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Theories of Harm for Digital Mergers – Note by Mexico

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More documents related to this discussion can be found at
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Federal Economic Competition Commission (COFECE or Commission)

1. Introduction

1. Under the Mexican competition regime, there are no special principles or methods to analyze digital mergers. The elements that the Federal Economic Competition Law (LFCE for its initials in Spanish) provides that must be considered when determining whether a merger should or should not be approved in traditional markets are also used by the Federal Economic Competition Commission (COFECE for its acronym in Spanish, or Commission) when analyzing mergers in digital markets.

2. The following contribution presents a summary of the challenges faced when analyzing mergers in digital markets, the theories of harm used to assess the effects of these transactions in the markets, and some examples of such analysis.

2. Challenges for traditional merger analysis in digital markets

3. Digital markets are characterized by being multi-sided platforms where different groups of consumers with interdependent demands interact. One of the main characteristics of a multi-sided platform is its pricing structure. Since consumer groups are related, prices set by the platform on one side, affect competition on the other side. In this sense, setting a zero or even subsidized price on one side can be a profitable strategy for the platform that does not necessarily translate into competition harm.

4. While traditional merger analysis focuses primarily on measuring the effects of a transaction through possible price increases, for digital mergers a zero or negative price may be observed on any of the sides of the platform; thus, the premise of possible anticompetitive effects becomes difficult to measure due to the complexity of determining a price.

5. Another challenge for traditional merger analysis derives from indirect network effects among the group of users of a platform. If network spillovers are not considered in a digital market, one might make the mistake of concluding that a platform has market power on one of the sides. However, increasing prices on one side of the platform may not be profitable if network spillover effects are positive.

6. Furthermore, traditional merger analysis focuses on the effects of a transaction mainly when the economic agents involved are competitors or when a vertical relation or conglomerate is created. In contrast, digital markets usually involve platforms that provide several complementary products or services that allow platforms to leverage from economies of scale and scope that are generated not only with respect to the provision of said products or services, but also with respect to the use of the common or complementary information generated by users of the platform. For these cases, it is considered that, sometimes, the definition of the relevant market and the determination of market power should be broader, considering the related activities of the complementary goods or services offered or produced by the notifying economic agents.

3. Theories of harm for digital mergers

7. COFECE's analysis has been supported by current literature which has articulated theories of harm for digital markets. In the Commission's experience, these theories capture the particularities of digital markets and allow it to have a solid theoretical framework to assess the competitive effects of a digital merger.

8. Some of the theories of harm that have been introduced in the COFECE's merger analysis are: i) elimination or loss of potential competition, which would originate the elimination of innovation, ii) strategic use of the information to displace competitors, and iii) the creation of an ecosystem that is difficult to replicate. Larger ecosystems can create barriers to entry or competitive advantages that are difficult to overcome. For example, a new entrant may have to compete in multiple markets to attract users on all sides of the platform. This will require not only greater technological capabilities but also greater investments.

9. However, one important challenge is the high burden of proof standards set to the Commission. In the first theory of harm mentioned above, COFECE must prove that the loss of competition resulting from the rise of a competitor would ultimately result in benefits for final consumers.

10. As for the second theory, the creation of an ecosystem, COFECE may face the following challenges: i) it must provide evidence that there is market power in the related markets, ii) there must be a high degree of complementarity and a way to preserve market power for the ecosystem, iii) there may be other economic agents with a different ecosystem that could expand and enter the analyzed market, and iv) the nature of the market is disruptive, therefore, new platforms with a different scope may emerge and become relevant competitors.

4. Digital mergers in Mexico: experiences

11. COFECE has had some significant experiences involving the analysis of digital mergers. Although the cases have been challenging, the Commission has been successful in conducting assessments to determine whether these transactions should be authorized or not. Below are examples of mergers analyzed by COFECE and the challenges faced during their assessment:

4.1. Walmart / Cornershop[1]

12. In 2018, COFECE was notified of the intention of Walmart, the largest chain of retail stores in Mexico, to acquire Cornershop, a digital platform that offers logistical services for the display, purchase and immediate delivery of products offered by retailers through their website or a mobile app. In this case, COFECE's analysis focused on the capacity and incentives that the resulting company could have to displace its competitors.[2]

[1] The public version of the resolution for this case, under file CNT-161-2018 is available, in Spanish, at https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6013/14/4901568.pdf

[2] A case study document with more information on the analysis conducted by COFECE for this merger is available, in Spanish, at /https://www.cofece.mx/wp-content/uploads/2019/08/AnCAs-CornerShop-12agsoto2019.pdf

13. An important aspect of such analysis was the definition of the relevant market; Cornershop offered different services to two groups of users: i) the final consumers that buy and receive products through the platform, and ii) businesses, including different supermarkets and price clubs, that offer, display, and commercialize their products through the app. In this regard, it was determined that this is a two-sided market as it allows the interaction between two groups with different demands using a digital platform.

