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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE

Global Forum on Competition

COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Summary of Discussion --

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SUMMARY OF DISCUSSION

By the Secretariat

1. General introduction to competition issues in television and broadcasting.

- 1. The **Chair**, Ashok Chawla, *Chairperson of the Competition Commission of India*, opened the Roundtable discussion on competition issues in television (TV) and broadcasting and thanked delegates for the contributions received by the Secretariat. The Chair presented four expert panellists: Agustín Díaz-Pinés from the OECD Directorate for Science, Technology and Industry; Professor Allan Fels, Professor of Government and Director International Advanced Leadership Programs, Australia and New Zealand School of Government; David Hyman, General Counsel at Netflix; and Christophe Roy, Deputy General Counsel, Distribution and Competition, at the Canal+ Group.
- 2. The Chair introduced the three specific themes to be addressed during the Roundtable: first, convergence and its impact on barriers to entry and regulation; second, competition policy challenges in TV and broadcasting; and third, additional challenges in TV and broadcasting and responses of national competition authorities (NCAs). The Chair then gave the floor to Gregory Bounds, co-author of the Secretariat background paper.
- 3. First, **Gregory Bounds** noted that ensuring widespread access to broadcasting services may not only reduce the digital divide, but it may also help foster development and alleviate poverty. Next, Mr Bounds underlined that convergence has become central for competition issues in TV and broadcasting. It has changed the ways in which consumers access broadcasting content, as the latter is increasingly available over the Internet and on wireless portable devices. The effects of convergence are being felt in markets around the world, but to differing degrees. The background paper puts forward that technological evolution and the emergence of new products and services have increased the opportunities for competition.
- 4. Mr Bounds observed that numerous submissions to the Roundtable demonstrate that some constraints on competition remain in TV broadcasting, and that they vary between geographic markets. Most importantly, access to premium content has become a bottleneck in the broadcasting market. This problem concerns content that is time critical, for which there are no substitutes, and content that is demanded by a mass audience, for which traditional broadcasting technologies have a competitive advantage. In the first place, Mr Bounds referred to sport events, such as the FIFA World Cup or the Olympic Games. Second, first releases of blockbuster Hollywood movies also fit these criteria.
- 5. Finally, Mr Bounds explained that governmental policy might lead to distortions of competition in the broadcasting market. Regulatory or administrative measures that pursue concerns in the national interest or take into account economic as well as cultural and social factors might affect the level of competition.

2. Convergence and its impact on barriers to entry and regulation.

- 6. The **Chair** opened the first section of the Roundtable and gave the floor to Agustín Díaz-Pinés who discussed the issue of convergence in TV and video markets.
- 7. **Mr Díaz-Pinés** began his intervention by noting that convergence is a global phenomenon that takes place at a different pace in different countries. The main driver towards convergence is the roll out of the broadband and the gradual increase of its speed. Mr Díaz-Pinés observed that it enhances competition between traditional broadcasters, either private or public, and new players that operate only in the Internet. Further, convergence has an impact on the proliferation of devices that are used to watch video and TV services, like tablets, smart phones or computers.
- 8. First, Mr Díaz-Pinés discussed the issue of network neutrality. With regard to the subject of the intervention, network neutrality can be defined as when the Internet does not favour one application (e.g. the world wide web) over others (e.g. email). However, there are several types of discrimination that may impinge on network neutrality, like: 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 caps. The OECD's stance on traffic prioritisation highlights competition, especially among Internet service providers, and transparency. In practice, network neutrality can affect competition in TV markets, which is seen in several cases: KT/Samsung in Korea (2012), Free/Google in France (2013) or Comcast/NBCU (2009). In addition, some countries (Chile, the Netherlands and Slovenia) have developed regulations that reflect a stricter approach towards respecting network neutrality. Mr Díaz-Pinés explained that a related issue is the Internet interconnection and indicated that the current model functions properly by producing lower prices and increased competition, even though it is an unregulated market. Finally, substantial competitive pressure coming from online video providers (OVD) has been observed recently. This 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 network neutrality in video markets, especially regarding OVDs.
- 9. Next, Mr Díaz-Pinés introduced the problem of vertical integration in TV and video markets and noted that there are several vertically integrated firms, *inter alia* in Brazil, France, Mexico and the United States (the US). Among the many issues that arise from vertical integration in this sector, Mr Díaz-Pinés pointed to the foreclosure of competing content providers, the foreclosure of channels to downstream competitors and the exclusivity deals or monopsony in content acquisition, in particular for sports and movies. Specific challenges can be also identified for acquiring content for DSL and OVD. Finally, in some cases it has proven difficult to monitor commitments made by merging entities (*e.g.* CanalSat/TPS France 2006).
- 10. Third, Mr Díaz-Pinés referred to bundling issues. The 2011 OECD paper on "Broadband Bundling: Trends and Policy Implications" concluded that the benefits of bundling include: (i) price reductions for video, voice or data services; (ii) subsidization by consumer surplus of less valued services; and (iii) unified billing and customer care. The challenges of bundling concern consumer lock in or obligations to purchase services that a customer may not value. Therefore, the competition implications of bundling should be carefully assessed.
- 11. Finally, Mr Díaz-Pinés addressed the issue of the institutional framework and posed the question of whether institutions should correspond with converging technology. Within this subject there are a number of questions that require further analysis: the role of sectoral regulation versus competition law, the unification of telecommunications and media regulators (*e.g.* Republic of South Africa), technology neutral regulation and content versus infrastructure regulation. Mr Díaz-Pinés concluded by saying that, in an ideal world, convergent and technology neutral regulation should be the rule.

