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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session III: Competition
and sports**

- Contribution from Argentina -

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The attached document from Argentina is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 28–29 September 2023 in Quito, Ecuador.

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Session III: Competition and sports

- Contribution from Argentina -

1. Argentina has the highest pay-TV household penetration in Latin America.¹ Despite the development of over-the-top platforms, around two-thirds of households currently have a signal distribution provider. One reason for this high penetration is that pay-TV offers content that is highly relevant to the population, such as live sporting events (known in television jargon as “must-have” content).
2. In Argentina, “must-have” content related to sporting events comprises almost exclusively football matches. A select group of matches draws the biggest audiences. They include the national Argentine team’s fixtures,² local and international tournaments involving teams from the first division of the Argentine professional league,³ and events involving international teams.
3. Football matches are so important that the arrangements concerning their broadcast have been investigated by the competition authority and regulated by the government.⁴
4. Traditionally, one of the main concerns from a competition standpoint about sporting events broadcasting in Argentina has been the vertical conducts between the broadcasting rights licensee and the cable TV operators distributing the content to viewers’ homes. The vertical integration between the broadcasting rights licensee, the sports signal provider and the cable TV operator incentivised various practices to hinder the sale of the sports signal with “must-have” content to signal distribution competitors in the downstream market.⁵

¹ See: <https://www.cronista.com/control-remoto/Argentina-alcanzo-la-penetracion-de-TV-paga-mas-alta-de-Latinoamerica-20160404-0027.html>, <https://www.infobae.com/america/america-latina/2021/06/11/infografias-asi-es-el-mercado-de-tv-paga-en-america-latina-y-el-caribe/>, and https://www.diariojornada.com.ar/127688/economia/argentina_el_pais_con_mayor_penetracion_de_la_tv_paga.

² The final of the 2022 FIFA World Cup, in which Argentina won the tournament for the third time in its history, drew the highest viewing figures in the history of Argentine television. See: <https://www.infobae.com/teleshows/2022/12/19/hubo-record-de-audiencia-televisiva-en-argentina-y-francia-por-la-final-de-la-copa-del-mundo/>.

³ However, in recent years, the popularity of some second division teams has added other types of matches to this group.

⁴ In 2000, the broadcasting rights to the Argentine team's 2002 World Cup qualifying matches were acquired by the two main cable TV companies in Buenos Aires, which designed a business plan for these fixtures based on the pay-per-view model. The resultant social discontent prompted the government to enforce the regulation introduced by decree 304/94, which mandated that all football matches involving the Argentine national team must be broadcast domestically free-to-air. In 2009, Chapter 7 of Act 26.552 on audiovisual communication services established the "right of access to relevant content of interest".

⁵ See opinion 91393066 related to the concentration operation AT&T INC. AND TIME WARNER INC. S/NOTIFICACION ART. 9 ACT 27.442, available at: <http://cndc.produccion.gob.ar/sites/default/files/cndcfiles/CONC%201643%202019.pdf>.

5. However, a deal recently analysed by the National Commission for the Defence of Competition (CNDC in Spanish), linked to Disney's purchase of 21st Century Fox ("Disney/Fox"), involved possible horizontal damage related to i) the increased concentration of the sports signals market and ii) the portfolio effects arising from the number of signals in different content areas accumulated by the acquiring group. The case also included a prospective analysis of the deal's potential impact on the development of "skinny bundles" (cheaper packages with fewer channels than traditional bundles).

6. This article is organised as follows. The first section describes how broadcasting rights are granted in Argentina. The second section analyses in depth the Disney/Fox case, the negative effects on competition identified by the National Commission for the Defence of Competition in its Objection Report, and the remedies imposed to mitigate the damage caused by the acquisition. The third and final section makes some final comments on competition in the markets for broadcasting rights to sporting events in Argentina and the production and distribution of sports signals.

1. LICENSING OF BROADCASTING RIGHTS FOR SPORTING EVENTS IN ARGENTINA

7. In Argentina, the most valuable broadcasting rights in terms of sporting events are mostly those for football matches.

8. Official football tournaments in Argentina are organised and regulated by the Asociación de Fútbol Argentino (AFA) (Argentine Football Association), which is the governing body in charge of the national teams and the umbrella organisation for all the local clubs, both first division and other categories.

