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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Executive Summary --

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EXECUTIVE SUMMARY

By the Secretariat

1. Considering the discussion at the roundtable, the background paper as well as the delegates' and experts' written submissions, several key points emerge:

1. The television and broadcasting sector has been undergoing significant technological and structural changes, which have given consumers access to a great variety of communications and media services. Convergence is changing the way in which consumers use communication services and consume content, as it is available on new platforms and on various wireless portable devices. At the same time, technological change has impacted on regulation and conditions of competition.

2. The penetration of new technologies and the dynamic effects of convergence are changing the way that consumers access and view audiovisual content. Nowadays, it can be provided via multiple platforms: analogue or digital terrestrial broadcasts, satellite, cable or Internet Protocol (IP) and Over-the-Top (OTT) television.

3. A fundamental change affecting traditional broadcasting stems from the migration of networks to IP data transmission. Combined with significant broadband penetration, increases in bandwidth and the proliferation of digital devices, this has enabled different devices to use the same networks and has facilitated the ability of the communication industry to offer new and bundled services. This allows consumers to receive and decode video services across a variety of fixed and mobile devices.

4. Technological developments affect the conditions of competition as they alter: the range and quality of services; the underlying costs; the extent of barriers to entry (new technologies provide new means by which the market is contested); the ability of customers to switch suppliers; and pricing mechanisms (technological developments allow for provision of pay per view services). Therefore, digitization generally reduces barriers to entry.

5. One implication of convergence is the need to ensure a technology neutral approach in the design of regulation. Furthermore, NCAs have to be aware of network neutrality issues and focus on potential forms of network traffic discrimination that may be anticompetitive in specific circumstances: introduction of a 'fast lane' for some services, degradation in the quality of some services or the method chosen to count video consumption towards data cap. Certain countries (Chile, the Netherlands and Slovenia) have developed regulations that reflect a stricter approach towards respecting network neutrality. It can affect competition in TV markets, which is found in a number of cases: KT/Samsung in Korea (2012), Free/Google in France (2013) or Comcast/NBCU in the United States (2009). Further, the substantial competitive pressure coming from online video distributors (OVD) is reflected in certain decisions of some NCAs: Comcast/NBCU (2009), Project Kangaroo (2009) and Newscorp/BSkyB (2012). Therefore, in the future, NCAs should pay a great deal of attention to discrimination in video markets, especially regarding OVDs.

6. Convergence has added further uncertainty to business planning, in particular concerning future demand, the deployment of new technologies, the choice of a profitable business model or potential

sources of competitive products. These uncertainties also create dilemmas for competition regulators. On the one hand, when market circumstances are difficult to assess, intervention may rule out an otherwise desirable market development. On the other hand, the potential for innovation means that it is crucial to keep opportunities open for future competition to develop. For regulators this represents a reason to be cautious, because regulatory ignorance is considerable in the presence of uncertainty generated by the current forms of convergence. However, some regulatory risks are unavoidable and a policy of non-intervention can lead to the rapid emergence of new forms of market power. Professor Fels suggested that the paradigm of sequential innovation might serve as a source of guidance in shaping the regulatory policy, with a high priority going to ensuring that new generations of supply can displace the existing generation.

7. Finally, convergence has led to a realignment of the boundaries between telecommunication and broadcasting sectors. Since converging services use the same access infrastructures, it might also be necessary to combine the legal framework so as to promote efficient decision-making and minimise possibilities for arbitrage and forum shopping. Some countries plan to integrate the dual broadcasting regulations into a single comprehensive act on broadcasting and telecommunications (*e.g.* Korea).

2. While technological evolution and the emergence of new products and services have rendered media markets more competitive, some developments in the television and broadcasting market create challenges for competition policy.

8. Product market definition in television and broadcasting has become a serious challenge due to technological changes and convergence. To properly define the relevant market, NCAs must have a clear understanding of demand and supply side substitutions along the entire value chain. The market analysis must also take into account the different variables specific to audiovisual products and service markets, like high fixed costs, low marginal costs, bundling, non-price competition, two-sided or multi-sided nature of markets, vertical integration or rapid technological development. Convergence has led to situations of triple play, with telecommunications, cable TV and the Internet, or even quadruple play, with telecommunications, cable TV, Internet and mobile industry. Although market definitions will likely differ across jurisdictions and among individual markets, on a general level a wholesale market for content, a wholesale access market to the infrastructure and a retail market can be identified. A narrower market definition can be based on the type of: broadcaster, platform, pay TV services or premium content. Historically, different types of media (TV, radio, Internet or press) were viewed as separate product markets, but convergence has forced a number of NCAs to adopt a broader market definition (*e.g.* CME/Balkan News Corporation and TV Europe in Bulgaria). Similarly, representatives of the industry favour the adoption of a more inclusive product market definition.

