incorporation Fee**") equivalent to 24,000 UF³ (US\$1M app.)

Figure 1. Chilean soccer Divisions and Incorporation Fee



9. In other words, each Promoted Team that won the Third Division, and managed to be promoted to the Second Division, had to pay approximately US\$1M to the ANFP – an amount that is almost the average annual expenditure of Third Division teams on players and coaching staff. Considering this, the Promoted Teams faced a budget constraint that affected their performance⁴.

10. On June 25, 2020, the Antitrust Court (Tribunal de Defensa de la Libre Competencia, hereinafter "**TDLC**") partially accepted the complaint of the FNE and, through Ruling No. 173/2020, sanctioned the ANFP for having breached Chilean antitrust law. According to the TDLC, the ANFP created an artificial barrier that hinders entry to the market or, if it manages to enter, hampers the competitive performance of the entrant.

11. Specifically, the TDLC considered that the Incorporation Fee created a budget constraint for the Promoted Teams. Indeed, in absence of the Incorporation Fee, it was expected that -as a counterfactual scenario- the Promoted Teams would have obtained better results. Thus, probably -if the high Incorporation Fee had not been paid- the newly Promoted Team would end up in a better position in the Second Division or they would have faced a lower probability of relegation. The TDLC took the foregoing into account when determining the applied fine corresponding to approximately US\$2.3M.

public, but according to estimates, in 2020 the three most popular clubs in the first division received 20% of the total income, while the other fifteen teams in this league shared 70% of the incomes. The remaining 10% corresponded to the fifteen second division teams. Third division teams did not receive incomes from this concept, because these matches were not televised.

² Although the requirement was established in 2011, it was only in 2014 that a promoted team had to pay the first installment. Also, originally, the fee was set at 50,000 UF, although no Team was able to pay the full amount.

³ UF means Unidad de Fomento, is an inflation-indexed unit of account, calculated and published by the Central Bank of Chile, equivalent to nearly \$36,000 CLP (45 USD app.).

⁴ As confirmed by the economic literature, those soccer Teams that spend a greater amount of money on their players and coaching staff would intuitively obtain better sport results and, conversely, those Teams whose budget is restricted would obtain worse sport results. The TDLC confirmed this in its decision.

12. On September 6, 2021, the fine was confirmed by the Chilean Supreme Court (hereinafter, “**Supreme Court**”). Although there are several relevant issues, some noteworthy aspects of the TDLC and the Supreme Court decision are the followings:

- **The Antitrust Authorities are competent to review the ANFP's conduct and decisions.** The ANFP claimed that -as an independent entity- it has "governmental autonomy" and, therefore, the Antitrust Authorities do not have jurisdiction to review its policies, such as the Incorporation Fee. However, the TDLC and the Supreme Court stated that all entities (public or private) that carry out an economic activity and may affect competition are subject to administrative and judicial scrutiny.
- **The relevant market is the matches organized by the ANFP.** The TDLC concluded that the relevant market includes all soccer matches organized by the ANFP, offered directly in stadiums or indirectly through radio and television, in which the First Division and Second Division teams of Chilean soccer compete.

According to the Supreme Court, it is important to bear in mind that in this market consumers are loyal "fans" who support a specific team. This fact means that their consumption decision is not likely to change due to slight changes in price or quality, making the demand inelastic. Considering this, the Supreme Court states that it would even be correct to limit the relevant market to the matches in which Second Division teams of Chilean soccer compete, excluding the matches of the First Division.

- **The Council of Presidents of the ANFP has a special duty of diligence in its decisions.** The Supreme Court pointed out that the Council of Presidents of the ANFP has a special duty of diligence in establishing the Incorporation Fee because such fee is an "external constraint" that the First and Second Division teams impose and enforce on the Promoted Teams (and the two groups of teams –those in the First and Second Division as opposed to the Promoted Teams– have different economic interests). In this regard, the Supreme Court stated that this special duty of diligence on the "market that [the ANFP] regulates" was not complied with.

2. Sports broadcasting: allocation of TV broadcasting rights of the 2023 Pan American Games

13. On February 23, 2023, the FNE rejected a complaint filed in December 2022 by a private party, regarding the direct, exclusive, and free allocation of the broadcasting rights to the 2023 Pan American Games and 2023 Parapan American Games (hereinafter, “**Games**”) by the Santiago 2023 Corporation (hereinafter, “**Corporation**”) to Televisión Nacional de Chile (hereinafter, “**TVN**”).