- 12. The **Chair** thanked the speaker for the intervention and invited Professor Allan Fels to present his paper concerning competition issues in broadcasting and Internet content.
- 13. **Professor Fels** started his contribution by observing that market power over the physical infrastructure used to supply programming to end users has traditionally been of concern to regulators. However, the focus of NCAs and regulators has increasingly turned to content supply and how the sale and distribution of content affects competition in downstream markets. Examples include decision by the Competition Commission in the United Kingdom (the UK) on Sky Television and decision of the Australian Competition and Consumer Commission on the acquisition by Seven of Consolidated Media Holdings.
- 14. Professor Fels indicated that vertical integration across the functions necessary to provide retail pay TV services has also been of significant concern to regulators and NCAs. Functions necessary for the supply of retail pay TV include: the production of content, the supplying of programming, the broadcasting of programming and the use of the physical infrastructure for disseminating programming (cable networks, DSL networks, satellite facilities, etc). Potential competition issues arising from vertical integration include: refusals to supply essential inputs to rival downstream firms, margin squeezes, raising rivals' costs or other discriminatory practices. A recent example of where an NCA identified vertical integration problems concerns Comcast acquisition of NBC Universal in the US, which was approved subject to conditions.
- 15. Second, Professor Fels moved on to discuss how technology trends affect competition in the broadcasting markets. Technological developments 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 (digitization allows for provision of pay per view services). Therefore, digitization generally reduces barriers to entry.
- 16. Among the economic considerations of competition in broadcasting, Professor Fels underlined that market structure analysis is critical for NCAs. 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. Hence, it would be able to corner an upstream market for content and 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, it turns out that the structure of the upstream market has an important impact on market outcomes. When upstream markets are structurally competitive and supply is elastic, then it is impossible to corner upstream output. Alternatively, if upstream supply is competitive but less responsive to price, then a downstream firm must pay a high price to corner the market. Finally, if upstream supply is monopolized it is very difficult for a downstream firm to profitably corner all output.
- 17. Professor Fels observed that NCAs are 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. Where that supply is elastic, it is unlikely that it would be regarded as premium or "must have" but, even if the competing supply is inelastic, it does not follow that it is profitable for the merged entity to refuse to supply downstream competitors. Rather, it depends on the loss of profits from foregone sales to downstream competitors, compared to the increased profits from greater sales in the downstream market. 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 markets.
- 18. Further, a broader set of concerns arises from the fact that the markets at issue are being reshaped by rapid technological change, which allows the delivery of multiple communications services through

multiple technologies using common, or converged, digital platforms. Professor Fels explained that a major impact that the convergence process and the associated technological changes have had, and will continue to have, is the dramatic level of uncertainty it has introduced into business planning. Thus, service providers face at least four types of uncertainties: (i) demand uncertainty; (ii) deployment of new technologies; (iii) whether, and to what extent, a business model for a particular service might be profitable; and (iv) potential sources of competitive products. Furthermore, there is deep uncertainty as to where profit opportunities lie in the emerging, but as yet poorly understood, markets.

- Finally, Professor Fels highlighted that these uncertainties create dilemmas for competition regulators. On the one hand, the inherent uncertainty can make intervention dangerous, both as market circumstances are difficult to assess and as intervention may rule out otherwise desirable market development. On the other hand, the potential for innovation means it is crucial to keep opportunities open for future competition to develop. Therefore, Professor Fels advised that, generally speaking, this should cause regulators to be cautious, because regulatory ignorance is considerable in the presence of the 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. In considering how this might be done, Professor Fels referred to the paradigm of sequential innovation, in which market change occurs through relatively abrupt shifts from one form of supply to another. Therefore, Professor Fels suggested that competition regulators should prioritise ensuring that this process can continue, so that new generations of supply can displace the existing generation. Hence, NCAs should be less concerned about ensuring competition within an existing broadcasting platform so long as new platforms can displace it. In practice it will not be an easy line to draw, since an exclusive content agreement may both undermine existing competitors and deter new competitors and types of supply from emerging. However, the greater the extent to which the exclusivity is specific to a particular, narrowly defined, type of platform, the lower that risk is. Professor Fels concluded by stating that striking the right balance will undoubtedly be challenging for competition regulators, and at times frustrating for market participants, in developed and developing countries alike.
- 20. The **Chair** thanked for the intervention and invited panellists to make comments regarding Professor Fels' contribution.
- 21. **David Hyman** agreed that future technological changes are difficult to predict, which implies a need for a more cautious regulatory approach.
- 22. **Christophe Roy** acknowledged that the regulatory approach and decisional practice of NCAs should take into account both technological changes and the fact that the sector is evolving very quickly.
- 23. The **Chair** opened the floor to country contributions and invited Zambia to explain its experience with barriers to entry.
- 24. The delegate from **Zambia** first noted that entry and expansion barriers can be regulatory in nature. For instance, before 2002, radio and TV licence conditions provided for a small broadcasting radius. Most radio station licensees were restricted to a radius of 150 kilometres. The second barrier to entry might concern the market power and advantage of an incumbent player. Next, high investment costs, particularly in the case of TV, regarding infrastructure, technology or costs of digital migration constitute a significant barrier in Zambia. Fourth, the initial distribution infrastructure may also be a source of concern. Finally, the delegate pointed to negative experiences of consumers with new entrants and noted that for this reason they are reluctant to switch to another new player in the market.