9. Argentina has a hierarchical competition model with two national divisions (first division and *Primera Nacional* [National B Division]). Teams are relegated and promoted between the two according to their performance. The *Primera Nacional* also has relegation and promotion arrangements with lower divisions, which differ on the basis of the latter's location and organisation. On the one hand, there is the *Metropolitana* division (comprising *Primera B*, *Primera C* and *Primera D*) and, on the other hand, the *Torneo Federal* division (*Federal A* and *Federal B*). Every year, both the *Primera B Metropolitana* and the *Torneo Federal A* receive the lowest performing teams from the *Primera Nacional* and promote their highest scoring teams to it. From highest to lowest, the hierarchy is: i) first division, ii) *Primera Nacional*, iii) *Primera B Metropolitana* / *Torneo Federal A*, iv) *Primera C* / *Torneo Federal B*, and v) *Primera D* / regional tournaments.

10. Currently, the AFA organises two tournaments per year for teams that belong exclusively to the first division. One tournament has a league format in which all teams play each other and the champion is the one with the most points. The other starts with two groups; the teams with the highest scores at the group stage qualify for a playoff stage, and the champion is decided in a final played between two teams. The AFA also organises the Copa Argentina, which is a playoff tournament in which all the Association's teams participate. It is similar to certain foreign tournaments such as the Copa del Rey in Spain.

11. The clubs assign broadcasting rights for the tournaments in which they play to the AFA for collective management.

12. The AFA licenses the tournament broadcasting rights and distributes the television revenues to the clubs. The tournaments for each division are licensed as a group, i.e. first division tournaments are licensed separately from *Primera Nacional* tournaments. Although first division teams tend to dominate the final stages of the Copa Argentina, this

tournament is licensed separately from the tournaments in which only first division teams participate.

13. The first division tournaments are the most valuable to broadcasters, since their matches draw the largest national audiences. The AFA last awarded broadcast rights for first division tournaments in 2017. The winner was a joint bid from TNT and Fox (the latter is now part of the Disney group), which broadcast the matches on pay-per-view signals.

14. The agreement gave each company 50% of the weekly events, with adjustments to account for the quality of the events – determined by the popularity of the teams playing. Specifically, the partners must share and alternate between them any events involving the two most popular teams in Argentina (Boca Juniors and River Plate). If one weekend TNT broadcasts the Boca Juniors fixture, Fox (now Disney) will broadcast the River Plate fixture, and they will alternate the following week. When the teams play each other, the event will be broadcast simultaneously on both networks.

15. The Copa Argentina tournament, which the AFA's various divisions play in, is broadcast by TyC Sports, a channel that is part of cable operators' basic programming offer, i.e. not marketed under the pay-per-view model.

16. The licensees are in charge of the technical and audiovisual production of the broadcasts: direction, filming, choice of journalists, etc.

17. Finally, it is important to note that the contract between the event generator (AFA) and the broadcast licensee is exclusive, meaning that each event is broadcast live and exclusively by one television signal. This is because licensing is most valuable when it is granted on an exclusive basis. This generates higher revenues for the AFA, resulting in a better economic situation for the clubs and, in turn, higher-quality competition among the teams through increased funding for players' and coaches' contracts.

18. However, the signal is then sold to signal distribution companies on a non-exclusive basis, and no commercial conditions can be imposed on this sale. The National Commission for the Defence of Competition has pointed out on several occasions that the existence of contractual clauses that imposed minimum resale prices for the sale of signals to end consumers could constitute a violation of Act 27.442 on the protection of competition.

2. THE DISNEY FOX MERGER | THE NATIONAL COMMISSION FOR THE DEFENCE OF COMPETITION DECISION

19. The Disney/Fox merger took place in March 2019. The Walt Disney Company (Disney) acquired sole control of Twenty-First Century Fox, Inc (Fox).

20. In Argentina, Disney and Fox were involved in: i) the distribution and licensing of films in cinemas; ii) the distribution and licensing of audiovisual content for television and home entertainment; iii) the production and marketing of pay-TV signals; and iv) other segments related to these markets, such as the sale of advertising space, the licensing of intellectual property rights to manufacturers of consumer products, and music licensing.