14. According to the complaint, the Corporation, which is in charge of organizing the Games and allocating the TV broadcasting rights to this multi-sport event, justified this decision on the public role of TVN, being a state-owned channel, and on its greater geographic coverage. The complaint also stated that, although the Corporation made an alternative broadcasting proposal to the other free-to-air television channels, this would not be in an official capacity and the content would be limited to categories defined by the Corporation itself. The foregoing could constitute an allocation of relevant rights without a mechanism of competition for the market, which undermines competition.

15. The FNE conducted various proceedings to analyze the complaint, including requests for information from the Corporation and depositions of different industry agents.

16. As a result, it was determined that the Games are the most important multi-sport event to be held in Chile, so having its TV broadcasting rights is of great interest to the agents in the television industry. Likewise, it was also established that the relevant market would consist of the allocation of the TV broadcasting rights to the Games in Chile, where there would be no substitutability and in which the Corporation would hold a monopoly position, with exclusive ownership for their allocation within the country. On the demand side, there are the different free-to-air television channels with national coverage, whose magnitude - based on the evidence gathered - can be measured not only in number of concessions but also in terms of ratings and financial results.

17. Regarding the competitive analysis, the FNE identified that in March 2022 the Corporation carried out a request for information with different interested channels, in which it was assumed that the allocation system would be a bidding process. However, in May 2022, the Corporation decided to contact TVN to know its interest in generating a proposal for the official transmission, which was made by the latter and it referred to a minimum number of hours of broadcasting and commercial obligations that, according to the proceedings, were of great scale.

18. Thus, in September 2022, the Corporation publicly announced its decision to allocate the TV broadcasting rights directly, exclusively, and free of charge to TVN.

19. Notwithstanding the foregoing, the FNE considered that, based on the facts described so far, there were several objectionable aspects from a competitive standpoint. Firstly, the lack of ex-ante delimitation of the allocation process and its requirements, as well as the consideration of TVN's public role which could be contrary to the principle of competitive neutrality. This principle dictates that all enterprises should be provided a level playing field concerning a state's ownership, regulation, or activity in a market, and that undue advantages that may distort competition and selectively benefit some enterprises over others should be avoided⁵.

20. On the other hand, it was also noted that, although TVN has the largest number of concessions, this does not ensure greater coverage at a population level, since the broadcasting of the Games may depend on other factors such as the rating of the channels or other media like streaming platforms.

21. However, new facts later arose that implied that the allocation of TV broadcasting rights was no longer exclusive. Indeed, in view of the FNE intervention and market reactions, and after the alternative proposal that did not succeed with any of the remaining channels, the Corporation offered them in December 2022 the allocation on similar terms to TVN, as long as they matched or improved its offer.

22. This generated interest of these actors, with whom the Corporation began negotiations, that resulted in an agreement with a specific channel (Canal 13), in which the requirements originally established with TVN were relaxed⁶. The Corporation informed the FNE that these requirements would be applied to the negotiations with the other channels and to the agreement already signed with TVN. This situation, therefore,

⁵ OECD (2021), Recommendation of the Council on Competitive Neutrality. Available at: <https://www.oecd.org/mcm/Recommendation%20of%20the%20Council%20on%20Competitive%20Neutrality.pdf>.

⁶ Although this channel matched TVN's offer in the number of broadcasting hours, it agreed with the Corporation to substitute hours on the main signal for more hours of broadcasting on the secondary signal. In any case, it also agreed to broadcast on the main signal a minimum of total hours and a minimum of hours per day. The commercial obligations, on the other hand, were maintained.

constituted a change of conduct that led to the closing of the investigation, because no further proceedings were necessary.

3. Acquisition of Servicios de Televisión Canal del Fútbol Limitada by Turner International Latin America, Inc.⁷

23. On December 14, 2019, the FNE approved with remedies the acquisition agreement through which Turner acquired all the shares of CDF, whose sole owners were the abovementioned ANFP, and ‘Gestión de Televisión Limitada’.

24. Both companies, Turner and CDF (hereinafter, the “**Parties**”), are active in Chile in the wholesale provision of pay TV channels, retail provision of pay TV services, provision of OTT (Over-The-Top) platforms, sale of advertising space on TV channels and the provision of sports content for broadcast TV channels.

25. Firstly, CDF operates mainly in the segments of program and content production, provision of wholesale programs and channels for third-party operators, sale of original programming, commercialization of non-linear content and sale of advertising space. In particular, CDF had exclusive rights for the broadcasting of Chilean professional soccer matches of the tournaments organized by the ANFP.⁸ The Turner corporate group operates in the wholesale programs and channels provision segment through Turner, Home Box Office Inc, Warner Bros. and in the pay TV segment through Direct TV.