- 25. The **Chair** introduced the contribution from Latvia and noted that it has a very specific example of a regulatory barrier where the regulator prefers a single terrestrial operator model even though the NCA's report favoured a multiple operator model.
- 26. The delegate from **Latvia** explained that amendments to the sectoral law were initiated in 2012. In the first reading, the draft amendments proposed that instead of one terrestrial operator, there should be two or more operators. The report from the Competition Council of Latvia established that, under some conditions, the model with several operators was more pro-competitive. Ultimately, the Parliament supported the model with one terrestrial operator, which is to be selected by a tendering procedure. The delegate noted that the state would have to make significant additional investments in purchasing the relevant equipment to create competition within the terrestrial platform. Further, the benefits from competition within terrestrial platforms are limited since every operator can offer a maximum of 40 channels. The delegate concluded that, in light of those arguments, the benefits from such competition would not be significant.
- 27. The **Chair** observed that the contribution from Singapore indicates that barriers to entry can arise from content fragmentation.
- 28. The delegate from **Singapore** pointed out that, even though the pay TV market is liberalized, access to content constitutes a barrier to entry. This is because licensees tend to adopt an exclusive content strategy. This has led to a high level of content fragmentation across the two nationwide platforms only seven channels were common across those platforms. Content fragmentation brought about increased inconvenience and attendant costs for consumers, as well as creating significant barriers to entry. Furthermore, the attention and resources of subscription TV licensees were diverted from other aspects of competition, such as service and content innovation.
- 29. To rectify the situation, Cross-Carriage Measure was introduced in 2010. Under this measure, a subscription TV licensee that has acquired exclusive content would need to ensure that it is cross-carried on the other subscription TV licensee's platform in its entirety and in an unmodified and unedited form, and that it is made available at the same price, terms and conditions to any subscriber. The measure does not require the subscription TV licensees to share the content, and the contractual relationship remains between the subscription TV licensee with the exclusive rights and the consumer. The other subscription TV licensee is only required to provide its platform to cross-carry the content to the consumer. Since the introduction of the measure, more than fifty channels have become available to consumers across multiple retailer platforms, there are new subscription options from the subscription TV licensees and the nationwide licensees have introduced service differentiation and innovation as more and more content is becoming non-exclusive.
- 30. The **Chair** invited Ukraine to share its experience on the shift towards digital TV.
- 31. The delegate from **Ukraine** stressed that the major concern for digitization lies in the rules governing access to residential and non-residential facilities for the development of telecommunication networks. The current situation in this area (high tariffs, specific rules of access) creates unreasonable barriers for network operators. To solve the problem, a draft law has been proposed on the joint use of infrastructure elements of residential and non-residential facilities, which should settle issues that arise between economic entities, operators, telecommunication providers, local authorities and owners of existing infrastructure.
- 32. The **Chair** turned to the contribution of the European Union (the EU) to explain the issue of State aid and digital switchover and to clarify potential competition problems with respect to the assignment of the digital dividend.

- 33. The representative of the **European Commission** (the Commission) remarked that the digital switchover offers significant advantages and carries some risks. The transition from analogue terrestrial broadcasting to digital terrestrial television (DTT) broadcasting by 2012 constituted one of the EU's policy objectives. The mandate of the EU allows it to take certain actions in this respect.
- 34. First, with regard to access to spectrum, EU Member States are bound by the principles set out in the Competition, Authorisation and Framework Directives when assigning DTT spectrum. These rules require, among other stipulations, that spectrum be allocated on the basis of open, transparent, objective, non-discriminatory and proportionate criteria, without prejudice to specific criteria and procedures aimed at pursuing general interest objectives. On this basis, the Commission carried out cases against certain member states, notably Italy, France and Bulgaria. Second, the Commission controls State aid to broadcasting and digital switchover. With regard to the latter, apart from State aid specific rules, the Commission verifies the technological neutrality of the aided project. The aim is to ensure a level playing field between different transmission platforms, such as terrestrial, cable and satellite. The review by the Commission concerns aid, both direct and indirect, to consumers and to broadcasters. The delegate concluded that, since the digital switchover is coming to an end, the next question should be on the prospective of free-to-air DTT versus satellite or cable TV. Second, the delegate questioned what the future holds for DTT in light of the development of high speed Internet.
- 35. The **Chair** introduced the contribution of France and asked the delegate to explain the competitive potential of the pay TV segment in light of the emergence of non-linear TV services.
- 36. The delegate from **France** referred to the decision of the Autorité de la concurrence (Autorité) concerning the acquisition of TPS and CanalSatellite by Vivendi group and Canal Plus Group (GCP), and indicated that in this case the Autorité dealt with the issue of competitive pressure of non-linear services on traditional pay TV. The delegate explained that such services may take the form of pay-per-view or video-on-demand (VOD). In the case at hand, the operation involved grouping of the pay TV activities of TPS and GCP in other words, the two satellite bundles of CanalSat and TPS, Canal+ and the thematic channels of Multithématiques within Canal+ France. The merger was allowed in 2006, but since it led to a quasi monopoly, the authorisation was subject to the implementation of fifty-nine conditions. Then, in 2011, the Autorité found that Vivendi and GCP were in breach of ten conditions, which were imposed to remedy the competition restrictions resulting from the merger. Consequently, the Autorité withdrew its authorisation and ordered parties to at least return to their status prior to the merger and to notify the operation again.
- 37. In 2012, based on the new notification, the Autorité agreed to the merger, but subject to fulfilment of additional conditions. The delegate indicated that the new decision had to examine evolution in the markets concerned, such as the appearance of non-linear services. The Autorité found that VOD and subscription video-on-demand (SVOD) were still not developed. In particular, VOD and SVOD services were predominantly provided by pay TV operators and offered in conjunction with traditional pay TV, with over-the-top (OTT) services representing 15% of consumption. The reason for this was twofold. First, some French rules concerning broadcasting of movies may constitute a barrier to entry. New films can be proposed in VOD from four to twelve months after their premiere in cinemas, while in SVOD they can be offered after thirty-six months from their first screening. Further, VOD and SVOD operators are obliged, like traditional pay TVs, to provide a financial contribution to French cinematography and to offer a specific percentage of French movies. The second issue concerned the Canal+ position in the acquisition markets and the substantial size of its movies database. The Autorité noted that Canal+ had a considerable advantage in the acquisition markets, which could constitute leverage to its VOD and SVOD services. The Autorité used injunctions to ensure that the entity resulting from the merger does not neutralise the competitive potential created by non-linear TV services.