21. In response to this merger, the National Commission for the Defence of Competition issued an Objection Report in which it identified risks to competition in the market for sports-themed pay-TV basic signals.

22. The deal had a worrying impact on the classic concentration indicators of that market, which comprised Disney (with four signals under the name ESPN), Fox (with three signals under the name Fox Sports), TyC Sports (with one homonymous signal) and RTA (with one signal under the name DeporTV). The merger created a new company with seven

of the nine existing basic sports signals, accounting for 64% of the audience. As a result, the Herfindahl-Hirschman Index increased to 5 166 points, a rise of more than 2 000 points.

23. In addition to the concentration indicators, the National Commission for the Defence of Competition studied some qualitative elements that could eventually mitigate or accentuate the effects of the deal. It held testimonial hearings with competitors of the merging companies and with the most representative signal distributors in the country.

24. The distribution companies' key message was that sports signals were of great importance because they transmitted live sporting events, and that pay-TV users considered their inclusion in the signal package to be essential. They added that sports signals were historically more expensive than signals carrying other types of content due to the value users assign them, and that removing them from the signal package could therefore drive the user to change provider.

25. Moreover, a detailed study of substitution among the different sports signals showed that ESPN and Fox Sports were those with the closest substitution, due largely to the content they broadcast. Thus, ESPN and Fox Sports were found to broadcast highly relevant international sporting events such as i) South American football tournaments involving Argentine teams, including the Copa Libertadores (Fox Sports), the Copa Sudamericana (ESPN) and the Recopa Sudamericana; ii) European football tournaments, such as the UEFA Champions League (Fox Sports and ESPN) and the Europa League (Fox Sports and ESPN); iii) European football leagues, such as the English league (ESPN), the Spanish league (ESPN), the Italian league (ESPN), the French league (ESPN), the Dutch league (ESPN), the Belgian league (ESPN) and the German league (Fox Sports); iv) other relevant content such as NBA basketball (ESPN), Grand Slams and ATP circuit tennis tournaments (ESPN), motor racing championships such as Formula 1, Formula 2 and Formula 3 (Fox Sports), and rugby tournaments such as the World Cup and the Six Nations.

26. Conversely, TyC Sports tended to broadcast national sports content; its most popular content included second and third division football tournaments, the Copa Argentina, Argentine motor racing and the Argentine basketball league.

27. The three biggest companies (Disney, Fox and TyC Sports), which accounted for more than 95% of the audience, broadcasted events in the same sports. However, merging parties' programming focused on international events, while the remaining competitor focused mainly on national events. In other words, the difference was not in the sports but in the types of tournaments broadcast. The close substitution between the Disney and Fox signals was also confirmed by the various signal distributors, who stated that the main competitor of the Fox Sports signals were the ESPN signals and vice versa.

28. Another competition risk identified by the National Commission for the Defence of Competition was the portfolio effect in relation to non-sports channels. In this area, Disney marketed children's channels, accounting for 45% of the audience. Fox marketed 20 channels, ranging from basic to premium, offering genres such as documentaries, children's programmes, films and series, and general entertainment.

29. According to the National Commission for the Defence of Competition research, most of those genre channels could be partially substituted by other services, such as Netflix or YouTube. Sports was the only genre that had no direct substitutes on any platform, and a large proportion of the consumers who contracted a pay-TV service did so for the live sporting events. The merged companies could therefore use their increased bargaining power in the field of sports to include their non-sports signals in the signal distributors' basic packages, generating: i) a reduction in the number of signals provided by other marketers due to programming limits; ii) an increase in the price of all Disney and Fox signals, with a resultant increase in the pay-TV subscription for the end consumer; and

iii) because of the increased cost of programming, attempts by the signal distributors to reduce their remaining programming costs by paying the competitors of the merged companies less, thus lowering the quality of content by reducing competition. In this regard, it was verified that signal distributors usually had access to all the signals marketed by the signal providers because they were marketed on a packaged basis.

