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COMPETITION COMMITTEE**

LATIN AMERICAN COMPETITION FORUM

Session I and III: Competition issues in the retail grocery sector in Latin America and the Caribbean

-- Call for Country Contributions --

23-24 September 2015, Montego Bay, Jamaica

The attached document is circulated in preparation for the discussion under Session I and Session III of the Latin American Competition Forum at its forthcoming meeting to be held on 23-24 September 2015 in Jamaica. Delegates are requested to send written contributions for that session to the Secretariat by 17 August 2015 at the latest. Advance notice of contributions by Monday 6 July 2015 would be useful.

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LATIN AMERICAN COMPETITION FORUM



**13th Latin American Competition Forum
23-24 September 2015 • Montego Bay • Jamaica**

Session I and III Competition issues in the retail grocery sector in Latin America and the Caribbean

CALL FOR COUNTRY CONTRIBUTIONS

Introduction

1. This request for contributions is circulated in preparation for two discussions to be held at the 2015 Latin American Competition Forum on the topic of **“Competition Issues in the Retail Groceries Sector in Latin America and the Caribbean”**. Session I will focus on the structural issues in the sector, and Session III will focus on issues related to conduct and retail practices. You are invited to make a written contribution **for one or both** of these sessions.
2. In this call for contributions we aim to identify some topics that you may wish to address in your written and oral contributions. Please note that this list is neither prescriptive nor exhaustive. You are free to raise other relevant issues that reflect your experiences of the sector. Please prepare a concise and synthetic contribution, even if that ignores some of the questions.
3. To assist the OECD Secretariat in planning the session, please inform us by **6 July 2015** if you intend to submit a contribution. The contributions themselves should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Angélique Servin [Angelique.Servin@oecd.org] and copied to: Ania Thiemann [Ania.Thiemann@oecd.org] by **17 August 2015 at the latest**. Country contributions will be circulated to participants through the LACF website (www.oecd.org/competition/latinamerica). Furthermore, if you have any relevant regulation on supermarkets, please submit a copy to the Secretariat before 6 July 2015.

1. Background discussion

1.1 Session I: Structural matters in the groceries sector – focusing on mergers

4. The technical nature of merger review in the supermarket retail sector, and in particular the groceries sector, potentially raises some serious concerns about the capacity of a competition authority to properly assess the effect of a merger that might affect tens or hundreds of local markets, but each in somewhat different ways.

5. Mergers in the supermarket/grocery sector, as well as other competition investigations in the sector, often turn on some complex questions of *market structure*. Defining the relevant product market is rather complex and the size and location of the geographic market matters. In some jurisdictions, retailers might be able to supply highly relevant data – e.g., from scanners or loyalty programmes. Although this data can help, it also adds substantially to the complexity of the analysis and the resource requirements of the case.

6. One reason why product market definition can be complex is the breadth of products sold in supermarkets. Clearly, it would make little sense for each to be assessed separately, so many competition authorities have defined the product market using for example consumers' use of large stores as 'one-stop shopping'. However, this could miss constraints in the product range presented by a combination of speciality retailers, at least for some products and some consumption bundles, or by traditional stores. Secondly, different supermarket chains operate in different niches, from cheap or own-brand 'hard discounters', through 'mainstream' outlets up to upmarket and organic retailers¹. Similarly, the format (size) of stores might matter. Are these separate markets? Possibly an asymmetric market definition could be part of the answer – larger stores constrain smaller ones, for example, but not the other way around.

7. Geographic market definition can also be complex. Clearly, consumers shop for groceries 'locally' and so competition cases have generally concluded that the market is geographically local. This could simply be defined by the radius of a circle, or by location (towns) or even travel time, including the availability of public transport (for instance in continental Europe the availability of buses going to the shopping areas will be a determinant). Often, for ease of analysis in cases involving many multiple markets, authorities assume a single size for all markets, but is this too crude an assumption? If pricing is national or regional, parties will often argue that the market must be national too, as a loss of local competition would have only a minimal effect on the nationally-set price. This raises the question of what it means for prices to be the same – as by varying pack sizes or the availability of discount brands across stores, chains can affect the average price while maintaining 'national' prices. Internet shopping might also be changing the geographic nature of grocery retail. Finally, many chain stores operating nationally will nonetheless vary prices according to geography with wealthier neighbourhoods being charged more for similar products.