14. One of the elements taken into consideration for defining the relevant market was the ability to substitute the product and/or service offered by the economic agents. Once it was established that Cornershop is a digital platform that operates in a two-sided market, also known as "*matchmaker*",[3] COFECE considered both sides of the demand, economic agents that currently serve consumers on both sides of the platform (i.e., final consumers and businesses).

15. Another comparison for examining the ability of substitution was made between online stores and the different platforms that offer an immediate purchase and delivery service of products offered by supermarkets and price clubs through a webpage and apps to end users. COFECE, based on the evidence of the file, concluded that at that moment, online stores could not have been considered as reasonable substitutes of these platforms. Additionally, at that time, they did not serve the demand of competing retailers who wish to offer and sell to end users, nor did they offer a comparable service in terms of delivery time of orders to the end consumer.

16. COFECE determined that the product dimension of the relevant market was the logistic services of display, purchase and immediate delivery of products offered by supermarkets and price clubs through websites and apps for mobile devices to end consumers. This dimension had, at the same time, two sides: i) the logistics services to display products through the internet and apps and immediate purchase to retailers (supermarkets and price clubs), and ii) the logistic services of immediate purchase and delivery of products offered by retailers (supermarkets and price clubs) through websites and mobile apps to end users.

17. The geographical dimension of the relevant market, from the consumer's point of view, was circumscribed to the coverage area of the stores through which the platform could provide its services. Conversely, retailers would only be able to offer their products through Cornershop and its competitors in the areas where they had activities: the reach of each supermarket or price club would respond to each platform's algorithm, which could vary depending on the type of store. Thus, the relevant market was defined according to the areas in which Cornershop operated at the time of the notified merger.

18. One of the theories of harm was the strategic use by the resulting company of the information generated and provided to the platform. COFECE observed that the information provided by the consumers on both sides of the platform could represent a barrier to entry. A potential new competitor would have to face the mistrust of supermarkets and price clubs about how the platform would use their information and that of their consumers, as they collect relevant data and prices on customer preferences and consumption patterns, as well as inventories and commercial strategies. Moreover, the lack of trust and the uncertainty about the use that Cornershop could have made of the information generated by the purchase of products through the app in its supermarket stores

[3] These platforms must maintain demand from both groups of consumers in order to exist, since the benefit that one side of the consumers obtains from the platform will depend on the existence of consumer demand from the other side of the platform and vice versa.

and price clubs could not only lead to the resignation of new retailers wanting to join Cornershop, but also to their exit from the platform.

19. Another aspect of the theories of harm analyzed was the need for a critical mass of users to develop a profitable logistics network. The generation of users makes it possible to improve the logistics network derived from the information on consumption patterns. The information obtained by the platform from users, supermarkets and price clubs, allows it to customize the service offered to end users and improve the logistics service. COFECE considered that replicating a network as that of Cornershop required an important investment of time and economic resources, while generating the critical mass of users that would have made a new platform financially viable.

20. Even though the parties submitted remedies, these were deemed as insufficient to avoid possible negative effects on competition. Thus, the Board of Commissioners resolved to block the transaction.

4.2. Despegar / Best Day[4]

21. In 2020, the Commission authorized the acquisition of Best Day by Despegar Corp, owner of Despegar.com, one of the leading travel comparison websites in Latin America. During the analysis of this operation, the Commission focused on assessing the effects on each side of the platform, taking into account the network spillover effects that are generated between the groups of users. First, the Commission analyzed the services offered by the parties and the types of customers to which these were aimed at and concluded that the parties were multi-sided platforms that provided services to different groups of customers (tourism services providers, end users, travel agencies and even other travel comparison websites).

22. Likewise, the Commission found that the network spillover effects in the platform were positive. From this, for each group of customers, COFECE assessed if the operation would generate risks to competition derived from possible horizontal overlaps or vertical integration between the economic agents involved. After a thorough analysis of the market shares of each side of the platform, the merger was authorized since the Commission ruled out any anticompetitive effects.