- 38. The **Chair** moved the discussion on to the need for legal reform in the context of convergence and inquired whether a single comprehensive act on broadcasting and telecommunication is the right solution. The Chair ceded the floor to the delegate from Korea.
- 39. The delegate from **Korea** pointed out that national broadcasting laws have been slow to respond to convergence. Korea has two independent sets of regulations one for terrestrial, cable and satellite broadcasting and another for internet protocol (IP) TV. The delegate remarked that this has resulted in potential problems in terms of disproportionate regulations between services and a lack of room for the adoption of new converged services enhanced by cutting edge technologies. Such inequality between incumbent players and newcomers holds back industry growth. Hence, Korea plans to integrate the dual broadcasting regulations into a single comprehensive act on broadcasting and telecommunications.

3. Competition policy challenges in television and broadcasting.

- 40. The **Chair** introduced the second subject of the Roundtable and gave the floor to Christophe Roy to provide a business perspective.
- 41. **Mr Roy** began his intervention by outlining some basic facts about Canal+. It is a French pay TV group active in the production of channels, distribution of pay TV offers as well as in the production and distribution of cinema movies. Canal+ was the first operator to offer pay TV in France (in 1984) and has recently entered the free-to-air TV sector after acquiring two channels. It has 11.5 million pay TV subscribers worldwide and achieved a turnover of EUR 5 billion in 2012.
- 42. First, Mr Roy defined competition threats for Canal+ in France. For a number of reasons, the pay TV market is becoming increasingly competitive. This is due to the evolution of usages, as there are many ways of watching TV (multi-screens, catch up TV, VOD and SVOD). Next, the development of free-to-air DTT (eighteen channels) constitutes direct competition to pay TV. Mr Roy suggested that this should be reflected in the relevant market definition, which so far has considered pay TV market and free TV market separately. Finally, the development of OTT services and connected TVs, as well as the arrival of international actors (Apple, Google, Amazon or Netflix), have impacted on the conditions of competition. In the latter case, those actors have important financial resources and substantial market power to negotiate access to content and premium content.
- 43. The Canal+ strategy towards new conditions of competition is essentially based on content. It focuses on providing diversified and editorialized content and creating strong brands. An important element in its strategy is to ensure distribution on all available platforms and on all TV value chains. This should create a virtuous circle in which higher revenues are reinvested in premium content, which in turn increases the value of the services offered. Another important aspect is to develop an objective ranking of services and contents on all platforms, in order to promote French and European contents and cultural diversity.
- Mr Roy explained that the competitors of Canal+ are not regulated, while the company itself is overregulated. Therefore, a level playing field is needed in which a single set of rules applies to all actors and services, irrespective of the platform. These rules would have to entail: investment in audiovisual production, youth protection, compliance with the French media chronology, data privacy and anti-piracy provisions as well as the harmonisation of VAT rules. Mr Roy proposed that a new legal status should be defined for new audiovisual actors. Finally, the issue of content and services listing by the Internet giants should be addressed. On the other hand, Mr Roy argued that Canal+ is overregulated, as it is subject to both audiovisual law and competition law. Since 2006, following the acquisition of TPS, a significant number of remedies has been imposed. Recently, Canal+ has been ordered by the French competition authority to implement thirty-three injunctions within five years, which can be renewed for another five

years. These injunctions restrain the firm's activities throughout the value chain: upstream markets (acquisition of rights), intermediate markets (relations with independent channel editors) and downstream markets (marketing of its pay TV offer, VOD and SVOD offers, obligation to wholesale).