30. Finally, the National Commission for the Defence of Competition conducted a prospective analysis of the merger's possible effects on skinny bundles, a model that was not available in Argentina at the time of the merger. Skinny bundles are packages with few channels, designed to lower the cost of programming and the subscription price paid by the user. Pay-TV operators would tend to offer about 20 channels in these bundles. The importance of "must-have" content for this type of package, and the number of sports and non-sports channels accumulated by the merged entity, could exacerbate portfolio effects in the future, as the dominant company becomes more able to prevent programmers from offering smaller packages of this kind.

31. In response to the National Commission for the Defence of Competition's Objection Report, the merging parties submitted two proposals to the authority, which were rejected. The first proposal was for a series of behavioural remedies, while the second suggested structural remedies, such as the transfer of broadcasting rights and trademarks and the extension of behavioural measures.

32. The National Commission for the Defence of Competition rejected the proposed commitments due, in part, to the concentration of live football matches in the hands of the merged entity. Football draws the largest audiences because of the interest it generates in the population nationally. The objectives set by the National Commission for the Defence of Competition meant that the divestiture proposal had to make it possible for the eventual new competitor in the market to broadcast events in a variety of sports. This was considered a necessary but not sufficient condition of a workable remedy. A second necessary but not sufficient condition was that the new operator would have relevant football-related content that would enhance the positioning of its signals. In short, the new competitor's sports signals had to include both a varied sports offering and relevant, meaningful live football content.

33. The National Commission for the Defence of Competition finally authorised the merger on the condition that structural and behavioural remedies were implemented. In relation to the sale of assets, the Commission pushed in particular for the sale of broadcasting rights for live sporting events, considering that a signal's value lay in the "must-have" content. It also established several requirements concerning the multiplicity of sports to be broadcasted, because the signals that drew a large audience tended to offer a varied range of sports. If the two conditions were not met, structural remedies would not be sufficient to restore competitive conditions.

34. The conditions imposed by the National Commission for the Defence of Competition consisted, on the one hand, of the sale / transfer / licensing of a series of "fundamental contents" and, on the other, of accepting requirements regarding the duration of the contracts for the transfer of broadcasting rights.

35. As football is considered a strategic asset in competitive terms, the fundamental contents included the matches of international football tournaments involving Argentine teams, such as the Copa Libertadores de América, and international football events such as the UEFA Champions League matches. It also included international content from other sports, such as basketball, motor racing, boxing, wrestling, baseball, rugby, American football and tennis. These transferred rights ought to remain in the hands of the company

acquiring the divestment package for five years, in the event that the merged entity is awarded the same rights in the future.

36. In April 2022, the merging parties announced that MediaPro would acquire the fundamental content and other assets originally proposed by the National Commission for the Defence of Competition. MediaPro is a group with proven international experience that had not previously been active in Argentina in signal programming. This step was in addition to the aforementioned behavioural remedies that the National Commission for the Defence of Competition established.

37. Disney had requested an injunction to suspend the behavioural measures imposed by the National Commission for the Defence of Competition: i) the obligation to guarantee, for five years, that the cost of the premium sports signals it markets does not exceed the revenues of the cable operators from the sale of such content; ii) the obligation not to retransmit, also for a period of five years, the sports events that were transferred to the MediaPro group in compliance with the structural conditions imposed; and, finally, iii) the obligation to appoint a third party as a monitoring agent, responsible for auditing and overseeing the degree of compliance with the commitments imposed.

38. On 20 May 2022, Room I of the Federal Court of Appeals on Civil and Commercial Matters unanimously rejected the request and confirmed the full validity of all the behavioural conditions imposed by the National Commission for the Defence of Competition.

3. FINAL COMMENTS

39. The Argentine experience shows that the licensing of broadcasting rights to sporting events can have economic ramifications in related markets, such as signal programming in other genres, pay-TV services for households, and over-the-top services. It is important to highlight that football fandom in Argentina structures preferences and purchase decisions in terms of sports signals programming and the inclusion of sports signals in cable operators' packages. This is a specificity of the Argentine market that distinguishes it from other markets and must be considered in any competition analysis.

40. The perception of “must-have” content as a strategic asset for competition is a fundamental element that a competition agency must consider when analysing the economic effects on the different related markets. It is therefore necessary to carry out a detailed study of the quality of the content available to the population, the duration of the licensing contracts, the design of the tournaments that are licensed, and the way in which the broadcasting rights are bid for or acquired.