4.3. Uber / Cornershop[5]

23. Also in 2020, the Commission analyzed a merger between Cornershop and Uber, an ecosystem of platforms that offers intermediation services between private drivers and users (riding) and delivery services for restaurants and supermarkets. While the platforms were not deemed as competitors, the Commission analyzed if the creation of a larger ecosystem could generate, increase, or keep a dominant position over all the verticals.[6] Thus, the analysis implied a review of all sides of each platform with a focus on the users, since indirect positive effects would be transferred to the other sides of the platform. The

[4] The public version of the resolution for this case, under file CNT-057-2020 is available, in Spanish, at https://resoluciones.cofece.mx/CFCResoluciones/docs/Concentraciones/V6061/15/5279476.pdf

[5] A brief article analyzing this merger is available, in Spanish, at https://www.cofece.mx/wp-content/uploads/2021/02/art-Uber-cornershop-03febrero2021.pdf

[6] Verticals is a term to point out the different services offered to users by an ecosystem. In this particular case, verticals were food delivery services, transportation services and groceries delivery services.

Commission concluded that there were other economic agents that exercised competitive pressure on the groceries business, as well as potential competitors that could address the entrance of a newly merged entity. Thus, the Board of Commissioners resolved to authorize the operation since given the dynamism of this sector, blocking the merger would have been counterproductive for the development of the market.

Federal Telecommunications Institute (IFT)

1. Introduction

24. Merger control analysis is per se a complex endeavour, which requires a thorough analysis. The IFT considers, agreeing with previous OECD's research, that digital markets have specific characteristics that could make harder for competition authorities to adequately analyse mergers, as well as to propose and proof Theories of Harm (ToH).

25. In this contribution, the IFT shares (i) a description of the applicable legal framework for the assessment of mergers in Mexico; (ii) a succinct description, according to IFT's experience, regarding the elements that would require an exhaustive analysis in digital merger control and some of which have been considered in the determination of ToHs in digital mergers; and (iii) provides case examples of ToHs analysed in merger cases for digital markets.

2. Legal Framework

26. The IFT is the Mexican competition authority and regulator of the Telecommunications and Broadcasting (T&B) sectors. The applicable legal framework for the assessment of mergers is established in the Federal Economic Competition Law (LFCE, for its Spanish acronym).

27. Article 61 establishes that the IFT shall not authorize mergers which purpose or effect is to hinder, harm or impede competition and free market access regarding equal, similar or substantially related goods or services. Any merger which has those purposes or effects is considered unlawful (article 62).

28. Article 64 provides general criteria to determine whether a merger could be considered unlawful:

- If the merger confers or may confer the merging party, or the acquirer, with substantial market power (SMP), or if it increases or could increase its SMP, by which free market access and economic competition may be hindered, diminished, harmed or impeded.
- If it has or may have the purpose or effect of imposing barriers to entry, impeding other undertakings access to the relevant market, to related markets or to essential facilities or could displace other undertakings.
- If the merger has the purpose or effect of substantially facilitate the merging party to incur in unlawful competition practices. In particular, abuse of dominance (for example, tying, exclusive dealing, margin squeeze, boycott, cross-subsidies, predation, price discrimination, and refusal to deal, article 56) or antitrust cartels.

29. Article 90, paragraph sixth, establishes that the IFT may authorize, object or subject the authorization of merger to certain conditions that are intended to prevent the possible

effects to free market access and economic competition which could result from the notified concentration.

3. Elements for the establishment ToH and challenges in digital market control merger analysis

3.1. Current control merger analysis

30. The IFT has extensive experience in the analysis of mergers in the T&B sectors and has recently analysed mergers in which parties participate or are expected to participate in digital markets.

31. In its experience, the IFT has identified that there are some characteristics of the T&B sectors, that closely relate to those of digital markets. In particular, these are: (i) strong network effects (direct and indirect); (ii) multi-sided markets; (iii) market participants are vertically integrated (usually participate in upstream and downstream markets); (iv) economies of scale and scope; (v) barriers to entry and expansion; (v) the provision of "zero price" services for consumers; (vi) fast evolving markets with substantial technological innovation, among others. These elements have been considered in T&B mergers, as well as in mergers that involve digital markets.

32. IFT's merger experience has shown that in fast evolving markets with substantial technological innovation is harder to establish and proof ToHs, with a reasonable degree of certainty regarding all the potential harms to the markets affected by the transaction.

