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Challenges and perspectives for
Competition Policy in Creative and
Cultural Economy

Economics Affairs Group

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NOTE TO READER

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Challenges and perspectives for Competition Policy in Creative and Cultural Economy

*Economics Affairs Group
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Abstract

Creative and Cultural Economy and, particularly, creative industries, have become one of the pillars of economic development in terms of value added, international trade, productivity, investment and employment. However, it is not strange that the consolidation of this type of industries have largely been achieved through the digitisation of the economy by combining science, technology, art and creativity (development of digital platforms, software creation, APP's, among others). This has made it possible, with greater speed and ease, to increase efficiency, promote new markets, the emergence of new economic agents and the consolidation of existing ones. From this perspective, this situation poses an additional challenge in terms of competition policy considering that these business models, which are typical of creative industries, under certain conditions, have the potential to concentrate, at least in the short and medium term, markets and encourage the development of anticompetitive practices.

In this sense, for the 2019 ICN Annual Conference, this Special Project stands as an opportunity to emphasize in some aspects, challenges and perspectives that not only reflect the effective and efficient application of competition policy rules in the Creative and Cultural Economy, but, in turn, that Competition Authorities submit to evaluation and reflection new methodologies and tools to encourage innovation, taking into account the implications of innovation for competition law, consumer rights and industrial property.

Key words: Competition Policy, Creative Economy, Cultural Economy, Digital Economy.

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1 Introduction

This is the Report of the Special Project on “*Challenges and perspectives for Competition Policy in Creative and Cultural Economy*” for 2019 ICN Annual Conference in Cartagena de Indias, Colombia. Creative and Cultural Economy and, particularly, creative industries, have become one of the pillars of economic development in the contemporary world. Indeed, according to the United Nations Conference on Trade and Development (UNCTAD), exports of creative goods and services grew by 134% between 2002 and 2011. Furthermore, the Inter-American Development Bank (IDB), in 2014, estimated that 6.1% of the world economy, that is USD 4.3 billion, depends on the intellectual creations that, in general, they constitute innovative solutions to face the development problems in the region, combining science, technology, art and creativity. In the same way, it should be noted that the Fourth Industrial Revolution has led to the consolidation of this type of industry, that is, “*the collection of goods and services based on talent, intellectual property, connectivity and cultural heritage*” (Ministerio de Cultura, 2018).

Colombia has not been strange to this new dynamic and considers that the Creative and Cultural Economy stands as an economic and social potential, as well as an opportunity for the development of public policies. In particular, according to the Administrative Department of Statistics (DANE, for its acronym in Spanish), between 2005 and 2017, intermediate consumption in the Colombian cultural sector grew by 94.12%, while the Gross Added Value increased by 88.81%. In addition, the creative and cultural sector, in 2017, generated 247.849 jobs, representing about 30% additional jobs generated by the mining-energy sector (191.157 jobs) in this same period.

Now, as mentioned, the Creative and Cultural Economy has relied, for its strengthening, on the digitization of the economy through tools such as digital platforms, software creations and APPs development, which together have enabled, with greater speed and ease, to increase efficiency and promote new markets, the emergence of new economic agents and the consolidation of existing ones. This poses an additional challenge in terms of competition policy due to these business models, under certain conditions, have the potential to concentrate, at least in the short and medium term, and encourage the development of anticompetitive practices.

Thus, for the Eighteenth Meeting of the International Competition Network (ICN), the Economic Affairs Group presents this Special Project which stands as an opportunity to emphasize on the challenges and perspectives that not only reflect the effective and efficient implementation of the competition policy in Creative, Cultural and Digital Economy, but in turn that Competition Authorities submit to evaluation new methodologies and tools that

encourage innovation, considering the implications of these sectors for consumer rights, industrial property and competition law. In other words, this document claims to analyse whether the current regulations and quantitative analysis allow to efficiently articulate the incentives of the cultural and creative entrepreneur and the creation of an enabling environment that facilitates innovation, without ignoring what this entails in terms of strengthening competition policy, protecting industrial property and defending consumer rights.

This document is organized as follows. The second section presents a description of the Creative and Cultural Economy as an engine of development, with particular emphasis on Colombia. The third section presents a theoretical review of this sector from the perspective of Digital Economy. The fourth section presents a review of SIC decisions related to Creative and Digital Economy whose implications allow to characterize the challenges that competition authorities face. Finally, in the fifth section, some public policy recommendations are made, which are derived from the present analysis.

2 Creative and Cultural Economy as development engine

Creative and cultural economy has become, in the contemporary world, one of the pillars of economic growth and development. This branch of the economy has contributed significantly in terms of exports, gross value added, employment, competitiveness, productivity and investment. In fact, as Benavente and Grazzi (2017) emphasize, recent research has shown that the creative economy, particularly the creative industries, has generated revenues close to USD 2,25 billion and more than 29 million jobs in the world, that is, approximately 1% of the economically active population, being the creative industries those that employ, directly and indirectly, about 800.000 people. Moreover, according to the United Nations Conference on Trade and Development (UNCTAD), exports of creative goods and services grew by 134% between 2002 and 2011. At the same time, the UNCTAD, in the second edition of "*Prospects for the Creative Economy*", emphasizes that the industries associated with architecture, arts, crafts, advertising, media, publications and computer programs (the core of the Creative Economy) is an expanding and resilient sector mainly driven by China, the economy which has experienced annual growth rates of corresponding exports exceeding 7% over the past 13 years. However, looking at trade data for creative goods and services in 130 countries, between 2002 and 2015, the value of the global market grew from USD 208 billion in 2002 to USD 509 billion in 2015 (+144.71%). Particularly, China, India, Singapore, Taiwan, Turkey, Thailand, Malaysia, Mexico and the Philippines are among the first nine

economies to stimulate world trade in creative goods, whereas among developed economies such as the United States, France, Italy, the United Kingdom, Germany, Switzerland, the Netherlands, Poland, Belgium and Japan are the main exporters of this type of goods (UNCTAD, 2018).

Besides, the Inter-American Development Bank (IDB), in 2014, estimated that 6,1% of the world economy, that is USD 4,3 billion, depends on the intellectual creations that, in general, they constitute innovative solutions to address development problems in the Latin American and Caribbean region, combining science, technology, art and creativity.

However, in order to understand the challenges and perspectives of competition law in this area, it will be appropriate to define the concept of Creative Economy. This one, known in Latin America as “Orange Economy”, represents *“the specific set of activities based on creativity”* (Benavente & Grazzi, 2017) or, specifically, those activities through which ideas are transformed into goods and services. The above definition does not imply that the traditional economy does not involve a certain degree of creativity in its production processes. On the contrary, the improvement of existing goods and services in turn requires ingenuity, ideas and creation. Nevertheless, despite this, there is a difference between those activities based on creativity and those goods or services of the traditional economy modified by ingenuity or innovation. This difference, as highlighted by Benavente and Grazzi (2017), based on the nature of the changes, lies in *“on the one hand, creativity is generally associated with aesthetics (that is, the aspect of goods and services) and the emotional changes that these products generate in consumers. On the other hand, innovation has traditionally been linked to scientific and technological progress, as well as to changes in the functionality of products that can be directly associated with the generation of economic value”* (Benavente & Grazzi, 2017).

This definition is neither unique nor recent and, in this regard, different organizations such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and UNCTAD have given their respective definitions:

“The term creative industries applies to a much broader productive mix, including goods and services produced by cultural industries, as well as those that depend on innovation, including many types of research and software development” (UNESCO, 2013).

Besides, UNCTAD stresses: *“creative industries are the cycles of operation, production and distribution of goods and services that use creativity and intellectual capital as primary inputs. They constitute a set of knowledge based activities, focused on but not limited to the*

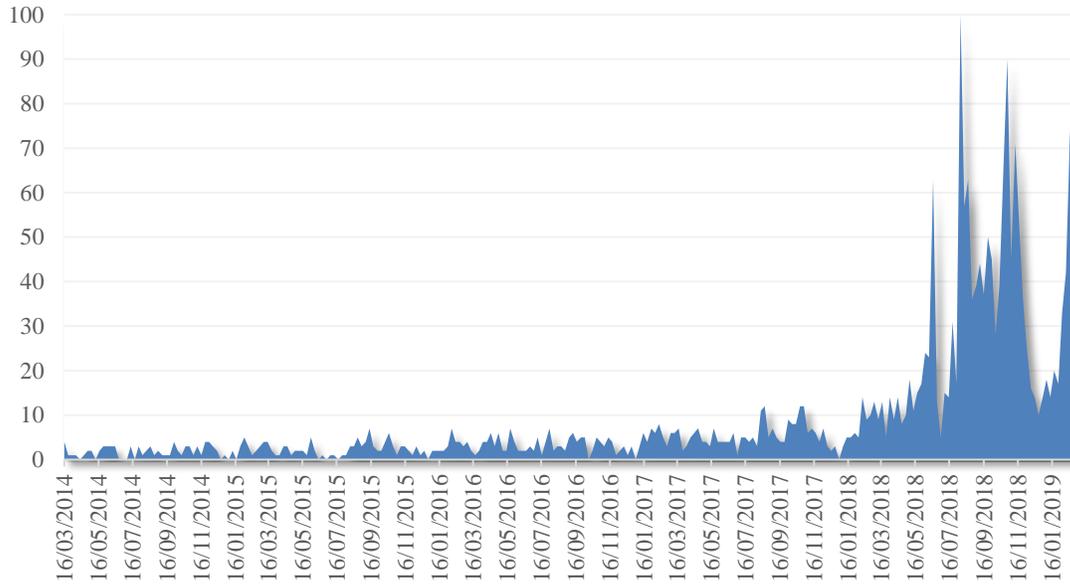
arts, potentially generating revenues based on trade and intellectual property rights. They include tangible goods and artistic or intellectual services of creative content, economic value and market objectives" (UNCTAD, Informe sobre la economía creativa 2008. El desafío de evaluar la economía creativa: Hacia la formulación de políticas públicas informadas, 2008).

Specifically, the Creative Economy is considered as the set of traditional and artistic activities (visual and performing arts); creative industries (cultural industry and functional creations); and, creative support activities such as product design, packaging design and marketing. Hence, the School of Arts of Utrecht (Netherlands) determines that culture is the factor that explains innovation and where, particularly, creative industries focus on the development of software, radio, television and visual arts (HKU, 2010).