9. Even though convergence and technological changes have lowered barriers to entry, there are still significant challenges that may restrict market access. The doctrine gives a non-exhaustive list of examples: governmental policy, the presence of dominant broadcasters, access to content, audience behaviour, consumer costs or capital requirements.

10. Governmental policy (*e.g.* regulation or administrative practices) may restrict market access. Regulatory protectionism takes various forms and may be based on economic, social, cultural or technical premises. An example of this would be the granting of a broadcasting license with a limited radius (*e.g.* Zambia). Hence, the regulation of market access should be clear, transparent and non-discriminatory. Moreover, in many markets the state is directly involved in TV broadcasting through ownership or funding of TV stations. Such state-owned channels can significantly distort competition, erect barriers to entry or harm private operators. The presence of public operators can also provide incentives for regulators to discriminate against private parties to protect the interest of the former. In many jurisdictions, free-to-air and pay TV services are direct competitors. Therefore, the dominance or expansion of public free-to-air broadcasters might increase barriers to entry for pay TV operators.

11. Access to transmission facilities can still pose a challenge. Although digitalisation has significantly reduced barriers in access to transmission facilities, competition concerns have not ceased to exist. For instance, a regulatory decision to limit the distribution of DTT signal to only one technology may prevent TV broadcasters from changing network operators or making use of other transmission technologies, and deprive third party network operators of opportunities that the digital switchover provides (*e.g.* Astra/Abertis in Spain).

12. Access to premium content is a serious bottleneck and a source of market power. In particular, premium sport events (*e.g.* Olympic Games or football matches) and new releases of movies, which have no substitutes, are essential to the successful functioning of pay TV providers. Barriers to accessing content can arise from the integration of content owners and broadcasters, exclusive contractual arrangements or from vertical foreclosures by a dominant firm. Premium content may also have an impact on competition in other non-TV markets. For instance, in triple or quadruple play markets, content can increase the attractiveness of the package. Market structure analysis is essential for NCAs to address challenges relating to access to content. A key issue is that a downstream broadcasting service provider may be able to leverage its market position to gain power in an upstream market for content. This upstream buyer's power would enable the exercise of additional market power in the downstream market. In the scenario of a competitive downstream market, the structure of the upstream market has an important impact on market outcomes. NCAs may be most concerned when a merger between a downstream broadcaster and a provider of premium content threatens the availability of that content to competing broadcasters. This depends on the elasticity of supply of competing content. The analysis undertaken by Professor Fels shows that competition concerns in content markets cannot be ruled out, but any assessment of the likelihood of those issues arising depends on a complex, and often counterintuitive, analysis of market structure and conduct in both the upstream and downstream market.

13. Moreover, the exclusive content strategy can lead to its fragmentation across platforms. To address this problem, some countries (*e.g.* Singapore) have imposed on subscription TV licensees a statutory obligation to cross-carry the exclusive content on the other subscription TV licensee's platform in its entirety and in an unmodified and unedited form. Specific challenges can be also identified for acquiring content by non-linear TV services (*e.g.* CanalSat/TPS in France). Finally, in some countries (*e.g.* Egypt) piracy has decreased the value of the premium content.

14. Vertical integration across the functions necessary to provide retail pay TV services has also been of significant concern to regulators and NCAs (*e.g.* Comcast/NBCU). Competition issues potentially arising from vertical integration include: refusals to supply essential inputs to rival downstream firms, margin squeezes, raising rivals' costs, exclusivity deals or monopsony in content acquisition.

3. Competition authorities have become more active in launching policy interventions in television and broadcasting markets. In some cases these also involved a consideration of public interest criteria other than competition concerns. Economic and non-economic objectives are often intertwined. This raises questions regarding division of competences between NCAs and sectoral authorities, as well as the model for their cooperation.

15. Rapid technological changes and convergence enable the provision of triple or quadruple play services, which increases risks of overlapping regulatory jurisdictions. In particular, competition analysis in the TV and broadcasting sector may involve sectoral regulators, like telecommunications regulator, that often subsume competition issues into a broader analysis of public interests. On the other hand, NCAs may be instructed to look beyond competition policy and consider non-economic factors, which increases potential for poor quality decisions. That is why NCAs should not introduce non-competition concerns in reviewing TV broadcasting operations. Such public interests should be addressed by a sectoral authority. Likewise, sectoral authorities should not take the lead in conducting a competition analysis. The

simultaneous application to the same transaction of a competition paradigm and public interest concerns by separate agencies can lead to contradictory or overly complex outcomes. Further, this deprives businesses of clear guidance. Submissions to the roundtable provided examples of good practices on institutional cooperation in this area (*e.g.* decision in Comcast/ NBCU). Moreover, some countries have adopted more or less formal agreements, which prescribe cooperation procedures.