33. In recent years, conglomerate ToH effects have been more important. In these cases, the IFT has analysed and proof ToHs that consider the compounded effect of the merger. In other words, the focus has been on proving the aggregated and consolidated merger's detrimental effects on competition and consumer's welfare.

34. In this regard, to establish adequate ToHs in merger control the IFT exhaustively considers structural market features and firms' power and conducts. For example, market power, vertical integration and foreclosure incentives; as well as:

- **Economic Interest Group (EIG)**: this implies defining the EIG to which each of the parties belong before the merger. In particular, the IFT assesses who are the natural and legal persons in control of the EIG, which are the undertakings in which they have decisive control or influence, and the economic activities in which they participate. This analysis has helped the IFT to determine whether an EIG does have direct or indirect control or has decisive influence on undertakings that belong to the T&B sectors, and how they participate (e.g. upstream and downstream providers). In particular, in digital mergers this has helped to understand the economic interests of an EIG in the merger. Also, in digital mergers, the IFT considers that this analysis could help in the determination of whether one of the parties does constitute or could be considered as a digital ecosystem, and how the different undertakings constituting a single EIG could have incentives and capacities to hinder, damage or impede competition or free entry access.
- **Economic activities performed by the parties**: in the merger notification, merging parties must inform on all the activities, products and services in which they participate, including those coincident and non-coincident. This information allows the IFT to identify actual and potential matching activities, products and services, between merging parties and to identify whether they have access to certain inputs which can be deemed as relevant for the purposes of providing related

services or products. Hence, they constitute important information to define potential ToHs, and whether they can be considered as horizontal, vertical or conglomerate effects. In recent years, the IFT has identified the prominence to analyse ToHs related to conglomerate effects, concurring with OECD's Roundtable and ICN Report.[7]

- **Barriers to entry and expansion**: in fast evolving markets and with a high level of technological innovation, the most relevant elements that have been considered by the IFT are: (i) the financial costs, the costs of developing alternative channels and limited access to financing, technology or efficient distribution channels; (ii) the amount, indivisibility, and recovery period of the required investments, as well as the absence or limited viability of alternative uses of infrastructure and equipment; (iii) the need to have concessions, licenses, permits or any kind of authorization. The IFT stresses the importance to adequately assess which assets constitute or could become an entry barrier for potential competitors; this is not easy because technological innovation might reduce costs and induce entry. However, the effect of technological evolution on entry cannot be considered without a thorough analysis.

35. For example, new technologies such as cloud computing are necessary for the provision of a wide set of digital services. In this regard, the IFT has analysed how new technologies and participants could reduce or enhance current barriers to entry. For example, in the Equinix/Euro Rowan Joint Venture, for the construction and operation of a data centre in Mexico, it was concluded that the transaction would enhance competition in the relevant market.[8]

36. Also, in media markets, due to the technological innovations, the cost of producing some types of content has decreased (users of video sharing platforms, such as YouTube, Facebook and Instagram, can produce their own content just with a medium quality mobile). Nonetheless, the cost of producing or acquiring licencing rights of certain content –mainly premium content, high budget movies and series, or premiere live sport or music events–, still remains high. In this regard, access to licensing rights (e.g. premium content) might still make harder for competitors to adequately contest for the market. For example, it could give rise to conglomerate effects ToHs, when this content is bundled with other services.

37. In this regard, IFT's expertise has allowed it to understand the economic and technological characteristics of certain inputs that could make them more prone to become bottlenecks.

3.2. Digital mergers, challenges and elements to be considered to degine ToHs

38. The IFT considers that merger control analysis could benefit from some refinement on the ToHs assessed and to explore conglomerate effects more extensively.

39. Among the most important challenges for establishing adequate ToHs in digital markets are: (i) establishing the anticompetitive effects of a particular acquisition within a

[7] OECD (2020). *Roundtable on Conglomerate Effects of Mergers*. Available at: https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf; and ICN (2019). *ICN Conglomerate Mergers Project Report*. Available at: https://www.internationalcompetitionnetwork.org/portfolio/conglomerate-mergers-project-report/.

[8] Available in Spanish at: http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vp010622353.pdf.

digital ecosystem; (ii) assessing the impact of technological innovations and the constant evolution of markets, and access to relevant inputs such as data; and (iii) not fully considering potential effects on related markets and conglomerate effects.