Thus the European Commission, in 2010, stressed that innovation, explained by creativity and culture, is one of the most important factors in terms of competitiveness and economic growth. Faced this phenomenon, the new productive models focus more on cognitive skills than on physical skills, giving rise to a new type of economy: the Knowledge Economy. Keep in mind, it must be emphasized that innovation, accompanied by technological progress, stands as one of the determining factors of economic growth where capital, based on knowledge, plays a determining role. Innovation is seen as the transformation of ideas into specific products or services that respond to an economic need. This is either because existing goods or procedures are used more efficiently or because a new productive asset or mechanism was developed.

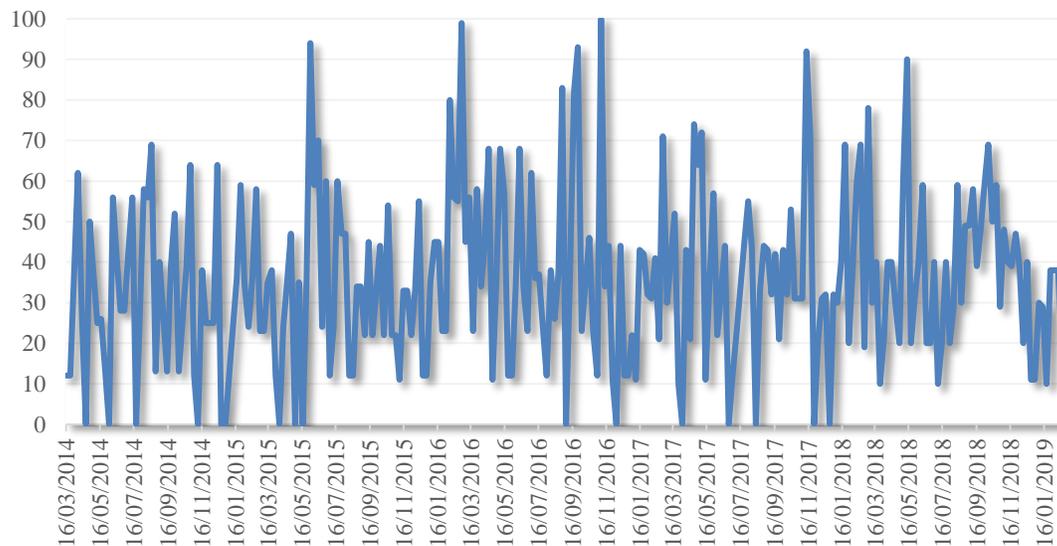
Nevertheless, in order to recognize the appropriation of the term associated with Orange Economy, Digital Economy and Creative Industries, the Economics Affairs Group of the Superintendence of Industry and Commerce realized an additional exercise, as an initial approach, which consisted in quantifying the search frequency of the terms mentioned above in "Google Trends".

Figure 1. Search frequency for the expression “Economía Naranja” in Colombia



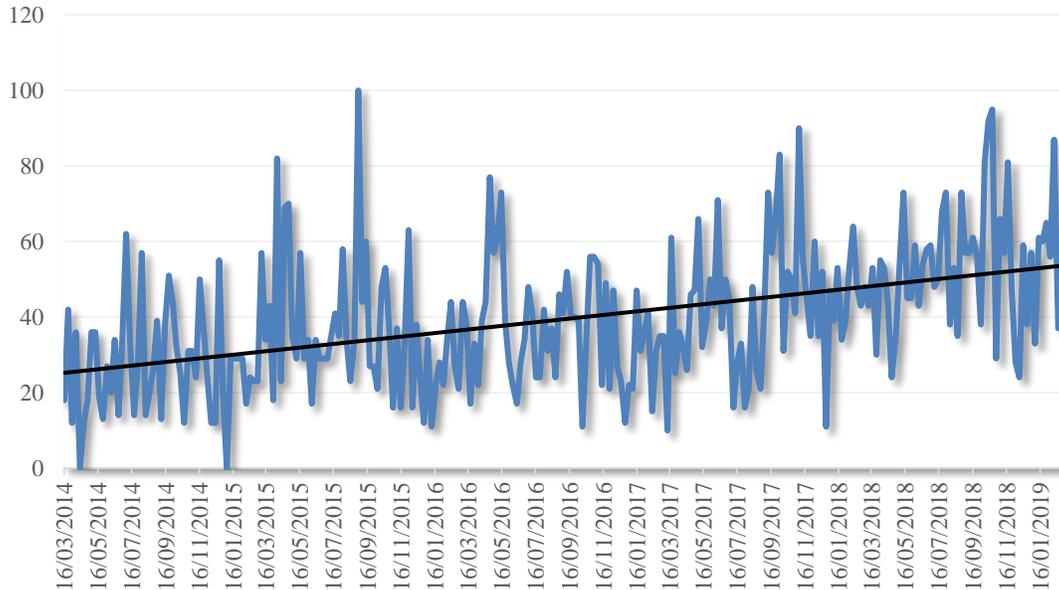
Source: Google Trends (2019) – Estimates: GEE-SIC.

Figure 2. Search frequency for the expression “Industrias creativas” in Colombia



Source: Google Trends (2019) – Estimates: GEE-SIC.

Figure 3. Search frequency for the expression “Economía Digital” in Colombia



Source: Google Trends (2019) – Estimates: GEE-SIC

Considering Figure 1, at the end of 2018, the search for the expression "Orange Economy" presents an exponential trend, this confirms the importance of this expression in the search tool. Also, although it is less evident, from Figures 2 and 3 it is possible to conclude that there is a growing trend in the search for expressions such as "Creative Industries" and "Digital Economy".

2.1 Creative and Cultural Economy in Colombia

Colombia has not been strange to this new dynamic and considers that the Creative and Cultural Economy stands as an economic and social potential, as well as an opportunity for the development of public policies. Indeed, our country has been characterized by a culture based on its ethnic origins from multiple latitudes. In fact, Creative and Cultural Economy is characterized by including all those industries whose basis is creativity, classified as follows (El Tiempo, 2019):

- **Leisure:** Development of software and video games

- **Contents and media:** Radio, television, literature
- **Entertainment:** Music, fashion and design
- **Culture:** Cinema, theatre, tourism, architecture, crafts, advertising, visual and performing arts.
- **Research and development:** Generally all industries that involve copyright protection.

Taken together, these industries aim to generate capital, derived from exports, investment and tourism, to contribute to economic growth and development, as well as to create employment. In fact, according to the National Administrative Department of Statistics (DANE for its acronym in Spanish), the creative and cultural sector, in 2017, generated 247.849 jobs, representing about 30% additional jobs generated by the mining sector-energy (191.157 jobs).

Additionally, although it is difficult to quantify and contribute the cultural sector to a considered economy, in 2007, Colombia consolidated the first Satellite Account of Culture (CSC for its acronym in Spanish) in the world, which has been the main statistical source reporting on the performance of the sector. This CSC constitutes *"an economic information system focused, continuous and comparable that takes as general reference the System of National Accounts of the United Nations"* (DANE, 2019). In this regard, the main objective is to quantify the economic value of cultural products and activities, taking into account the social and economic context that encompasses them. In this way, the purpose is to have a set of information necessary for public and private decision making (DANE, 2019).

Considering a preliminary statistical analysis of this database, between 2005 and 2017, intermediate consumption in the Colombian cultural sector grew 94.12%, while the Gross Added Value increased 88.81%. In this way, it is possible to infer the significant growth in cultural production in Colombia in recent years, as presented in Table 1.

Also, the CSC contemplates a Matrix of Cultural Work for the period between 2015 and 2017, in which it quantifies both the supply and demand of full time work, discriminated by segments of the cultural field (CIIU REV 4 B.C.), occupational category (salaried and independent) and sex (Table 2).

Table 1. Production and Income Generation in Colombia in the Culture Sector.

	Intermediate Consumption	Gross Added Value	Total Output
2005	2.973.418	4.322.381	7.295.800
2006	3.273.169	4.746.789	8.019.957
2007	3.820.009	5.459.618	9.279.629
2008	3.946.486	5.673.136	9.619.623
2009	3.933.282	5.644.806	9.578.090
2010	4.398.933	6.258.943	10.657.877
2011	4.554.106	6.470.525	11.024.633
2012	4.851.943	6.830.565	11.682.510
2013	5.257.899	7.279.380	12.537.281
2014	5.646.459	7.762.755	13.409.216
2015	5.739.683	7.906.516	13.646.200
2016(p)	5.785.808	8.096.527	13.882.337
2017(p)	5.772.022	8.161.254	13.933.277

Source: DANE – Ministerio de Cultura – Cuenta Satélite de Cultura (2019).

Table 2. Full time job offer in the Colombian cultural sector in 2015.

Cultural Field Segments	Supply - 2015				Total - 2015	%
	Salaried		Independents			
	Male	Female	Male	Female		
Books	9.848	3.864	3.703	1.108	18.523	7,9%
Games and Toys	5.622	2.727	3.023	2.714	14.086	6%
Audio-visual creations	10.613	7.159	5.867	4.383	28.022	11,9%
Design	21.380	19.136	18.989	12.747	72.252	30,8%
Visual Arts, Music, Performing	5.430	5.788	30.485	9.139	50.842	21,7%
Arts Heritage	1.653	2.218	1.290	1.009	6.170	2,6%
Cultural Education	14.025	24.946	3.683	2.063	44.717	19,1%
Total	68.571	65.838	67.040	33.163	234.612	100%

Source: DANE – Ministerio de Cultura – Cuenta Satélite de Cultura (2019). Estimates: GEE-SIC.

Table 3. Full time job offer in the Colombian cultural sector in 2016.

Cultural Field Segments	Supply - 2016				Total - 2016	%
	Salaried		Independents			
	Male	Female	Male	Female		
Books	11.756	4.500	1.417	511	18.184	7,6%
Games and Toys	3.126	2.093	2.639	3.138	10.996	4,6%
Audio-visual creations	11.956	9.392	4.927	1.792	28.067	11,8%
Design	27.340	13.371	31.657	12.435	84.803	35,5%
Visual Arts, Music, Performing	4.295	2.869	27.425	9.242	43.831	18,4%
Arts Heritage	1.980	4.088	903	1.053	8.024	3,4%
Cultural Education	15.657	26.634	1.137	1.499	44.927	18,8%
Total	76.110	62.947	70.105	29.670	238.832	100%

Source: DANE – Ministerio de Cultura – Cuenta Satélite de Cultura (2019). Estimates: GEE-SIC.

Table 4. Full time job offer in the Colombian cultural sector in 2017(p).