26. Regarding the provision of OTT (Over-The-Top) platforms, the sale of advertising space on TV channels and the provision of sports content for broadcast TV channels, the FNE did not identify major concerns, given the low relevance of the Parties in this segment and the existence of multiple competitors in such segments.

27. Thus, the competition analysis focused mainly on the segments of wholesale provision of pay TV channels and retail provision of pay TV services, identifying concerns associated with the vertical integration that would occur between CDF -as a content provider- and DirecTV -as a pay TV operator- and the greater bargaining power in the wholesale provision of pay TV channels that the merged entity would attain, as a result of the integration between CDF and Turner.

28. During the investigation, the relevant product market for the provision of content was not defined, since this definition would not change the conclusions reached. However, the FNE did consider the possible segmentation between basic and premium content, between areas of interest (e.g. sports, children's or entertainment programming) and – specifically in relation to sports content– the segmentation among the broadcast of regular national soccer tournaments and other types of matches, such as friendly or pre-season matches.

29. As a result, it was determined that the live broadcasting of the Chilean professional soccer league could be a relevant market in itself, which would be consistent with comparative rulings and in line with what was pointed out by several industry players during the investigation.

⁷ Adquisición de CDF por parte de Turner International Latin America, Inc. Rol FNE F116-2018.

⁸ As it was mentioned before, ANFP is the institution that organizes professional soccer for men and women in Chile and it is also in charge of the commercialization and broadcasting of all content related to the Chilean professional soccer tournaments and each of the Chilean soccer cups.

30. Regarding the competitive analysis, the FNE assessed the vertical relationship between wholesale provision of pay TV channels and retail provision of pay TV services, with a focus on input foreclosure concerns. The latter, since the operation would generate the possibility that the concentrated entity would worsen the conditions for the provision of CDF content, or totally prevent the distribution of CDF content to DirecTV's rivals.

31. Thus, the FNE assessed the ability and incentives of the merged entity to engage on a vertical foreclosure strategy. Firstly, regarding the ability, it was relevant to consider the importance of CDF content for pay TV operators. In this line, it was established that sports content, and particularly the Chilean professional soccer league, was especially important for pay TV operators' customers. In addition, since CDF has the exclusive rights to broadcast the Chilean professional soccer matches of the tournaments organized by the ANFP, there would be no substitute of equivalent quality and content. Also, potential incentives to increase prices (partial input foreclosure) were quantified by calculating upward pricing pressure indices adapted for vertical mergers (i.e., vertical gross upward pricing pressure indices, also known as "vGUPPIs").⁹ The incentive to refuse to sell (total input foreclosure) was also quantified using the methodology known as vertical arithmetic.¹⁰ The analysis of the incentive to foreclose, given that there was the ability to do so, concluded that the transaction could lead to a substantial lessening of competition through an input foreclosure strategy.

32. Finally, the Parties submitted a proposal of remedies consisting in the subscription of six commitments for a term of 15 years, which was the extension of the license for the broadcasting of the contents produced by ANFP and, therefore, the period in which they would remain under the control of the acquirer. The above, in addition to the incorporation of a review clause that allows the remedies to be reviewed in the future under special circumstances.

33. In detail, the parties offered an absolute prohibition of tied and bundled sales between the CDF content and the Turner channels, which implies that CDF channels shall always be offered independently and not conditioned to the purchase of Turner channels. In addition, they offered an arbitration mechanism if required by the pay TV operator to resolve discrepancies that may arise during negotiations, which would also operate as a dispute resolution mechanism to mitigate the possibility of content foreclosure.

⁹ Moresi, S., & Salop, S. C. (2013). vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers. *Antitrust Law Journal*, 79(1), 185.

¹⁰ This quantitative approach is commonly used by several competition authorities. For example, Baker, J.B., Bykowsky, M., DeGraba, P., La Fontaine, P., Ralph, E., & Sharkey, W. (2011). The year in economics at the FCC, 2010-11: Protecting competition online. *Review of Industrial Organization*, 39(4), 297-309. DGComp (2015), Case N° COMP/M.7194, Liberty Global/Corelio/W & W/De Vijver Media. Federal Communications Commission (2011). Memorandum Opinion and Order. In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket 10-56. January 18.