- 45. Finally, Mr Roy pointed out that, based on Canal+ experience, three questions can be formulated regarding competition law in the broadcasting sector. The first concerns the delineation of an NCA's powers vis-à-vis those held by sectoral regulators. In another recent decision relating to the acquisition by Canal+ of two free-to-air TV channels, the audiovisual regulator issued recommendations that went beyond the measures actually adopted by the NCA. The second issue is how far a competition authority can go in monitoring and regulating a private company's commercial policy. Mr Roy expressed the view that the injunctions applied to Canal+ are intrusive and allow the NCA to determine the firm's marketing policy on its pay TV offers. Last, Mr Roy asked how long-lasting injunctions can be justified by a company's market power in a market that is constantly evolving.
- 46. The **Chair** asked David Hyman to give another business perspective on the subject.
- 47. **Mr Hyman** discussed the opportunities and challenges facing OTT video providers. First, Mr Hyman explained that Netflix helped pioneer streaming movies and TV shows over the Internet. In 2008, it began to deliver instant streaming videos to TVs through the use of a handful of devices connected to the Internet. Today, over thirty million consumers in more than forty different countries use the Netflix streaming service on thousands of different types of interconnected devices. The company delivers over a billion hours of streaming movies and TV shows to its consumers every month.
- 48. This implies an innovative approach on many levels. In 2012, Netflix introduced an open connect network a single purpose content delivery network focused on the efficient distribution of large media files that helps make the Internet faster and less expensive. Users' interfaces, through which consumers discover and engage in video, are likewise evolving. The Internet is also helping to reconceptualise how content is made and consumed. For the first time, high quality productions are debuting over the Internet (e.g. "House of Cards"). Further, the company took a novel approach to releasing TV series by offering all episodes at one time in all countries. Finally, to expand the reach of video content, Netflix leverages the power of the Internet to help consumers discover movies and TV shows using recommendation and merchandising technology.
- 49. Mr Hyman noted that the change brought about by OTT services has led to speculation about the demise of traditional video distribution platforms. However, he indicated that these platforms will adapt to the shifting video landscape. This has already happened with authenticated Internet video offerings, which provide traditional pay TV subscribers with access to a variety of content through devices connected to the Internet. In this way, traditional pay TV subscribers are offered the benefits of Internet video within the bundled offering of their TV service. This trend will continue further, as traditional platforms and networks move to distribute their content in an on-demand fashion over the Internet.
- 50. As traditional operators begin to compete more directly with OTT video providers, some competition concerns may arise where the former control the broadband infrastructure. For this reason, Netflix favours network neutrality and finds that regulators have to ensure that owners of infrastructure do not block or degrade traffic in favour of their own services and that these providers do not adopt discriminatory data caps. Moreover, last mile interconnection of broadband networks has to be secured. In the end, the future of broadcasting is tied up with the future of the Internet and all players will leverage the Internet to compete.

- 51. Mr Hyman concluded by suggesting that one must proceed with caution regarding whether market changes require new regulations. Since it is difficult to predict developments in this market, the approach should be flexible to ensure that innovation continues.
- 52. Next, the **Chair** outlined four subsections of the second subject of the Roundtable: (i) market definition; (ii) access to transmission facilities; (iii) content related issues; (iv) audience measurement and advertising revenues. The Chair introduced the contribution of Chinese Taipei on the issue of shifting market definition.
- 53. The delegate of **Chinese Taipei** underlined that, with advances in information and communication technology (ICT), digital convergence has broken industry boundaries. It has led to triple play, with telecommunications, cable TV and the Internet, or quadruple play, with telecommunications, cable TV, Internet and mobile industry. Hence, market definition can no longer be limited to the market boundaries conventionally used to classify the businesses. Digital convergence is characterised by two-sided or multi-sided markets. The differences between single-sided markets and two-sided or multi-sided markets concern network effects and feedback effects.
- The delegate provided the example of a merger between Da-Fu Media Technology Co., Ltd., and twelve cable TV system operators (2010). In defining the product market, the NCA referred to the range in which the demand substitutability or supply substitutability of a product or service is high in terms of its functionality, characteristic, use or price. In the end, the cable TV market was considered as the product market (excluding TV, satellite broadcasting and MOD), due to the lack of demand and supply substitutability between video service providers in terms of the numbers of channels, content, regulations and demand of subscribers. A paper published by Tsai and Fan (2012), which discusses this merger, indicates that the market definition should have been extended to incorporate IP TV into cable TV's relevant markets. The delegate concluded that the NCA constantly reviews important parameters of the horizontal merger framework and revises its policy in line with the digital convergence trend.
- 55. The delegate from **Bulgaria** discussed CME's acquisition of Balkan News Corporation and TV Europe (2010), a decision that stands as an example of the practice of defining product markets in the broadcasting sector. After the merger, CME would control five TV programs (one free-to-air and four cable TV or DTH technology channels). The Commission on Protection of Competition (CPC) focused its analysis on the market for TV distribution and the market for audiovisual content. It found that in Bulgaria free-to-air TV channels and TV channels broadcasted by satellite or by cable cannot be separated into different and independent product markets. As a result, the CPC defined the relevant product market as the market for audiovisual content, comprising all productions (including films, sports, news, etc.), which could be broadcasted by TV operators, both as content creators and as licensed rights holders.
- The CPC focused its analysis on technological access to the program, its profile and the financing model. First, based on a survey of a number of stakeholders, it turned out that there was little difference in quality and choice for additional services between both categories of TV operators. In addition, cable TV services in Bulgaria are widely available and they deliver both analogue and digital signals. Moreover, all free-to-air programs are included in the basic package of all cable or satellite platforms. Delivery of additional content would require an additional fee, on top of the fee for the standard package. Second, there was no significant difference in the profile of the programs offered, implying interchangeability. Third, the financing model was similar. Finally, the delegate underlined that this market definition is specific to the merger case and it does not imply a similar approach in other antitrust decisions.
- 57. The **Chair** moved the discussion to the second subsection, on access to transmission facilities, and ceded the floor to the contribution from Spain on unilateral exclusionary behaviour.