Cultural Field Segments	Supply – 2017(p)				Total - 2017	%
	Salaried		Independents			
	Male	Female	Male	Female		
Books	16.782	6.761	1.641	626	25.810	10,4%
Games and Toys	2.529	1.524	2.477	2.078	8.608	3,5%
Audio-visual creations	14.100	7.297	3.952	1.201	26.550	10,7%
Design	29.975	17.153	30.827	12.099	90.054	36,3%
Visual Arts, Music, Performing	4.516	2.259	27.733	6.993	41.501	16,7%
Arts Heritage	1.726	3.360	952	1.689	7.727	3,12%
Cultural Education	16.909	27.617	1.493	1.580	47.599	19,2%
Total	86.537	65.971	69.075	26.266	247.849	100%

Source: DANE – Ministerio de Cultura – Cuenta Satélite de Cultura (2019). Estimates: GEE-SIC.

From the statistics presented, it is possible to infer that, between 2015 and 2017 (p), the supply of full time work in the Colombian cultural sector grew 5.64%. Specifically, it should be noted that, in 2015, 57.8% of the total supply corresponds to the male supply and the segments of Design (30.8%) and Visual Arts, music and visual arts (21.68%) are those where more labour is offered. Similarly, it can be inferred that 57.3% of the supply is for employees.

In 2016, 61.2% of the labour supply is male and 58.2% of the total labour supply is employees. In this same period of time, Design continued to be the segment of the cultural field that most contributed to the supply (35.5%), followed by Cultural Education (18.8%). Finally, in 2017 (p), 62.8% of the supply is male and 61.5% are wage earners, being again the segment of Design that offered the most (36.33%).

Table 5. Demand for full time work in the Colombian cultural sector in 2015

Cultural Field Segments	Demand - 2015				Total - 2015	%
	Salaried		Independents			
	Male	Female	Male	Female		
Books	9.613	3.772	1.937	1.245	16.567	10%
Games and Toys	2.418	1.173	2.903	2.606	9.100	5,5%
Audio-visual creations	7.323	4.940	2.376	1.775	16.414	9,9%
Design	14.921	13.356	14.470	9.713	52.460	31,8%
Visual Arts, Music, Performing	3.740	3.986	26.876	8.057	42.659	25,8%
Arts Heritage	1.042	559	1.059	309	2.969	1,8%
Cultural Education	14.948	8.404	1.013	567	24.932	15,1%
Total	54.005	36.190	50.634	24.272	165.101	100%

Source: DANE – Ministerio de Cultura – Cuenta Satélite de Cultura (2019). Estimates: GEE-SIC.

Table 6. Demand for full time work in the Colombian cultural sector in 2016

Cultural Field Segments	Demand - 2016				Total - 2016	%
	Salaried		Independents			
	Male	Female	Male	Female		
Books	9.054	3.466	937	338	13.795	7,7%
Games and Toys	2.489	1.666	2.306	2.741	9.202	5,1%
Audio-visual creations	9.229	7.250	3.848	1.400	21.727	12,1%
Design	17.486	8.552	28.017	11.005	65.060	36,2%
Visual Arts, Music, Performing	3.270	2.184	25.268	8.515	39.237	21,8%
Arts Heritage	634	1.308	676	788	3.406	1,9%
Cultural Education	10.027	17.056	135	177	27.395	15,2%
Total	52.189	41.482	61.187	24.964	179.822	100%

Source: DANE – Ministerio de Cultura – Cuenta Satélite de Cultura (2019). Estimates: GEE-SIC.

However, in terms of demand, as shown in Tables 5 and 6, between 2015 and 2016, the demand for full time work in the Colombian cultural sector grew 8.92%. In particular, it is important to mention that in 2015, the 63.4% of total demand corresponds to the demand for male labour. At the same time, it can be concluded that the 54.6% are employed. In 2016, 63% of the demand for cultural work is male and 52.1% of the total demand for work is for wage earners. In both, 2015 and 2016, the design segment was the one that demanded the most labour, 32.56% and 36.18%, respectively, followed by visual arts, music and performing arts (25.84% and 21.82%).

Finally, based on this analysis, it is possible to affirm the existence of an imbalance between supply and demand for cultural work in the country. In fact, while 234.612 people were offered in 2015, 165.101 people were sued in the same year. This shows a deficit of 69.511 people. In parallel, in 2016, 238.832 people were offered, while 179.822 people were sued, that is, a deficit of 59.010. Despite the existence of the imbalances between supply and demand, it should be mentioned that this deficit between 2015 and 2016 has decreased 15.11%, which demonstrates the need to introduce new business strategies that involve culture and, consequently, creativity in order to diversify the economy and stimulate prosperity and social welfare.

The Colombian Science and Technology Observatory recognizes that those firms which invest in science, technology and innovation achieve better results and performance against those firms that are not necessarily intensive in this type of investment. This implies, therefore, that the firms see science, technology and innovation as the necessary framework for transforming their businesses, to obtain a greater position of dominance in the markets and to be more attractive to consumers.

Specifically, the Colombian Science and Technology Observatory highlights that investments in science, technology and innovation promote (Pardo, 2019):

- i. Market power:** More innovative goods and services make consumers more willing to pay for them. In addition, as they are the first to venture into these new and/or better products, they can establish the prices and rules in order to ensure the return on the investment. This is not unrelated to what is observed in market structures with differentiated goods.
- ii. Increased productivity and competitiveness:** Empirically, investments in science, technology and innovation have been shown to generate economic growth, higher levels of competitiveness and social welfare. Particularly, it has been inferred that as a result of the investments in this area, employment is of higher quality and there is greater automation in the productive processes, thus limiting the errors that can be incurred.
- iii. Product differentiation:** It is considered a disruptive economic agent, this will be able to develop some specialization for a period of time, which, ultimately, can be translated in the short and medium term, in market power. Even more if patents and their corresponding exploitation are obtained as a result of such exclusivity in the production of the good or service.
- iv. Cost reduction:** Investments in science, technology and innovation generate significant efficiencies and the development of economies of scope and scale. This will result in lower costs and new marketing and/or distribution strategies.
- v. New benefits:** Finally, as a consequence of the above points, creativity and innovation will facilitate entry into new market segments and performance improvements.

3 Economic analysis of the Cultural and Creative Economy: a theoretical review

Although the Knowledge Economy is not a recent phenomenon, the new technologies of the Digital Economy and the Fourth Industrial Revolution, as well as their use, have facilitated and promoted the mass of creative content and, in particular, have allowed to characterize, in a more efficient way, the preferences of the consumers. However, this relationship can be seen in two ways, since the development of new technologies also requires creativity and innovation, which opens the way to the creation of new markets and the consolidation of existing ones.

In this sense, these two new phenomena have led to the consolidation of those activities through ideas are transformed into goods and services. This does not mean, then, that creative industries essentially supported in the development of new technologies benefit only the creation of new products. On the contrary, these creative inputs also have the potential to generate value for existing industries. This is how the interaction between digital economy, investment in creative industries and innovation has led firms to redefine their methodologies and business strategies in order to compete against emerging opportunities.

Specifically, in the context of the Fourth Industrial Revolution, culture plays a central role in the adoption of new technologies with the aim of reducing existing socioeconomic gaps. Indeed, over the past 20 years, the already consolidated market economy has managed to build much of the tools needed to generate economic welfare. In this sense, culture will strengthen the demand for knowledge and new skills, which, as a whole, will seek to generate greater growth and economic development (Buitrago, 2019). However, it is important to note that this new gear within the new "enriched" economic model requires the construction of infrastructure and the digital integration of a considered economy. In this regard, UNCTAD (2018) mentions that the Creative Economy generates significant income through trade and intellectual property rights, creating new business opportunities, especially for small and medium enterprises. The above should not be ignored that its performance is largely explained by the intersection between culture, technology, business and innovation. Thus, several goods of this type of economy, in recent years, have become services driven by digital subscriptions and advertising on the internet (UNCTAD, 2018).

Considering that the constant interaction between creative industries and technologies affects the market power of a firm, this concept becomes fundamental in the design of competition policies (Shapiro, 2000). While it is true that competition stimulates innovation, it is not unconnected that the benefits derived from market behaviour determine the appropriation of investment (Motta, 2018).

In fact, Shapiro (2000) determines that, in the era of the Information Economy, networks, compatibility and intellectual property rights are at the centre of competition. Specifically, this author considers that the performance of a firm or a market depends primarily on innovation and not on the price structure. Thus, intellectual property rights play an important role in competitive strategies. However, it is not appropriate to generalise that more competition implies more innovation. In this regard, Schumpeter (1912) concluded that the power of a monopoly can stimulate research and development and, empirically, it has been shown that there is an inverted U relationship between the levels of competition and innovation. However, it should be stressed that, clearly, the incentives to innovate are not only given by competition in the market but also in the chances of getting hold of the creations through the profits generated. Hence, market power encourages firms to innovate, to invest, to create and/or to improve the quality of existing goods and services.

Additionally, in order to analyse the challenges of competition policy in industries related to the Information Economy, a first relevant exercise, into the market definition, corresponds to a network impact analysis. In those sectors characterised by network effects, *"consumers increase their utility according to the number of other consumers opting for the same product"* (Motta, 2018). However, these effects may be distinguished according to the type of network. On the one hand, considering physical networks, consumers directly increase their level of utility (perhaps, level of welfare) when the number of people consuming the same good or service increases. On the other hand, they are considered hardware and software networks when *"the utility of the consumer increases indirectly with the number of other consumers buying the same good, due to its effects on the availability of a complementary product"* (Motta, 2018). Thus, from the point of view of supply, the Information Economy and the generation of information lead to the emergence of economies of scale and, from the perspective of demand, the network effects favour the establishment of certain products, which predisposes the accentuation of market power.

Thus, Garcés (2018) recognizes that in economic models involving the development of technology platforms, certain dynamics, which are not necessarily relevant in traditional economies, take importance in terms of Digital Economy: network effects, economies of scale and economies of scope. On the one hand, she recognizes that a platform is successful because it generates real value either by achieving lower transaction costs or by efficiently generating a higher level of information. On the other hand, in economies involving platforms, economies of scale create greater integration of different services. This emphasizes its potential to generate greater concentration in different markets simultaneously and to promote coordination between firms. Thus, in the context of technology platforms and

innovation, it is important to consider what type of value has been created and how that value has been monetized (Garcés, 2018).

