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#### LATIN AMERICAN COMPETITION FORUM

##### Session I: Competition Principles in Essential Facilities

##### Call for Country Contributions

8-9 September, San José (Costa Rica)

*The attached document is circulated to the Latin American Competition Forum FOR DISCUSSION under session I at its forthcoming meeting to be held on 8-9 September 2010 (Costa Rica). Written contributions for that session should reach the Secretariat by 10 August at the latest.*

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## LATIN AMERICAN COMPETITION FORUM

-- 8-9 September, San José (Costa Rica)

### Session I: Competition Principles in Essential Facilities

#### CALL FOR COUNTRY CONTRIBUTIONS

1. This request for contributions is circulated in preparation for the discussion to be held in Session I of the Latin American Competition Forum (LACF, 8-9 September 2010 in Costa Rica). Session I will discuss Competition Principles in Essential Facilities. You are invited to make a written contribution to this discussion.
2. In addition to reviewing the basic concepts of essential facility, Session I will discuss three different issues: i) when should sharing of a facility be mandated; ii) what are the regulatory instruments to apply when facility sharing is considered mandatory? and iii) when should competition authorities intervene in essential facility matters?
3. One common characteristic of infrastructure-based industries is that competitive market segments coexist with natural monopoly segments. Firms that participate in competitive segments usually need to access monopolistic segments, known as essential facilities, in order to reach their clientele. A facility is essential if it is substantially more costly to supply a market without access and if a monopolist facility owner would find it profitable to impose at least a small but significant non-transitory price increase above the competitive level for access to this infrastructure.<sup>1</sup> In such situations, sectoral regulations usually provide for and determine the price of mandatory third party access to the essential facility. Such access is most likely to prove beneficial when:

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<sup>1</sup> Although a variety of definitions of the concept of “essential facility” are found in the economic and legal literature, this definition has been previously advanced by the OECD. See DAF/COMP(2006)29 *Access to Key transport Facilities*, available on the OECD website at: <http://www.oecd.org/dataoecd/39/14/37981556.pdf>, at pp.21-22.

- The facility is capacity constrained;
- The facility is not subject to timely expansion and/or entry;
- Use of the facility is not subject to compelling economies of vertical integration (efficiency or safety), scale, or scope;
- It is feasible to reallocate use of the facility among competing upstream or downstream suppliers.<sup>2</sup>

4. Nevertheless, the participation of the owner of an essential facility in the unregulated segment places non-integrated competitors in an unequal position to compete, affecting the so-called “level playing field” doctrine whereby all firms are expected to compete under equal and fair conditions in the market. There are fears that, for instance, the integrated firm could block the entry of competitors through an excessive access charge or the requirement of abusive conditions to use its upstream input. Even where access charges are subject to regulation, the incumbent may degrade the quality of service to rivals, in order to render them less competitive and thereby increase its rents from the unregulated segment. The integrated monopoly may also discriminate against its downstream competitors by giving priority service to its own division (or subsidiary).

5. In certain instances, therefore, in addition to the *ex ante* regulatory action necessary to grant access to the essential facility, the intervention of competition law and competition enforcement agencies may be required in order to supervise the conduct of the integrated firm. As a matter of competition law, however, the essential facilities doctrine has proven controversial.<sup>3</sup> Accordingly, this discussion will consider essential facilities both as a regulatory and a competition issue.

### Submissions

6. Speakers will be selected on the basis of written contributions submitted to the OECD Secretariat in response to this call for contributions. All participating countries are invited to prepare submissions. To assist the OECD Secretariat with the detailed planning of the session, advance notice of your intention to provide a contribution would be helpful. The quality and utility of this discussion will be strengthened by written contributions from participants. It will be especially helpful if you include a discussion of one or more relevant cases from your jurisdictions. Your written contributions will complement a Background Paper prepared for the Secretariat.

7. To help you to prepare your contribution, several questions are listed below that may help you to frame your response. This is not intended to be a restrictive or comprehensive list, however; participants are encouraged to address other issues as well, based on their own experience.

8. Please advise the Secretariat **by 15 July** if you will be making a written contribution. Contributions are due by **10 August at the latest** by email (Word format, 5 pages maximum in English or Spanish) to the OECD Secretariat to [erica.agostinho@oecd.org](mailto:erica.agostinho@oecd.org) (copy to: [helene.chadzynska@oecd.org](mailto:helene.chadzynska@oecd.org)). All communications regarding documentation for this roundtable should be sent to them as well.

### Questions for Consideration in Country Contributions

9. Please provide a list of sectors in which access to essential facilities is mandated in your country. Give a brief description of the sectoral regulation for access in each of these sectors.

<sup>2</sup> See DAF/COMP(2006)29 *Access to Key transport Facilities*, available on the OECD website at <http://www.oecd.org/dataoecd/39/14/37981556.pdf>, at pp.21-22.

<sup>3</sup> See, in the US context, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 682, (2004), and in the EU context, Case C-7/97 *Oscar Bronner GmbH & Co. K.G. v. Mediapring Zeitungs und Zeitschriftenverlag GmbH & Co. K.G.* [1998] ECR I-7791.

1. Does your antitrust legislation have specific rules concerning essential facilities? If so, which are they? What are the conditions to determine that a facility is essential?
2. What are the roles played by the competition agency and regulatory agency in declaring a facility as essential? Are there overlapping jurisdictional powers? If so, are there any mechanisms in place – formal or informal – to structure interactions between these agencies and to avoid jurisdictional conflicts?
3. Does the competition authority have the legal authority to order the vertical disintegration of an essential facility or impose conditions on vertically integrated monopoly?
4. Has your antitrust agency heard any cases in which the definition of a facility as essential was the main point of controversy? If so, please provide details.
5. Has your competition authority prosecuted the owner of an essential facility for anticompetitive behaviour regarding its downstream client-competitors? What sanctions and/or remedies were imposed, if any?
6. Does your competition agency have jurisdiction to investigate and sanction acts of discrimination by the owner of an essential facility? If so, does it have special technical expertise to do so and how has this expertise been developed?