- 58. The delegate from Spain indicated that the ABERTIS case demonstrates how a regulatory decision that affects transmission services can have important consequences on the free-to-air TV broadcasters' ability to streamline costs and be competitive downstream. The Spanish regulatory framework conceived TV digitalization as a process of migration from analogue terrestrial to DTT broadcasting, with very high mandatory population coverage. Hence, the regulatory framework has consolidated DTT as the leading technology, by mandating its use to all national TV broadcasters with licenses to use the terrestrial radio electric spectrum, which include the main free-to-air TV broadcasters in Spain. ABERTIS is the telecommunications infrastructure operator, which owns and manages the only national terrestrial network for the broadcasting of DTT signals in Spain while also being the only provider of transport services (from the TV broadcaster offices to the terrestrial broadcasting stations) and distribution services (from the terrestrial broadcasting stations to viewers homes) of DTT signals to Spanish national TV broadcasters. Due to the digital switchover, ABERTIS continued to monopolise upstream transmission services and had little incentive to allow access to its essential transmission facilities. In this context, in April 2010, the Comisión Nacional de la Competencia (CNC) opened formal proceedings against ABERTIS for allegedly impeding other network operators from accessing its network of broadcasting sites via a margin squeeze between wholesale and retail prices. In February 2012, the CNC found that ABERTIS had abused its dominant position by hindering the entry of competitors in the market for the distribution transport of DTT signals. In the end, the regulatory decision that limited distribution of DTT signal to only one technology prevented TV broadcasters from changing network operators or making use of other transmission technologies, and deprived third party network operators of opportunities that the digital switchover provided.
- 59. The **Chair** announced the third subsection concerning content related issues and gave the floor to the UK.
- 60. The delegate from the **United Kingdom** observed that premium sports and movies have been traditionally considered as premium content. They are typically owned as exclusive rights by a given broadcaster or pay TV retailer, which can often limits their availability to a single platform, which contrasts with the content available from public service broadcasters. In addition, exclusive rights tend to be concentrated in the hands of relatively few players. The key characteristic of sports broadcasting is that the main attraction lies in live sport events, so recording does not really provide a substitute. Hence, premium sports continue to pose challenges and will attract competition scrutiny. On the other hand, premium movies have been subject to greater evolution. Consumer research suggests that new movies are less of a major driver of pay TV demand, in comparison to sports. However, there are positive changes, like high production TV series drama. Further, new modes of distribution (*e.g.* OTT) tend to lower barriers to entry and enhance competition. Conversely, the exclusive rights ownership predominantly remains in the hands of the incumbent operators. The delegate agreed with Professor Fels that this is an area of uncertainty and there are good reasons to act cautiously.
- 61. The delegate from the **Netherlands** examined the licensing of premium football rights in a merger between EMM and Fox. This merger proposal shifted the focus of the Netherlands Competition Authority (NMa) from competition between broadcasting companies to competition between distribution platforms. Beginning in the 2005/2006 season, the Dutch Eredivisie clubs started to offer broadcasting rights to football matches. However, the channels that acquired those rights (Talpa/RTL and Tele2) incurred considerable losses, so they could not generate sufficient income to cover the fees paid to Eredivisie. In the second tender (2008), bids for the rights to live matches were so low that the Eredivisie clubs decided to set up their own pay TV channel: Eredivisie Live. The Eredivisie Live channels were offered to all interested distribution platforms and the rights to the highlights were sold to the Dutch public channel (NOS). At the end of 2012, EMM, which markets football broadcasting rights, was taken over by Fox. The NMa decided to issue an informal opinion on the compatibility of the marketing plans, separate

from the formal decision on the concentration, once Fox committed to several concessions that ensured undistorted competition in free-to-air TV broadcasting and competition between distribution platforms.