Also, in order to illustrate this theoretical framework, Shapiro (2000) examines some implications in some competition policy areas: mergers, cooperation and behaviour of dominant firms:

- i. Mergers:** First, in horizontal mergers, this author considers that in the vast majority of mergers linking high technology firms, the analysis focuses particularly on unilateral effects. In this sense, the potential risk is that the integrated firm, acting independently, will have incentives to increase prices. It should be emphasized that the magnitude of unilateral effects will depend on the gross profits of each of the parties involved and the deviation ratio between them¹. Hence, he concluded that unilateral effects are greater when gross profits and the deviation ratio are large. Secondly, considering vertical mergers, the integrated firm may limit the compatibility of its products sold to its competitors. Thus, market power and entry barriers will become significant (Shapiro, 2000).
- ii. Cooperation:** It is usually that in those industries that involve technologies, the firms constantly form alliances or similar quality standards in their corresponding goods and/or services. This implies that homogeneity will make compatible products. In this way, competition authorities will need to analyse the impact of standardisation on competition policy. Considering the cooperation, the competition authorities will have to analyse whether the effect of this is to establish new products and standards that ensure compatibility, since, according to economic theory, cooperation between two firms selling complementary goods may lead to lower prices (Shapiro, 2000).
- iii. Behaviour of dominant firms:** According to the author, the main role of a competition authority is to prevent firms with a dominant position in a market under consideration from blocking innovation that could affect their position in the market (Shapiro, 2000).

In the same way, innovation makes economies increasingly dynamic and competitive. Although this is clearly an important achievement, it is no less true that it can also become a challenge for regulatory and competition authorities. Indeed, creative and cultural economies

¹ As usual, a deviation ratio between firm A and firm B is considered to be the fraction of sales lost by firm A when firm A increases its prices and are captured by firm B.

have the potential to concentrate markets, which translates into increases in mark-up and productivity. While these indicators are not the only ones, within a dynamic analysis of competition policy, the performance of an industry must be given important consideration (Mandel, 2018). Moreover, when the characteristics of the digital economy pose significant challenges in ensuring effective competition policy compliance, the context requires the development and the use of new techniques to carry out a correct cases investigation and, therefore, to be able to interpret the results (Almunia, 2018).

Similarly, Crémer et al. (2019) recognise that innovation has allowed greater connectivity and access to new markets, new goods, new services and a less costly distribution of cultural content, which translates into increased consumer welfare (Crémer, de Montjoye, & Schweitzer, 2019). However, they recognize, in parallel, that such innovation in digital industries differs from innovation in traditional sectors or markets. Indeed, a new platform is the result of various features, new processes and new technologies which, taken together, support a business idea. Innovation seeks a constant evolution in order to obtain the benefits derived from being "*the pioneer in the market*". However, these authors emphasize that the creation of digital platforms generally downplays the importance of industrial property protection such as patents and copyright (Crémer, de Montjoye, & Schweitzer, 2019).

Given the complementarity between the creativity, innovation and digitisation of the economy, the new dialectics created have, a priori, strong implications for competition policy: the methodologies to be implemented for market definition, market power evaluation and efficiencies, as well as the quantification of damage resulting from an anticompetitive practice.

Thus, in June 2017, the Competition Committee of the Organization for Economic Cooperation and Development (OECD), economists, academics and NGAs proposed a set of recommendations for market analysis which, essentially, involve digital economics:

Figure 4. OECD recommendations in markets involving digital economy.

Efficiency analysis: In those scenarios where network effects are strong, mergers involving digital platforms could generate efficiencies when they increase interoperability and combine databases. Hence, competition authorities should use different simulation tools in order to understand the different efficiencies that can be developed.

Market definition: In order to define markets involving multi-sided platforms, a detailed analysis of the network effect should be considered, as well as the identification of the sector performance in which the platform is inscribed.

Market power: Clearly, a multi-side platform is unlikely to have market power on one side of the market. This is why the substitutability analysis should be done in all markets involved, including an analysis of network effects and measurement tools based on demand responses.

Exclusive clauses or predatory prices: This type of market is more likely to develop this type of exclusionary behaviour. The assessment of exclusivity clauses should take into account the impact of exclusivity clauses on competitors' costs and on the intensity of competition. In this way, the predatory pricing assessment should examine whether predatory pricing can be profitable in a scenario where predatory pricing does not weaken competitors.

Source: OCDE (2018).

Other analyses carried out by Benavente and Grazzi (2017), mention that, while these business models based on creativity and innovation depend on the use of information and communications technologies, geographical proximity, known as creative clusters, plays an essential role in the generation and transfer of tacit knowledge, as well as the emergence of co-creation and collaboration: *"Creative clusters include creative firms that take advantage of geographic concentration to improve the collaboration that benefits all their members. This collective action increases the firm innovation and productivity, which can have access to better inputs: workers, knowledge, technology and new opportunities"* (Benavente & Grazzi, 2017). The emergence of these creative clusters then suggests the emergence of new markets that are not necessarily national and, on the contrary, could be considered local. In this sense, it can be inferred that there would be a certain degree of substitutability between goods, which therefore translates into local and specific markets for certain products (Rossi-Hansberg, 2018).

Over the past sixty years, competition policy has evolved and reacted to the each case challenges. The aim is to ensure firms participation, the welfare of consumers (respect for their rights) and the economic efficiency of the markets. However, it should be noted that the digital economy and the creative economy require a new adaptation of the analytical framework. In particular, as highlighted by Crémer et al. (2019), in the digital age, the monopsonic power of platforms and the effects on quality and innovation should be considered as a relevant part of the analysis. In turn, taking into account that the attention of consumers and their data are variables with high value for firms, their economic analysis differs from that implemented when the competition is for prices or quantities. Indeed, while market shares are traditionally measures such as the ratio of sales of a firm considered on the total sales in the market of the good or service, in the case of the digital economy, given the presence of increasing returns at scale, network externalities and data, market share should not take into account only prices. This reinforces the premise that measuring market power and market shares is a challenge in terms of free economic competition. Finally, in cases where platforms are multi-sided, the evaluation should consider all sides and the way they interact each other (Crémer, de Montjoye, & Schweitzer, 2019).

It can be inferred that, within a competition analysis and theories of harm, the interrelationship between markets and their interdependence are fundamental axes. In addition, as regards the identification of relevant markets, the dynamic nature of the markets poses significant challenges in the area of competition policy. In this regard, Crémer et al. (2019) mentions that: *"in abuse cases, competition authorities need to rewind and see the future as it was seen by the parties at the time of the conduct; in merger cases, they need to make their own assessment of the future evolution of the market and of technology"*.

4 A Review of SIC Decision related to Cultural, Creative and Digital Economy

The new requirements proposed by the constant interaction between Creative Economy, innovation and the digital economy open up the debate on how competition law should be addressed in order to ensure the firms participation in the market, consumer welfare and markets economic efficiency. The purpose of this section is to describe some SIC decisions related to Cultural, Creative and Digital Economy in order to illustrate the challenges that the competition authority has had to face.

4.1 Mergers

Article, Law 1340/2009, establishes that *"undertakings engaged in the same economic activity or participating in the same value chain and fulfilling the following conditions, are obliged to inform the Superintendence of Industry and Commerce of the operations they plan to carry out for the purpose of merging, consolidating, acquire control or integrate whatever the legal form of the planned operation:*

- 1. Where, as a whole or individually considered, they have had, during the fiscal year preceding the planned operation, higher operating income than, in current legal minimum monthly wages established by the Superintendence of Industry and Commerce; or*
- 2. When, at the end of the fiscal year preceding the planned operation, they have, as a whole or individually considered, total assets exceeding the amount of legal minimum monthly wages established by the Superintendence of Industry and Commerce.*

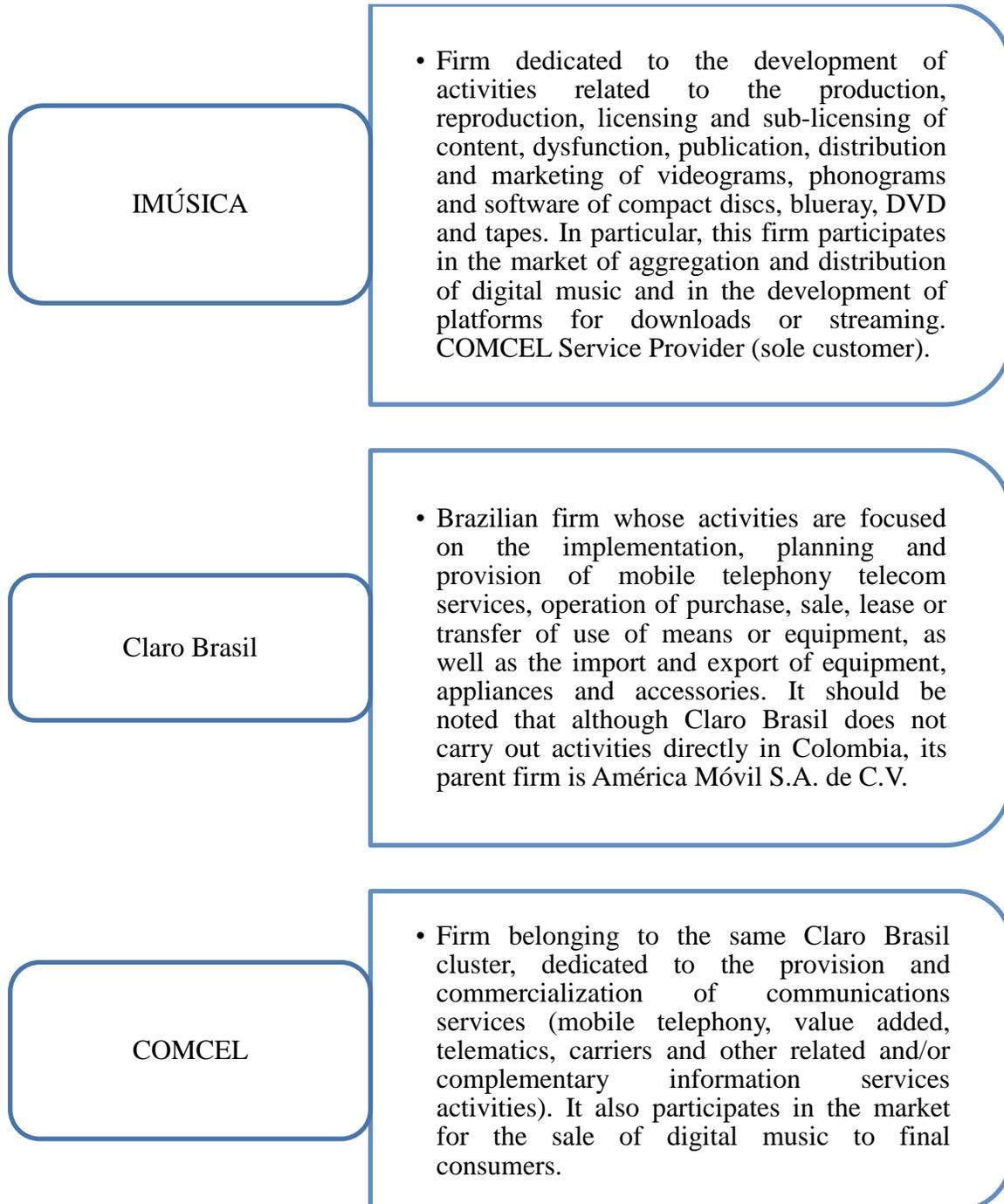
In the event that the interested parties meet some of the above two conditions but together have less than 20% of the relevant market, the transaction shall be deemed to be authorised. For the latter it will almost be necessary to only notify to the Superintendence of Industry and Commerce of this operation" (Ley 1340, 2009).