40. The following paragraphs present some aspects that the IFT considers would become more relevant in merger control:

3.2.1. Digital ecosystems, capacity to leverage a substantial position across markets

41. Among the most relevant actors in the digital economy around the world there are companies that facilitate provider-specific ecosystems (e.g. Alphabet, Apple, Meta, Amazon and Microsoft), which participate in Mexico through the provision of different digital services and products.

42. In particular, these actors participate in different stages in the internet ecosystem as well as in several markets. For example:[9] (i) the services they provide may be built around operating systems (OS) (e.g. Google, Apple and Microsoft) or key applications (e.g. Meta), each provider-specific ecosystem consists of a different combination of elements and services which most of the times are tightly integrated; (ii) some have invested increasingly in telecommunication infrastructures, are providing additional services such as virtualised network services, content delivery networks (CDN), cloud computing, etc., and also are actively participating in content production and distribution to final consumers; and (iii) it has been noted that whilst edge participants (e.g. content providers) can provide their services through mobile applications (set by OS providers through application programming interfaces-APIs) and/or web applications,[10] in the first case they are subject to the choices taken by mobile OS providers, in particular concerning technical formats, editorial choices and business models.

43. Hence, given the many markets and services in which a merging digital platform might participate, it would be advisory to further test ToHs related to conglomerate effects (such as tying and bundling) in the relevant markets and in any related market (for example, by establishing the use of common inputs and the relevance of economies scale), and to test their effects on actual and potential competition. For example, this could include to analyse if by conglomerate effects a merging party with a dominant position in one or several markets could reduce interoperability and multi-homing.[11]

44. Also, given that digital platforms can play a dual role of being simultaneously operators of their platforms and sellers of their own products and services in competition

[9] BEREC (2022). *Draft BEREC Report on the ex ante regulation of digital gatekeepers*. Available at: https://www.berec.europa.eu/en/public-consultations/ongoing-public-consultations-and-calls-for-inputs/public-consultation-on-the-draft-berec-report-on-the-internet-ecosystem.

[10] A native application is a piece of software developed to run on a specific underlying platform or operating system. Services provided through the World Wide Web.

[11] For more on this topic, also was consulted: Viktoria H.S.E. Robertson (2022). *Merger review in digital and technology markets: Insights from national case law*. Final report, for the Directorate-General for Competition. Available at: https://competition-policy.ec.europa.eu/system/files/2022-12/kd0422317enn_merger_review_in_digital_and_tech_markets_1.pdf.

with other rival sellers, this could give rise to competition concerns regarding self-preferencing practices.[12]

45. In this regard, the IFT considers that analysing current and prospective economic activities of the merging parties shall be analysed, and competition authorities should ponder whether the merger could entrench or enhance the market power of a digital provider.

3.2.2. The relevance of data

46. The IFT recognises that data has an important value for digital platforms, since it can be used as: (i) an input that allows for improvements in the supply of their services, e.g. improving online advertising targeting and improving its own algorithms; (ii) a strategic asset that enhances advantages over competitors; (iii) as a product, for example in online advertising. Furthermore, data has been considered as a very relevant input for the development and functionality of innovations such as Artificial Intelligence (AI) and Internet of Things (IoT).[13]

47. In this regard, in the establishment of ToHs, it should be analysed whether one of the parties of the merger can have access to specific data (and the characteristics of such data), and if it can be accessed elsewhere (non-rivalry); if it is very unlikely that this data cannot be obtained elsewhere then it should be consider carefully its impact on the merger, i.e. the effect on the competition dynamics of the relevant and related markets. The IFT has not yet assessed a merger where it has explicitly defined a relevant market for data, nor a ToH related to data access, however it does not rule out this possibility in the following years.[14]

48. Additionally, to determine ToHs related to access to data other features that shall be analysed are: (i) **network effects**; (ii) **lack of interoperability** between platforms; and (iii) **lack of multi-homing** and data portability.

4. IFT's merger control experience in digital markets

49. The IFT expects to analyse more mergers related to digital markets in the following years, given their growing importance in the Mexican economy and their close interdependence with telecommunication networks and services.

50. In this context, the IFT has conducted market studies regarding digital markets, especially in online advertising[15] and audio-visual content provision and distribution in traditional and digital platforms.[16] Likewise, in order to prevent practices inhibiting or

[12] Motta, M. (2022). *Self- Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases*. BSE Working Paper, No. 1374. Available at: https://bse.eu/sites/default/files/working_paper_pdfs/1374_0.pdf.

[13] BEREC (2022). *Draft BEREC Report on the ex ante regulation of digital gatekeepers*, p. 22.