- 62. The delegate noted that this has created a rather unique situation where there was no longer a market for the broadcasting rights to live matches. Fox has committed to offering Eredivisie Live channel to all platforms in a non-discriminatory manner and intends to set up a new free-to-air TV channel, which will broadcast the highlights. The delegate observed that the highlights channel represents a highly desirable content for distribution platforms, so it may hold a dominant position vis-à-vis those platforms, even though it may not have a large market share.
- 63. The delegate from the **US** asked the Bulgarian delegate to explain why the market definition was relevant only for the merger case and it would be different for antitrust.
- 64. The delegate from **Bulgaria** replied that the motivation behind the market definition adopted in the merger decision was to analyse in detail the content market. So if there were an antitrust case, the authority would probably focus on the segment of the distribution chain.
- 65. The delegate from **Mexico** indicated that Grupo Televisa (Televisa) and TV Azteca are the only companies that provide free-to-air TV services with national coverage. The two firms are vertically integrated. Televisa has about a 70% market share of the free-to-air TV and almost 50% of the pay TV market. Azteca has the remaining 30% market share in the free-to-air TV and it owns a mobile phone company, which has 4% of the market.
- 66. In 2011 a merger between Televisa and Iusacell was notified to the Comisión Federal de Competencia (CFC). In the mobile telephony market, the CFC considered that the operation provided Iusacell with additional capital that would enhance competition. In the free-to-air and pay TV markets, the CFC considered that the operation was anticompetitive since the merger would give both firms incentives to coordinate their activities. When the CFC decided to block the merger, the two parties submitted commitments. First, as regards open TV market, they agreed to dissolve the merger in case a public tender for a third concession on a TV network was not carried out within twenty-four months after the merger. Also, the company resulting from the merger must provide advertising space on a non-discriminatory basis and the separation of management in both companies must be ensured. As for the pay TV market, the parties committed *inter alia* to a non-discriminatory and unbundled content sale.
- The delegate from **Poland** described a case concerning an agreement that restricted competition on the market for premium sports. In 2006, the Office of Competition and Consumer Protection (UOKiK) imposed penalties of about PLN 8 million on the Polish Football Association (PZPN) and Canal+. PZPN had an exclusive right to grant a license for the broadcasting of football matches of the national first and second league and the Polish Cup. This exclusive license was granted by PZPN to a company that submitted the highest bid in a tender organized by PZPN. In 2000, PZPN signed a contract with Canal+. UOKiK found that the contract also granted Canal+ a priority in obtaining the exclusive license in the future. Pursuant to the contract, PZPN was obliged to inform Canal+ about the conditions of the bids submitted by its competitors. Canal+ could obtain the license if within thirty days it offered conditions equal to the most favourable bid. UOKiK observed that the possibility to enter into a contract with PZPN on conditions identical to those offered by potential competitors of Canal+ limited its economic risks. PZPN's obligation to inform Canal+ about the other bids led to an asymmetry of information. The delegate also stressed that, as a result, Canal+ was the real holder of the exclusive right, formally owned by PZPN. Ultimately, Canal+ did not make use of this clause, because it made the highest offer in the first bid.
- 68. The delegate from **Egypt** discussed piracy of new films and its impact on the market for content. Usually film producers, when considering distribution of their products, first approach pay TVs that later

redistribute movies to other TV broadcasters (*e.g.* free-to-air TV). Competition for first releases of movies faces several constraints because of the emergence of the informal sector and piracy. First, pirate decryption decreases the value of premium content. Such piracy has driven free-to-air TVs to compete in the direct TV market and to buy the content from producers. Next, the violation of contractual obligations is another form of piracy. Pursuant to contracts concluded with content owners, TV broadcasters can show movies a limited number of times. However, such obligations have been breached by several TV broadcasters, which also decreases the value of the content. The third constraint relates to broadcasting piracy of the non-Nile TV broadcasters. A number of TV broadcasters that have spectrums on satellites circling on the same orbit as the Nile Sat are able to broadcast without a license. Some of them show illegally acquired first release movies on their platforms. The delegate concluded that the remedy for those practices lies in vigorous international cooperation.

69. The **Chair** moved on to the fourth subsection, on audience measurement and advertising, and discussed the contribution of **India**. The competition authority received a complaint alleging an abuse of dominance in TV viewership ratings. The complainant asserted that the only company that measures TV viewership and monitors advertising expenditure across TV channels, radio and print had manipulated ratings data in favour of broadcasters that paid them money. This has, in turn, reduced the advertising revenues of the complainant. The case is currently under investigation. The Chair also noted that contributions from Colombia and Ireland discuss advertising discounts and their impact on the market.

4. Additional challenges in the broadcasting sector and responses of national competition authorities.

- 70. The **Chair** introduced the third subject of the Roundtable relating to additional challenges in the broadcasting sector and gave the floor to the delegate from the Business and Industry Advisory Committee (BIAC) to the OECD.
- The BIAC delegate agreed with the view expressed in the Background paper whereby a 71. technology neutral approach is of central importance in the design of regulation and in its application. It implies the need to maintain a level-playing field with regard to the entire value chain of TV broadcasting. This in turn suggests the removal of barriers to entry and of the imbalance that results from the presence of state owned or state sponsored TV networks. Hence, it is the role of NCAs to consider the extent to which state owned enterprises and restrictive regulations create such barriers. The delegate recognised that NCAs often face internal governmental pressures, including political influences that stand in the way of reform. Competition analysis in the TV and broadcasting sector may involve sectoral regulators, like telecommunications regulator, that often subsume competition issues in a broader analysis of public policy interests. On the other hand, NCAs may be instructed to look beyond competition policy and consider noneconomic factors, which increases potential for poor quality decisions. The delegate suggested that sectoral rules are used to regulate non-competitive or imperfectly functioning markets, so therefore they are ill equipped to conduct serious economic analysis. That is why BIAC considers that competition analysis has to be left to NCAs, which should not introduce public interest standards into their review of TV broadcasting markets. At the same time, a specialized sectoral regulator should look to public interest issues.
- 72. The delegate from the **United States** indicated that a recent case constitutes a good example of cooperation between the Antitrust Division of the US Department of Justice (Division) and the Federal Communications Commission (FCC). In 2011, the Division filed a lawsuit to block the formation of a joint venture between Comcast Corp. (Comcast) and General Electric Co.'s subsidiary NBC Universal Inc. (NBCU). At the time of the lawsuit, Comcast was the largest video programming distributor, it owned national cable programming networks, had partial interests in other networks and had controlling interests in regional sports networks. NBCU was involved in the production, packaging and marketing of news,