4.1.1 Resolution 1077 de 2015: Claro Brasil S.A., Comunicación Celular S.A. (COMCEL) e Ideas Musicales de Colombia S.A.S (IMÚSICA)

On September 9, 2014, Claro Brasil S.A. (Claro Brasil), Comunicación Celular S.A. (COMCEL) and Ideas Musicales de Colombia S.A.S (IMÚSICA) informed the Superintendence of Industry and Commerce (SIC) its intention to carry out a vertical merger whose object was to purchase all IMÚSICA shares by Claro Brasil. According to the undertaking, this transaction involves vertically integrating two markets belonging to the same value chain, namely (SIC, Resolución 1077 de 2015, 2015):

- i. The market for the sale of music to final consumers; and,
- ii. The market for the aggregation and distribution of digital music and the development of platforms for downloading or streaming digital music.

Figure 5. Undertaking Description.

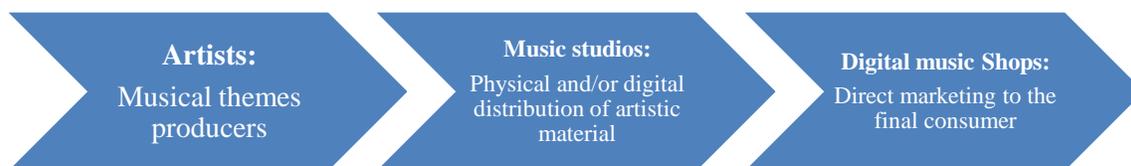


Source: GEE-SIC from Resolution 1077 of 2015.

In order to determine the potential impact of this merger, the SIC, taking into account the ICN Merger Guidelines Workbook, defined the product market as those goods and services considered substitutes in terms of demand, since the final consumer defines effective competition between bidders. Based on this analysis, the Colombian competition authority concluded that there is no overlap between the economic activities carried out by the undertakings. In fact, while IMÚSICA only provides digital music, it develops platforms for download and streaming and it is responsible for signing contracts with studios and artists in order to obtain the rights of distribution of the music, COMCEL is dedicated to the sale of digital music, through the virtual store CLAROMÚSICA, to the final consumers. Therefore, it is possible to infer the existence of a relationship of complementarity between the activities described (SIC, Resolución 1077 de 2015, 2015).

However, in order to understand more accurately the effects of the present merger, it is essential to understand the value chain to which the products and services involved belong. In the case that it is responsible, prior to the sale of digital music to the consumer, several agents intervene, thus forming the next value chain (SIC, Resolución 1077 de 2015, 2015). See Figure 6.

Figure 6. Digital music Value chain



Source: GEE-SIC from Resolution 1077 de 2015.

However, it should be noted that in the era of the Digital Economy and the Fourth Industrial Revolution, linked to the emergence of portable equipment and technological development, digital issues are no longer distributed massively in physical stores. This is how the intermediary distributors emerge, which through technological platforms digitally distribute

the music, example of this IMÚSICA who establishes himself as an intermediary between the musical studios and COMCEL in order to distribute the digital music to the final consumer (SIC, Resolución 1077 de 2015, 2015).

In this sense, as an intermediary distributor, it is responsible for negotiating non-exclusive licensing contracts with sub licensing rights. From this, it obtains the corresponding phonograms which are formatted and encrypted taking into account the preferences of the final consumers. Likewise, IMÚSICA stands as the developer of the COMCEL platform through which the themes are marketed in the digital store. Specifically, the sale of digital music can be done in three different ways, when these are done with the intermediary: (i) downloads; (ii) Streaming; and, (iii) file sharing applications (P2P). Once received the value of the purchase, IMÚSICA is in charge of transferring the values to artists and music studios, including a commission on sales. For its part, COMCEL markets digital music to its final consumers through downloads and streaming. This service can be paid through the invoice when the final consumers have this operator's mobile phone or by credit card (SIC, Resolución 1077 de 2015, 2015).

Thus, as regards substitutability analysis, the SIC identified that the wholesale digital music market is composed of digital music aggregation and distribution services. In turn, it was determined, on the basis of the information gathered in the file, that the market and the development of platforms for download and/or streaming are complementary services, since to ensure efficient distribution it is necessary to use a virtual platform that "connects" the market on two sides. Now, for the retail distribution market, the analysis carried out established that there are no substitutes close to digital music. Indeed, there are substantial differences in physical format such as easy access to more content and variety of topics and lower transaction costs from the consumer point of view. Finally, for the relevant geographic market analysis, the Colombian competition authority concluded that there is no evidence to establish the presence of geographical limitations for a supplier to participate in the wholesale digital music market, whereas the distribution of the same is done through digital platforms. In parallel, there are no geographical barriers that inhibit a consumer from acquiring music since the only requirement to access the service is to have an internet connection (SIC, Resolución 1077 de 2015, 2015).

In conclusion, the product and geographic market affected by the merger corresponds to the national wholesale market for digital music and the domestic retail market for digital music by download or streaming (SIC, Resolución 1077 de 2015, 2015).

Finally, after calculating the market shares for each players involved in the retail and wholesale digital music markets, as well as the analysis of entry barriers, the SIC concluded that there are no significant barriers to the defined relevant market, and the vertical effects of the business integration operation by which it was established that the transaction would not have the potential to unilaterally restrict competition in the relevant market, Considering that there are competitors with greater participation and global presence, the SIC decided that this operation would be approved with no conditions (SIC, Resolución 1077 de 2015, 2015).

4.1.2 AT&T INC. and Time Warner INC. merger

On February 15, 2017, the Superintendence of Industry and Commerce was informed about AT&T INC. (AT&T) and Time Warner INC. merger (Time Warner) consisted in "*the acquisition of exclusive control by AT&T over Time Warner*", which took place outside the country. Specifically, according to the Merger Agreement, AT&T acquired Time Warner 50/50 in shares and cash (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

Figure 7. Undertaking Description.



American telecommunications company. Its main activities focus on the provision of telecommunications and digital entertainment services. In particular, it provides advanced internet services through the segment of commercial solutions; video, internet, voice communications and interactive advertising in the United States through the Entertainment Group; and data for different consumers through their wireless networks; and, regarding its international unit, AT&T provides wireless services in Mexico and entertainment in Latin America. In Colombia, it has exclusive control of AT&T GLOBAL NETWORK SERVICES (GNSC, connectivity solutions to multinational companies), TELECENTER PANAMERICANA (Call center services for requests, complaints and/or claims of DIRECTV subscribers) and DIRECTV COLOIMBIA LTDA (satellite subscription television services, retail, and fixed broadband internet services).



American media and entertainment company. Its business lines are TURNER (TV channels and digital media), HBO (premium TV channels), WARNER BROS (production and distribution of television, movies and entertainment). In Colombia, its subsidiaries are TURNER COLOMBIA (trading and intermediation services to subscription television service operators in Colombia, as well as the sale of advertising and sponsorship through TURNER to agencies and advertisers in Colombia) and HBO LAG (postproduction, marketing and customer support).

Source: GEE-SIC from Estudio Económico 17-38927.

However, in order to identify the competitive forces to be developed and the potential anticompetitive effects that may arise, the definition of relevant market (product and geographic) is a fundamental tool for this purpose. In this regard, based on the study prepared by the Colombian Communications Regulatory Commission (CRC), the Superintendence of Industry and Commerce concluded that the television industry is composed by (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

- i. Content creation and production constituted by the owners and producers of content and those who sell such audio-visual material to wholesale distributors.
- ii. Wholesale distribution of channels on which television channel providers purchase the programmes individually and which are subsequently packaged on television channels. This content is offered by wholesale providers to subscription television operators who ultimately distribute it by cable, satellite and/or broadband. In turn, the wholesale distribution includes the sale of advertising spaces.
- iii. Retail distribution of content includes the purchase of channels from wholesale distributors by subscription distributors such as Claro, DIRECTV, Movistar, which combine these channels in packages to be sold to the final consumer. This level includes both free open television channels and online content distributors.