4. Acquisition of Twenty First Century Fox by The Walt Disney Company¹¹

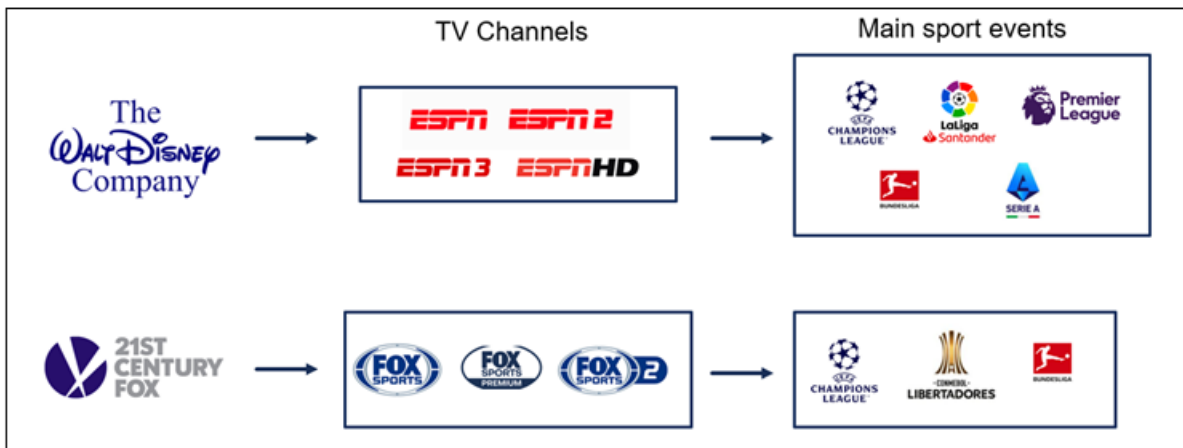
34. In August 2018, the FNE was notified of a merger consisting of the acquisition of Twenty First Century Fox, by The Walt Disney Company (hereinafter, the “Parties”), both companies were active in different segments linked to the communications industry.

35. The analysis in this case focused mainly on the competitive effects that the proposed transaction could generate to the provision of content for retail provision of pay TV services, in view of the increase in bargaining power that the merged entity would obtain by expanding its product portfolio.

36. As in the case described above, the relevant product market for the provision of content was not defined. However, for the competition assessment, the FNE did consider the possible segmentation between basic and premium content, between areas of interest (e.g. sports, children's or entertainment programming) and its relevance to the closeness of competition assessment.

37. The situation of increased bargaining power was particularly relevant in relation to live sports TV channels, a segment in which the Parties provided most of the live international sports content at a national and regional level.

Figure 2. Sports TV channels offered by the Parties



38. The FNE concluded that the Transaction would increase the bargaining power of the merged entity, leading to an increase in prices or a worsening of other commercial conditions.

39. In the closeness of competition assessment, an important aspect for the FNE was the focus that the Parties' channels had on live international soccer. Due to this focus, the Parties were strong competitors during the weekends, where many users have a “zapping” routine, searching for the most attractive content at the specific moment among all the channels that offer a live soccer games schedule. On the other hand, the competition during weekdays was different, since it seemed to be more associated to the user’s preference for specific events (such as the UEFA Champions League, which was broadcasted by both

¹¹ Adquisición de 21CF por parte de Disney. Rol FNE F155-2018.

Parties¹² and the CONMEBOL Libertadores Cup, which was broadcasted exclusively by Fox Sports).

40. In order to mitigate the competition concerns of the transaction, the Parties offered mitigation remedies.

41. Initially, industry players argued that the Parties should have offered a structural remedy, especially with respect to the sports TV channels. Regarding this point, the FNE took into consideration that sports channels are generally licensed at a regional level, for periods of 3 to 5 years, in packages for the entire Latin American or South American continent. Considering this, an eventual divestiture of sports TV channels would need to have a regional scope, which could generate problems for the entities organizing the sports events and for the market of transmission and commercialization of such events. Therefore, it was considered that such a measure might not address the concerns properly and would be difficult to implement.

42. The proposed remedies offered by the Parties consisted basically of 3 main commitments aimed at maintaining the competitive conditions existing prior to the proposed transaction. These commitments offered were: (i) the absolute prohibition of tied and bundled sales between TWDC and 21CF channels¹³; (ii) the prohibition of technical bundling¹⁴; and (iii) the creation of an arbitration body as a dispute resolution mechanism in the negotiation of 21CF or TWDC channel licensing agreements or changes in the supply of live sports content. By separating the offering of TWDC channels from the offering of 21CF channels, the aim was to maintain the negotiating position of each side in the licensing agreements (between the content providers and the pay TV operators).

¹² ESPN and Fox Sports broadcast different matches, except after the semifinals, when it was possible to watch the same matches on both channels.

¹³ This included the obligation to always present the prices and conditions of each group of channels separately and unconditionally.

¹⁴ This included the identification of specific content that had to be in one or another group of channels, including the most relevant sports content (UEFA Champions League, CONMEBOL Libertadores Cup, Spanish La Liga, English Premier League, French Ligue 1, Italian Serie A and German Bundesliga).