sports and entertainment programming. It owned NBC and Telemundo broadcast networks, as well as ten local TV stations, national cable programming networks and a film studio.

- 73. The Division cooperated with the FCC in analyzing the effects of the joint venture and in devising remedies. First, the delegate noted that the statutory mandates of their jurisdiction, standards of review, and burdens of proof differ. The FCC examines mergers to ensure that they are in the public interest, convenience, and necessity, where competition is one of many factors. At the same time, the Division applies the competition paradigm. However, the Division and the FCC consulted extensively to coordinate their reviews and to create remedies that were both consistent and comprehensive. For example, under the settlement and the FCC order, the joint venture must make available to OVDs the same package of broadcast and cable channels that it sells to traditional video programming distributors or make available similar programming to what the OVD has been able to license from Comcast's content creating peers. Next, in the event of a licensing dispute between the joint venture and an OVD, the Division may seek court enforcement of the settlement or permit the aggrieved OVD to pursue commercial arbitration. The FCC order also required the joint venture to license content to OVDs and included an arbitration mechanism for resolving disputes. Also, the FCC order allows Comcast's traditional competitors, such as satellite and telephone companies, to invoke arbitration at the FCC to resolve program access and retransmission consent disputes. The FCC has experience with arbitration in these areas, making it unnecessary for the Division to impose similar relief. Finally, the FCC order also included public interest provisions relating to the carriage of particular content that were not relevant to the Division's competition mission.
- The delegate from **Peru** provided an example of a case where a sectoral regulator, Organismo Supervisor de la Inversión Privada en Telecomunicaciones (Osiptel), and competition authority, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (Indecopi), reached different results in the same case. Osiptel controls anticompetitive practices in public telecommunication services, including telephony and pay TV. In 1999, a case concerned a local cable company, Tele Cable S.A. (Tele Cable), which filed a complaint against Telefónica Multimedia S.A.C. (Telefónica) and two cable content developers, Fox Latin American Channel Inc. (Fox) and Turner Broadcasting System Latin America Inc. (Turner). The complainant alleged that those companies concluded an exclusive distribution agreement for content transmission. Because content providers were not considered as telecommunication undertakings, Indecopi analyzed the complaint of Tele Cable against Fox and Turner, while Osiptel analyzed the complaint of Tele Cable against Telefónica. In the end, Indecopi found that Fox and Turner did not have a dominant position and dismissed the complaint. Osiptel, meanwhile, decided that Telefónica had a dominant position and that the exclusivity agreements with Fox and Turner had negative effects on competitors and raised entry barriers. Consequently, Osiptel ordered the annulment of those agreements. The delegate indicated that such problems are now avoided, since under the modified law Osiptel has jurisdiction to deal with competition cases when one party to the transaction is a telecom provider.
- 75. The delegate from **Tunisia** stated that in the current transition phase broadcasting sector is key to establishing a democratic climate and consolidating the freedom of expression. Before the revolution, the TV broadcasting market was highly consolidated and dominated by public TV channels. After January 2011, TV and radio markets have significantly expanded and have become less concentrated. The delegate indicated that the Independent High Authority for Audiovisual Communication (IHAAC) has been created recently to play the role of a sectoral regulator.
- 76. The most important case handled by the Tunisian Competition Council (TCC) concerned the marketing of televised football matches and it provides an example of the problems with access to sufficient data. In 2010, the TCC found that the Tunisian Football Federation (TFF) and the National Television Corporation (NTC) concluded an anticompetitive agreement, according to which TFF attributed exclusive audiovisual broadcasting rights of football matches to NTC. The TCC decided that the agreement

created barriers to entry and excluded competitors. The major difficulty in this case concerned the unavailability of the main indicators (market shares and turnovers), as the parties did not cooperate.

5. Final remarks.

- 77. The *Chair* closed the Roundtable by concluding that the TV and broadcasting sector is sensitive in a number of ways. Its stakeholders are numerous and influence the functioning of the market to differing degrees. One aspect to note is the consumers' capacity to pay. Second, the sector has a firm socio-political dimension. Third, its regulation involves not only public policy interests, but also covers technical, social and economic issues. Next, the market is subject to upheaval due to technological change, which forces stakeholders to reassess major issues, like product market boundaries, access to content, access to transmission facilities or composition of the vertical chain. Furthermore, technology neutrality and the maintenance of a level-playing field become increasingly relevant. Finally, the competition policy paradigm is gaining in importance over public policy concerns, which brings a number of consequences relating to substantive provisions and institutional cooperation.
- 78. The Chair thanked both the experts and the delegates for their contributions.