[14] In particular, in the Online Advertising market study that was concluded in 2022, the IFT found out that several telecommunications providers participate in different stages for the provision online advertising services.

[15] Available in Spanish at: https://www.ift.org.mx/sites/default/files/contenidogeneral/competencia-economica/metodologiaestudiosdemercadoenmateriadecompetenciaeconomica.pdf.

[16] Available in Spanish at: http://www.ift.org.mx/medios-y-contenidos-audiovisuales/estudios-y-reportes-de-analisis-de-medios-y-contenidos-audiovisuales.

limiting competition and entry, the IFT has monitored and will continue assessing digital markets evolution in the coming years.

51. Regarding mergers and acquisitions, in 2016 and 2018, the IFT analysed two mergers (AT&T/Time Warner[17] and Disney/Fox[18]) whose parties provide services related to OTT distribution of audio-visual content. In these cases, the IFT identified the following relevant markets:

- Provision and licensing of audio-visual contents for its distribution through OTT services; and
- Production of audio-visual content for its distribution through free-to-air TV, pay-TV and OTT services.

52. In both cases, the main concerns arose from possible non-horizontal effects (conglomerate and vertical), such as capacity and incentives for the resulting entity for coordination, foreclosure, and setting barriers to entry.

53. In the acquisition of the Twenty-First Century Fox, Inc., by The Walt Disney Company, the IFT analysed portfolio ToH's effects of the merger, due to the different market in which the merging parties participated and would participate after the merger. In this regard, the IFT addressed the potential harms in each of the relevant markets in which the parties participated, but also considered the compound effect of the merger across markets. In other words, how the integration of several economic activities in different markets could confer the merging entity with a non-contestable market position across them.

54. Notwithstanding, in both cases, the IFT dismissed anti-competitive effects in the digital markets identified either because: i) the market share was less than 3%, ii) the parties did not operate OTT platforms; and/or iii) no significant barriers to entry were identified.

5. Conclusions

55. There are several complexities of *ex ante* merger control analysis, particularly in digital markets, where specific characteristics make it harder for competition authorities to analyse mergers and propose ToH. The IFT has analysed mergers in the T&B sectors, which share several characteristics with digital markets, such as strong network effects, multi-sided markets, vertical integration, important economies of scale and scope, barriers to entry and expansion, the provision of zero price services for consumers, and fast evolving markets with substantial technological innovation. However, the fast pace of innovation makes it harder to establish and prove ToHs in digital markets, especially conglomerate ToH effects that consider the compounded effect of the merger.

56. To establish adequate ToHs in fast-evolving markets, the IFT considers several elements, such as the Economic Interest Group (EIG), economic activities performed by the parties, and barriers to entry. The EIG helps the IFT determine whether an EIG has direct or indirect control or decisive influence on undertakings that belong to the T&B sectors, and how they participate in digital markets. The economic activities performed by

[17] IFT (2017). Acuerdo P/IFT/150817/487. Available in Spanish at: http://apps.ift.org.mx/publicdata/VP_P_IFT_150817_487.pdf.

[18] IFT (2019). Acuerdo P/IFT/110319/122. Available in Spanish at: http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/verpubpift110319122canxuce.pdf.

the parties allow the IFT to identify actual and potential matching activities, products and services, and to define potential ToHs, whether they can be considered horizontal, vertical or conglomerate effects.

57. In recent years, the IFT has identified the prominence of analysing ToHs related to conglomerate effects due to the wide number of economic activities that T&B providers participate in, and that could give rise to competition concerns in mergers. The IFT stresses the relevance of barriers to entry in determining ToHs and whether or not to impose remedies to a certain merger, as they play an important role in the definition of ToHs and can become an entry barrier for potential competitors.

58. Regarding mergers and acquisitions, the IFT analysed two mergers in 2016 and 2018, AT&T/Time Warner and Disney/Fox, whose parties provide audio-visual content to OTT platforms. The main concerns in both cases were possible non-horizontal effects (conglomerate and vertical), such as capacity and incentives for the resulting entity for coordination, foreclosure, and setting barriers to entry. However, the IFT dismissed anti-competitive effects in the digital markets identified in both cases either because the market share was less than 3%, the parties did not operate OTT platforms, and/or no significant barriers to entry were identified.

59. The IFT has monitored and will continue to assess the evolution of digital markets in the coming years to prevent practices inhibiting or limiting competition and entry.