Thus, taking into account both the activities of each of the firms involved and the relevant market definition, the Superintendence of Industry and Commerce has determined that this merger is vertical as well as horizontal. Indeed, from the vertical perspective, the activities of TURNER COLOMBIA in the market for licensing and provision of television channels and the activities of AT&T through DIRECTV in the retail supply market of the subscription service; and, from a horizontal perspective, considering the wholesale market of offering television channels (WIN SPORTS) and the market of offering and selling advertising spaces on television (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

In particular, it was identified that in the case of AT&T the wholesale distribution is made through WIN SPORT and GOLF CHANNEL, while in the case of TimeWarner the offer is made through Boomerang, Cartoon Netime Warnerock, CNN en español, CNN internacional, Glitz, HLN, HTV, MuchMusic, Space, TBS Very Funny, TCM, TNT, TNT Seriesm Tooncast, TruTV, HBO, MAX, History Channel, H2, A&E, AXN, Sony

Entertainment televisión, E!, Universal Channel, Lifetime, Warner Channel and Telemundo International. In addition, for competitors in the wholesale distribution market, Walt Disney Co, Viacom inc, Discovery, Paramount, Televisa, Sony, NBCU, Claro, RCN, CARACOL, Señal Colombia, Citytv, Canal 13, Canal institucional and Canal UNO (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

One of the particularities of the present case is the fact that each channel stands as a monopoly of its own content, since this is the result of a creation obtained through copyright and intellectual property. However, it is important to note that the supply of the channels is made through monopoly competition because the channels, although not offered in the same way, are competing for the same audience. That is why it can be concluded that channels are imperfect substitutes and that wholesale channel distribution can be defined as a cluster market (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

Considering the content retail distribution market and, in particular, the multichannel retail market, AT&T is the only firm in the operation involved in this market through its subsidiary DIRECTV. AT&T provides satellite television subscription services in packages to different final customers. Hence, its competitors are cable television operators, Community television operators and IPTV operators (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

In fact, AT&T sells few advertising spaces, a sale that is negotiated at a Latin American level by DIRECTV and, in the case of WIN SPORTS, spaces are offered only on the streaming page of that channel. For its part, TimeWarner in the sale of channels includes advertising that has been inserted in the programming. However, it is important to emphasize that such advertising depends on the region where it is transmitted (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

Finally, in terms of advertising, the price of advertising is determined by the geographical reach of the channel, the ratings of the channel, the popularity of the programs, the number of advertisers, the availability of alternative media in the market, the development of projects and programmes associated with the programming and the level of expenditure of the advertiser. In the chaos in question, both AT&T and TimeWarner sell advertising spots on television but with different levels of competition. In conclusion, for the purpose of analysing the present merger, the relevant product market is composed of the wholesale distribution of channels, the retail market of multichannel television and advertising spaces on television,

being the relevant geographic market throughout the national territory (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

In order to assess the structure of the markets defined, that is, to determine competitors, market shares, effects and entry barriers, the Superintendence of Industry and Commerce took into account the following aspects (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017):

- i. In the wholesale channel market, aggregated audience data from each wholesale channel distributor, available from KANTAR IBOPE MEDIA, were used between 2014 and 2016.
- ii. Based on data from the National Television Authority (ANTV for its acronym in Spanish) the multichannel retail market shares in 2015 and 2016 were quantified and it was concluded that DIRECTV could not exercise exclusionary practices, where there is strong competitive pressure in the relevant market.
- iii. Finally, taking into account the ASOMEDIOS and LAMAC database, the Superintendence of Industry and Commerce has concluded that the combined participation of both firms in the market of offering of advertising spaces in television would not generate some type of significant competition effects.

Thus, once the above arguments have been put forward, the Colombian competition authority approved without conditions the merger presented (SIC, Estudio Económico de la Operación de Integración Empresarial AT&T INC. y Time Warner INC., 2017).

4.1.3 Resolution 92709 de 2018: The Walt Disney Firm y Twenty-First Century Fox, INC.

On August 6, 2018, The Walt Disney Colombia (Disney Colombia), a firm controlled by The Walt Disney (hereinafter Disney), reported to the Superintendence of Industry and Commerce, the Disney and Twenty-First Century Fox, INC. (FOX) merger. Specifically, *"the planned merger relates to the combination of the activities of The Walt Disney (TWDC) and Twenty-First Century Fox, INC (21CF). On 13 December 2017, TWDC and 21CF concluded an agreement for TWDC to acquire 21CF, including its cinema and television*

studios, cable entertainment networks and international television firms" (SIC, Resolución 92709 de 2018, 2018).

Figure 8. Undertaking Description.



Source: GEE-SIC from Resolution 92709 de 2018.

In the audio-visual industry, the content (films, sports and television series) is produced "upstreaming" by media producers and distributed "Downstream" in different formats. In the AT&T – TimeWarner merger, the Superintendence of Industry and Commerce recognized that the industry is composed by three levels, namely content creation and production, wholesale distribution of channels and retail distribution of content. Coincidentally, the undertakings participate in the following markets (SIC, Resolución 92709 de 2018, 2018):

- i. Production and supply of films for theatres, covering pre-production, production and post-production stages. Film production is generally monetized through the direct distribution by film producers, film producers or a third party (For example, in Colombia, CINECOLOR and CINE COLOMBIA).
- ii. Production and supply of television content where the firms participating in this market produce their content for internal use of their channels and/or for third parties as providers of television channels and/or service retailers from the television.
- iii. Operation and wholesale supply of television channels where producers offer audio-visual content to television operators. These contents are distributed either through open television platforms, subscription television platforms or through online solutions (streaming) where an additional payment is made.
- iv. Provision of advertising space, since the media is a tool for transmitting advertising to people or firms, which are interested in promoting their goods and services.
- v. Consumer products consisting of intellectual property rights licenses for the production of toys, clothing, textiles, jewellery, etc.
- vi. Books and magazines where Disney creates, distributes and awards product licenses to Colombian publishers in the sale of books and magazines, both digital and printed. FOX licenses book and magazine publishers without selling them directly.
- vii. Licensing of musical rights for the development, production, marketing and distribution of music for television programmes and films.
- viii. Licensing for video game developers through which those involved produce interactive family content such as multiplatform video games, online videos and

games. They also license video game developers to use their commercial names and characters.

It should be noted that, taking into account the characteristics of the audio-visual industry in Colombia, as well as the fact that services are offered at national level and there are no entry barriers justifying a market segmentation, the Superintendence of Industry and Commerce has determined that the relevant geographic market is all the national territory (SIC, Resolución 92709 de 2018, 2018).

However, for the purpose of specifying the market shares of the parties involved in each relevant markets, the competition authority analysed, on the one hand, those markets in which the integrated entity would obtain a market share of less than 20% and, on the other hand, those in which the share would turn out to be greater than 20%. Despite information constraints, in particular in the market for the production and supply of content, the Colombian competition authority took as reference the information provided by the participants as a basis of analysis of the participation held by Disney FOX, as well as PROCHILE market studies (2017) and the levels of audience (IBOPE, 2017). Based on the analysis, in the short term, Disney would not have incentives to establish constraints limiting the existing competitive pressure, considering that if it were to host such a strategy, demand could be diverted to other high probability options (SIC, Resolución 92709 de 2018, 2018).

Finally, it is important to highlight the potential anticompetitive effects. In this regard, a merger can generate both coordinated and unilateral effects. In particular, in our case, the operation would have horizontal effects since the participants are active in the audio-visual industry in Colombia, while vertical effects are ruled out, where the transaction does not consider the merger of two or more agents from different links in the value chain. Although Disney would increase its market share and, in the case of the market for the production and supply of films for theatres would consolidate itself as a leader, in the latter unilateral effects are discarded since it would achieve a participation not very different from its competitors participation (SIC, Resolución 92709 de 2018, 2018).

Thus, after analysing the present merger, the Superintendence of Industry and Commerce concluded that the planned operation would not generate substantial risks affecting competition. For this reason, the Superintendence of Industry and Commerce approved with no conditions the integration Disney-FOX (SIC, Resolución 92709 de 2018, 2018).

4.1.4 Resolution 60515 of 2018: Avianca Holdings S.A., Aerovías del Continente Americano Avianca, Price Res S. A.P.I DE C.V. y Price Res S.A.S.

On October 9, 2017, Avianca Holdings S.A. (Avianca Holdings) informed to the Superintendence of Industry and Commerce the intention to carry out a merger between Avianca Holdings, Aerovías del Continente Americano S.A. Avianca (Avianca), Price Res S.A.P.I. DE C.V. (Price Travel) and Price Res S.A.S (Price Res), which would consist on *"an association for the constitution of a new society (NEWCO) where Avianca Holdings and Price Travel (the unfertakings) would have joint control"* (SIC, Resolución 60515 de 2018, 2018). See Figure 9.

Specifically, merger seeks to create a joint venture firm, where Avianca Holdings and Price Travel will have a 50% stake each, whose purpose is *"the joint operation of online travel agency services under the brand Avianca Tours"* (Resolution 60515 de 2018). As presented to the Colombian competition authority, the services that Newco will provide will be nationwide, offering, in particular, tourist packages (air tickets and other tourist services) and other tourist services, individually or in packages. It should be noted that this transaction excludes the individual sale of domestic or international air tickets. In this sense, the new joint venture firm would carry out the following activities (SIC, Resolución 60515 de 2018, 2018):

- i. National or international transport services packaged with other tourist services.
- ii. Other tourist services offered individually or packaged with other tourist services.

These activities would therefore belong to the nation market for marketing and reserving tourism services.

Figure 9. Undertaking Description

	<p>Airline company whose investment lines are: air passenger transport; freight, mail and express courier transport; and related or air transport related activities, developed through various subsidiaries, such as the administration of the Frequent Lifemiles Traveller Program, marketing of engineering services and aircraft maintenance, through Avianca Services, training and training in aeronautical services, airport care for aircraft and third parties and activities related to the provision of tourism services through Avianca Tours.</p>
<p>Air passenger transport services on domestic or international flights; express cargo, mail and courier transport on domestic or international flights; and, services related to air transport such as ground handling, training, maintenance and activities associated with the provision of tourist services.</p>	
	<p>Promoter of variable capital investment whose main activity is the provision of commercial mediation services between hotels or airlines, or both, and third parties; marketing and booking of online flights and holiday packages and/or other communication systems; and, development and marketing of software and information systems for online booking and sales of air tickets and tourist plans. In Colombia, it operates through its subsidiary Price Res (www.tiquetesbaratos.com).</p>
<p>Price RES is a firm whose activities are: commercial mediation between hotels or airlines, or both and third parties; marketing and booking of flights and holiday packages via internet and other communication systems; and, development and marketing of software and information systems for online reservations and sales of air tickets and tourist plans.</p>	

Source: GEE-SIC from Resolution 60515 de 2018.

Once the activities carried out by each of the participants were identified, it was possible to conclude that they coincide in two lines of business (SIC, Resolución 60515 de 2018, 2018):

- i. Marketing and booking of domestic and international air tickets
- ii. Marketing and booking of other tourist services.

This merger foresees that the brand "Avianca Tours" does not disappear, meaning that it will continue to operate and compete in the corresponding market. Newco will have an exclusive license for the use of the mentioned trademark and will have management independence, which gives it autonomy to decide. In addition, Newco will use the technology platform supplied by Price Travel, as well as the call center and back office services offered by Price Travel. Finally, the mark "Tiquetesbaratos" and "PriceTravel" will continue to compete in the national market with the Newco and the agreements that specify the conditions of sale of the domestic and international air tickets of Avianca and the other firms of the business group offered in the Newco be objectively defined and equivalent to the conditions established with other travel agents (SIC, Resolución 60515 de 2018, 2018).

However, Newco will not market or book individual air tickets. On the contrary, it will only market and book tourist packages and services. That is why, on the basis of the foregoing and in order to identify whether the latter is a relevant market and therefore to determine the possible proximity, the Superintendence of Industry and Commerce has carried out a description of the tourist industry and the services rendered by the travel agencies (SIC, Resolución 60515 de 2018, 2018).

In conclusion, the competition authority determined that information systems such as GDS, through which travel agents can access online different databases of tour service providers and thus book on behalf of final consumers, and the metasearchers that locate the information in search engines (Kayak, TripAdvisor, Skyscanner, among others.) are not part of the market selling packages or tourist services to final consumers. Hotel establishments, passenger transport, gastronomic establishments and car rentals are providers of tourist services to travel agencies, including those involved in this business integration operation. Finally, the individual marketing and booking services of air tickets will not be offered by Newco, the reason why it does not stand as part of the relevant product market (SIC, Resolución 60515 de 2018, 2018).

In terms in which the present merger was presented and taking into account the existing horizontal relationship, the corresponding product and geographic markets are the national intermediation service in the marketing and booking of packages and tourist services. In turn,

from the vertical relationship, the national provision of technological solutions for reservation of packages and tourist services constitutes a relevant product market concerned (SIC, Resolución 60515 de 2018, 2018).

In this sense, after identifying the relevant product and geographic markets, the Superintendence of Industry and Commerce proceeded to estimate the market shares. For this purpose, it used the national travel agencies total sales in the services of intermediation in the marketing and booking of packages and tourist services market. Based on this analysis, it was concluded that, given the horizontal relationship, there are no risks for competition (SIC, Resolución 60515 de 2018, 2018).

However, with the merger, the undertakings could achieve a competitive advantage that is difficult to mitigate by another potential competitor unless individual sales of domestic or international air tickets are excluded. Moreover, taking into account that Avianca has a significant market share in the domestic and international air transport market (SIC, Resolución 60515 de 2018, 2018).

Thus, in order to avoid any potential anticompetitive practice, Article 11, Law 1340/2009 provides structural or behavioural conditions. In this case, a behavioural conditioning was imposed whose purpose was to mitigate the potential anticompetitive effects which are described in the following illustration (SIC, Resolución 60515 de 2018, 2018):

Figure 10. Description of the imposed conditioning in Avianca – Price Travel merger.

Conduct conditioning for mitigate the risk of possible vertical effects: Once the merger has been approved the Newco will not be able to trade, either directly or through its subordinate ones, domestic or international air tickets individually. For the purpose, the offer of Avianca air tickets must be made on an equal footing with its potential competitors, without discriminatory conditions that could favour Avianca.

Audit: The undertakings will have to propose three auditing firms with presence in Colombia. The Superintendence of Industry and Commerce will select one of them, taking into account the requirements. This audit will be responsible for verifying, monitoring and certifying compliance with the conditions imposed by the Colombian competition authority. Your report will be biannual since the Newco creation.

Compliance policy: Individually, participants must grant a compliance policy (compliance insurance, bank guarantee or promissory note) in favor of the Superintendence of Industry and Commerce.

Effect: The validity of the conditioning imposed will be for five years since the execution of the Resolution which approves this merger (Resolution 60515 of 2018).

Publication: This conditioning must be published on the official homepages within 15 working days of the date on which the Newco is established during three months.

Contributions: Article 22, Law 1340/2009 sets the payments for monitoring activities, paid by the undertakings.

Source: GEE-SIC from Resolution 60515 de 2018.

In conclusion, the Superintendence of Industry and Commerce authorized, with conditioning, the Avianca Holdings, Avianca, Price Res and Price Travel merger (SIC, Resolución 60515 de 2018, 2018).

4.2 Anticompetitive practices

According to the Constitution of Colombia, the economic competition is a right which suppose responsibilities. In this sense, Law 155/1959 (Article 1, *Prohibición General*), Decree 2153/1992 and Law 1340/2009 form the Competition Protection General Regime for all the sectors in Colombian Economy. Specifically, the legal provisions cover all anticompetitive practices (agreements, acts, abuse of dominance) as mergers too. Hence, the rules provisions on competition protection will apply to anyone (independently his legal form) who engages an economic activity which development, effects or conduct may have full or partial effects on national markets (Article 2, Law 1340/2009).

In addition to, as Article 6, Law 1340/2009 mentions, the SIC stands as the national competition protection authority in Colombia whose functions, among others, include to deal exclusively administrative investigations, to impose fines and to take other administrative decisions related to infringements of the provision on competition protection (Article 6, Law 1340/2009).

Therefore, in order to ensure the firms participation in the market, consumer welfare and markets economic efficiency, the purpose of this section is to describe a SIC decision related to audience measurement and to illustrate the challenges that the competition authority has had to face.

4.2.1 Resolution 23890 de 2011: IBOPE

On April 19, 2010, the Deputy Superintendent for Competition Protection at the Superintendence of Industry and Commerce ordered the opening of an administrative investigation in order to determine if RCN Television (RCN), Caracol Televisión (Caracol), the Colombian Union of Advertising Firms (UCEP) and IBOPE Colombia (IBOPE), in addition to 7 natural persons, break Article 1, Law 155/1959 (*Prohibición general*) and Article 47, Decree 2153/1992 (paragraph 5 and 10) (SIC, Resolución 23890 de 2011, 2011).

In the production of information from television audience measurement studies market, there was only one supplier (IBOPE); in the television advertising industry, in Colombia, national and international channels such as Caracol and RCN participate as advertisers; and, the UCEP acquired approximately 80% of the advertising pattern in national, regional and international television (SIC, Resolución 23890 de 2011, 2011).

Colombian television channels RCN and Caracol, UCEP and IBOPE signed an agreement in March 2009 to measure the audience on television (INFOMETER) and the Advertising Competition Service (INFOPAUTA), information necessary for decision making in the market for the purchase and sale of advertising guidelines. In this agreement, the conditions stipulated, the restrictions applied to some actors in the industry for access to audience measurement studies and the increase in the rates of the studies mentioned above indicated, the existence of a vertical agreement with horizontal and vertical anticompetitive effects in marketing of television and advertising media studies markets. Specifically, Caracol, RCN and UCEP (contractors) signed an agreement with IBOPE to carry out the studies of INFOMETER and INFOPAUTA where Caracol, RCN and UCEP will be the owners of the products obtained after the measurement ((SIC, Resolución 23890 de 2011, 2011).

However, certain exclusions to third parties, particularly international channels, were evident for access to such studies where IBOPE required prior authorization from contractors to supply to others the products derived from the study carried out. The agreements also empowered contractors to determine the costs of studies for their competitors by imposing a fee. This had the following effects (SIC, Resolución 23890 de 2011, 2011):

1. The third parties concerned shall be subject to prior authorization by the contracting parties to access the studies produced.
2. International channels will not access the information for almost 8 months.
3. Contracting parties shall determine the access rate and the increases, which vary between 20% and 120%.
4. Contractors and IBOPE will gain a competitive advantage, reinforced by their dominant position in their respective markets.

In this sense, the markets affected by anticompetitive practice are the market for the purchase-sale of information resulting from the television audience measurement studies and the purchasing market-sale of advertising guidelines on television. In order to characterize and accurately assess the effects of the conduct on the affected markets, the Superintendencia of

Industry and Commerce presented the industries performance features and their dynamic interactions:

- **Audience measurement industry and the television ratings measurement market in Colombia:** Consumers and producers use qualitative and quantitative ratings, as well as the measurements made by third parties to determine the quality and value of a good or service. In this sense, ratings and measurements of perception and preference play a fundamental role in investment and purchase decisions. In particular, in the advertising industry, the measurements are constituted as an indicator of the quality of their contents, evidencing the preferences and habits of consumption and, they are therefore the basis for negotiating the price for time and advertising space (SIC, Resolución 23890 de 2011, 2011).

In Colombia, there are only two agents that provide information on television audience measurement studies: IBOPE, with its INFOMETER and TGI studies, and the Colombian Media Studies Association with the General Media Study (EGM for its acronym in Spanish). However, IBOPE has the particularity that it is the only one that monitors advertising investment in television in its study INFOANÁLISIS (SIC, Resolución 23890 de 2011, 2011).

INFOMETER and INFOANÁLISIS are considered complementary studies rather than substitutes for EGM and/or TGI. Hence, IBOPE, given its experience and availability of infrastructure to carry out the measurement of audience and investment in advertising, is the only firm that can provide the relevant information to the market. Thus, the Superintendence of Industry and Commerce concluded that the performance of the market for information from television audience measurement studies determines the performance of the market for television advertising standards, whereas the former is regarded as a basic input for defining the trade policies to be implemented in the second one (SIC, Resolución 23890 de 2011, 2011).

- **Advertising industry and the advertising market on television in Colombia:** The information provided in the measurement of the audience on television allows the advertisers to establish which are the most suitable means to guide their good or service and, for media agencies and central media to design the media plans to offer and for the media to determine the values to be charged for advertising spaces. In Colombia, in the mere advertising pattern on television, national and international channels are the providers of advertising spots, while advertisers demand the purchase of the spaces in question. In this sense, when advertising agencies or media

centers select advertising space on a channel, they take into account the coverage area, audience behaviour and program rating, supported by the information provided in the INFOMETER and INFOANÁLISIS studies (SIC, Resolución 23890 de 2011, 2011).

- **Sale of advertising spots on television:** In the 2009 first semester, Caracol and RCN together held 81% of the advertising investment made by advertisers, advertising agencies and media centers. In turn, UCEP aggregated 15 agencies and nine media centers. Hence, the Office concluded that the contractors have a high participation in the advertising market on television. In addition, it should be noted that this market power transfers its effects to the market for audience measurement information, considering that the value to be cancelled for the study depends on their participation in the marking of advertising pattern on television (SIC, Resolución 23890 de 2011, 2011).

This is how, based on the information gathered in the file, the SIC determined that the agreement restricted access to the study of Colombian television audience to interested third parties during 8 months and it implement an unjustified increase fee. This situation has caused the creation of an artificial input barrier to information and, therefore, the development of exclusionary effects (SIC, Resolución 23890 de 2011, 2011).

Also, in the present case, one of the arguments put forward by RCN, Caracol and UCEP was that the audience measurement study should be considered a work protected by copyright. However, the study itself does not have the requisite qualifications to be considered as such (Resolution 23890 de 2011). Besides, they emphasized that the agreement achieved efficiencies. However, this argument is invalid due to the contractual conditions, in monetary terms, caused price increases that did not result in significant and structural technical improvements to the measurement study (SIC, Resolución 23890 de 2011, 2011).

In conclusion, the Superintendencia of Industry and Commerce considered that Caracol, RCN, UCEP and IBOPE violated article 1, Law 155/1959 and article 47, paragraphs 5 and 10, Decree 2153/1992. As a result, the Office of the Superintendencia of Industry and Commerce has determined on April 29th, 2011, that Caracol and RCN (\$1.060.488.000), the UCEP (\$754.660.400) and IBOPE (\$771.264.000) would be sanctioned. Similarly, natural persons as legal representatives were sanctioned whose fines were equivalent to \$52.488.800, \$38.563.200, \$37.492.000 and \$12.854.400 (SIC, Resolución 23890 de 2011, 2011).

4.3 Competition Advocacy Concepts

Article 7, Law 1340/2009, provides that the Superintendence of Industry and Commerce may give prior consideration to those regulatory projects of the Colombian State that may have some impacts on competition. To this end, the regulatory authorities must inform to the Colombian competition authority all administrative acts that they will issue. The concept delivered is not binding, however, if the regulatory authority does not accept this concept, it must state the reasons why it does not take into account (Ley 1340 de 2009, art.7).

In this sense, the Competition Advocacy is a legal tool to promote competition policy. Specifically, its functions include to advise the National Government on competition protection, to promote competition in markets through the socialisation of rules and the creation of a competition culture, and to verify that the regulatory projects do not competition in markets (SIC, Abogacía de la competencia, 2019).

4.3.1 Concepto 16-137076: Resolution 2163 del 27 de mayo de 2016 “Por la cual se reglamenta el Decreto 2297 de 2015 y se dictan otras disposiciones” y proyecto de Resolution “Por la cual se modifica la Resolution 2163 de 2016, se crea el trámite de Habilitación de la plataforma tecnológica del servicio de transporte público individual en el nivel de lujo y se hacen unas precisiones y aclaraciones”.

Resolution 2163/2016 issued by the Ministry of Transport, which is intended to be supplemented by the draft administrative act referred to, regulates Decree 2297 of 2015² on following aspects (SIC, Concepto 16-137076, 2016):

I. Features, functionalities and requirements that technology platforms must meet to be enabled:

- To set the fare in advance when the user requests the service
- To visualize the journey, distance and estimated time of the trip
- To filter the service request by model, vehicle class, and driver and vehicle rating
- To have a module to store the information of the applied formulas for the determination of the fee
- To have tools to ensure that the information remains unchanged
- To have a module that generates reports on the provision of public transport service
- To consolidate databases that record information of the vehicle, driver, operating card, driving license, user of the service, occasional travel spreadsheet, in the detail levels contained in 4 sheets of annexes to the Resolution, among others.

Once the platform is enabled by the Ministry of Transport, Paragraph 3 of Article 5 of Resolution 2163 of 2016 provides that a platform may operate only if it establishes a contractual relationship with a transport undertaking (SIC, Concepto 16-137076, 2016).

Specifically, the standard establishes six (6) service indicators to be met by transport undertakings and drivers, each with the formula to calculate it, the measurement regularity (monthly or biannual) and the default rate. Such indicators should be generated by technology platforms.

The draft resolution seeking to amend Resolution 2163 of 2016, concerning the procedure for the establishment of the technology platform, establishes that applicants must submit a standard format which can be found on the website of the Ministry of Transport (Article 6), Taking into account article 7, the draft resolution proposed to delete it when a cost for processing and authorization is established.

Finally, on Article 16, it proposed to amend it in order to establish that the service can be recalculated by the platform in case of events such as "*traffic, deviations or accidents*", among others, and then the real value of the service will be determined once the route is completed.

I. The concerns of this Superintendencia regarding excessive and/or restrictive regulation.

The OECD notes that the regulatory environment is key to the emergence of disruptive innovations for two reasons: i) firstly, such creations have emerged to address inefficiencies arising from excessive regulation; and ii) disruptive innovations arise in jurisdictions characterized by a less restrictive regulatory environment. For these reasons, OECD notes that "[r]egulations that block, deter or delay the entry of disruptive signatures are a challenge for competition authorities".

II. The risk that transport undertakings may hinder the entry into the market of new technology platforms to the detriment of the consumer.

"ARTICLE 5. TECHNOLOGICAL PLATFORM ABILITY:

Paragraph 3: In order to enter into operation at the level of luxury service, the technological platform enabled by the Ministry must prove to the Local Authority its relationship with the transport firm enabled in the mode and at that level.

Paragraph 4: In any case, automotive land transport firms in the individual mode at the level of basic service and luxury, they must ensure that vehicle owners have access to the platforms provided by the Ministry of Transport" (highlighted and underlined outside the text).

In order to provide the service at the level of luxury, licensed transport undertakings must use their own technology platforms. Besides, Paragraph 4, Article 5, Resolution 2163/2016 establishes the obligation in charge of transport undertakings, either at the basic level or at the luxury level, to ensure that vehicle owners have access to the platforms (SIC, Concepto 16-137076, 2016).

For the SIC, the regulation cited above may create an incentive for a transport firm to favour the use of a platform (one with which it has a contractual relationship) in relation to others. Such situation differs from competition policy because the developer of a new platform could face a barrier to enter into operation given the eventual refusal of the transport firms to establish a business relationship with him. In addition, the end user would see the possibility of having reduced variety in the market (SIC, Concepto 16-137076, 2016).

For this reason, it is advisable that the standard establishes clearly that owners of vehicles or drivers, both at the basic level and at the level of luxury, have the right to provide their services through all the enabled technology platforms. In turn, the requirement on transport operators to establish trade relations with all platforms that accomplish with the requirements should be set, without imposing unnecessary barriers or discriminatory requirements (SIC, Concepto 16-137076, 2016).

According to last comments, the Superintendencia of Industry and Commerce makes the following recommendations to the Ministry of Transport (SIC, Concepto 16-137076, 2016)

- i. To eliminate requirements for functionalities and technical requirements that are excessive and/or unjustified and do not relate directly to the principles and public policy objectives that the regulation pursues due to the fact that micro regulation in terms of functionalities and technical requirements, as included in Resolution 2163/2016, may be an impediment for disruptive innovations (Concepto 16-137076 de 2016).
- ii. To remove the entry barrier described in paragraph 3, Resolution 2163/2016. For it, the Superintendencia of Industry and Commerce proposes the following:
 - a. To establish that the Ministry of Transport approval of a technology platform is sufficient to enter into operation, without having to prove a business relationship with a transport firm. In this way, it would be sufficient for the vehicle owner to download the enabled platform for a new product to enter the market.
 - b. To clarify that vehicle owners and drivers can provide their services across all technology platforms they want, both at the basic level and at the luxury level, and to establish the lead requirement of transport undertakings in order to form commercial relations with all licensed technology platforms upon request.
 - c. To create a regulatory breach for a transport undertaking to: i) restrict the owner of a vehicle from gaining access to one of the platforms authorized by the Ministry of Transport; or ii) privilege the use by owners of vehicles of one of the platforms enabled by the Ministry of Transport.
 - d. To create a regulatory breach for a transport undertaking: i) to refuse to enter into a business relationship with the developer of a technology platform; or ii)

provide one technology platform with discriminatory terms compared to the others.

5 Public policies recommendations

Undoubtedly, Creative and Cultural Economy has become, in the contemporary world, one of the pillars of economic growth and development. This sector has contributed significantly in terms of exports, value added, employment, competitiveness, productivity and investment. Although there are different definitions of what is considered Creative Economy, they all agree that culture is the factor that explains innovation and where, in particular, creative industries focus on the development of software, radio, television and visual arts.

Although the Knowledge Economy is not a recent phenomenon, the new technologies of the Digital Economy and the Fourth Industrial Revolution, as well as their use, have facilitated and promoted the mass of creative content and, in particular, they have allowed to describe, in a more efficient way, the preference of the consumers. However, this relationship can be seen in two ways, the development of new technologies also requires creativity and innovation, which allow the creation of new markets and the consolidation of existing ones. Thus, different authors recognize that in economic models involving the development of technological platforms, software and creative content, certain dynamics that they are not necessarily relevant in traditional economies become very important: network effects, economies of scale and economies of scope.

In this sense, considering the complementarity between the creativity, innovation and digitisation of the economy, and in order to ensure the firms participation, consumer welfare and efficiency, the new dialectics created have strong implications for competition policy, taking into account the methodologies to be implemented for market definition, market power evaluation, concentration and efficiency, as well as the damage quantification derived from an anticompetitive practice.

The presented cases reflect the importance of understanding the productive value chain, the markets and their corresponding interrelationship. Hence the relevance of economic analysis and, consequently, interdisciplinary between jurists and economists. In addition, given the increased complementarity and lower transaction costs, the overview preferences and estimates of demand play an important role.

Specifically, considering that consumers' attention and their data are highly valued by firms, their economic analysis differs from which has been implemented when competition is for prices or quantities. Indeed, while market shares are traditionally measures such as the ratio of sales of a firm considered on the total sales in the market of the good or service, in digital economy, taking into account the presence of increasing returns at scale, network externalities and data, market share should not take into account only prices. This reinforces the premise that measuring market power and market shares is a challenge in terms of competition policy.

Also, personal data, their protection, the use of Big-Data, the protection of industrial property and international cooperation, taking into account the intrinsic national markets features, will allow a more detailed analysis about the implications and the effects of a merger or anticompetitive practice on the market(s) concerned. Finally, it is important to emphasize that disruptive innovation can sometimes be misread, which rise as risk for economic competition: technological neutrality, conditions of exclusion for those who cannot access it and exploitative effects.

Thus, derived from this analysis:

It has become easier for individuals to become suppliers of videos, books, image, news content all of which competes with traditional supply? As a competition authority (NGA), which approach do you think is required?

Creative economy and digital era require that established concepts, doctrines and methodologies (social welfare, demand side, forecast, market definition, data role, and industrial property) be adapted and redefined. How do you think the emergence of digital new economy and online platform affect effect-analysis? In the same way, do you think that online developments and their global reach affect the operation of cultural and creative markets?

Recently, different competition authorities have faced mergers that involve creative economy, for example, AT&T/Time Warner and Disney-21CF. Considering your experience what was/were the principal challenge(s) implicated and how a competition authority (or NGA) can improve them?

While organizing and holding the FIFA 2018 World Cup in Russia and the 2017 FIFA Confederations Cup, antimonopoly regulation tools were used to ensure the protection of FIFA property rights?

Has online developments and creative economy raised tensions between competition and protection of domestic culture? In this regard, what is the key-role of a competition authority?

Considering a balance between innovation and competition policy, isn't there a problem of vertical integration for entertainment industry?

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