8. Another issue is what is the price in this market? How does one apply any price based test?

9. Some authorities, particularly in OECD countries, have considered supermarket mergers to be well-suited to quantitative techniques that do not depend so much on market definition – such as Upward Pricing Pressure (UPP) or merger simulations. Such approaches can provide a more sophisticated and nuanced assessment of the complex interaction of product and geographic markets, but they require data, expert staff and time to be properly applied.

10. The ownership of land or the planning rights for retail space can raise competition concerns, especially in urban areas where space suitable for super- or hyper-market formats might be at a premium. Local planning regulations do not always take competition into account. In smaller economies especially,

¹ <https://www.ftc.gov/enforcement/cases-proceedings/0710114/whole-foods-market-inc-wild-oats-markets-inc>.

retailers might own the local franchise rights for major brands which could add an additional possible anticompetitive dimension to a merger.

11. All of these technical matters potentially raise some serious concerns about the capacity of a competition authority properly to assess the effect of a merger that might affect tens or hundreds of local markets, in somewhat different ways.

12. Finally, supermarkets play a very significant role in the local economy and local communities, and mergers – particularly when a large-format (“big box”), often foreign purchaser is involved – raise questions other than the simple competitive effects on end-customers. Should competition authorities take account of the effects on small shops, for example, or is that merely “protecting competitors”?

13. Although buyer power may more usually be dealt with under vertical restraints, should buyer power be a factor in assessment of a merger² – and is it potentially an anticompetitive effect or an efficiency measure?

1.2 Session III: Conduct – some specific practices in the supermarkets sector

14. In a separate session at LACF 2015, we would like to focus on some potentially anticompetitive practices of the supermarkets sector. These might feature in merger analysis but more usually will be the subject of abuse of dominance (and similar), vertical agreements or cartel investigations or possibly a result of government regulation, such as through the use of codes of conduct.

15. When supermarkets favour one upstream supplier over another, this could raise competition concerns, both for upstream and perhaps for downstream consumers. For example, “pay for display” arrangements for promotions or even ordinary shelf space (“slotting allowances”) have been criticised for possible foreclosure of rival brands (particularly if they specify – for example – shares of space, in which case reduction of a rival brand’s display directly meets the contractual obligation), as have “category captain” arrangements, under which an upstream supplier might itself affect or even control the display of rival brands, or generic brands (own-label brands). Such vertical agreements may have efficiency benefits to the end-consumer but could raise competition concerns, especially where the retailer has significant market power so that an upstream supplier would face serious threats to its viability if it cannot secure shelf space.

16. Similarly, there has been much criticism of supermarkets’ treatment of smaller upstream suppliers directly, and attempts to remedy perceived abuses whether through competition law enforcement or separate regulatory structures. Concerns particularly focus on the treatment of small farmers. Concerns could relate simply to buyer power itself, or to particular practices such as ‘retrospective discounts’ or other financial impositions on suppliers that a supermarket is able to exact through superior bargaining power. It is not clear whether such practices raise ‘mainstream’ competition concerns and, if they do not, is there still a case to be made for outlawing them on grounds of fairness or other essentially social policies? A competition authority that simply refuses to consider such matters could lose political and popular support, risking its ability to carry out its functions. However, attempts to increase prices to suppliers can be inefficient or might in themselves be anti-competitive³.

17. Finally, collusion is a potential concern between retailers as it is for any industry. In grocery retail especially, there have been concerns about so-called hub-and-spoke arrangements, in which price setting by upstream suppliers could be a cover for softening or eliminating horizontal competition.

² See Carlton (2011), available at http://www.researchgate.net/profile/Dennis_Carlton/publication/227194880_Proper_Treatment_of_Buyer_Power_in_Merger_Review/links/02e7e539714680355c000000.pdf

³ For example, in France the “Loi Galland”, which was intended to prevent such abuses, has also been criticised for strengthening effective resale price maintenance from suppliers to retailers.

ANNEX. QUESTIONS FOR CONSIDERATION IN COUNTRY CONTRIBUTIONS

Session 1: structural matters, with a focus on mergers

What mergers in the supermarkets/grocery retail sector have been assessed in your jurisdiction in the past five years?

In these mergers, what consideration did you give to the following aspects of market definition?

- Are supermarkets and specialist retailers in the same market? More generally, how is the supermarket's product offering defined?
- Store format (size) – e.g. do big box and convenience stores belong to the same market?
- Quality – e.g. are 'hard discounters' in the same market as branded shops?
- Local market definition – distance, travel time, geographic location. Do prices vary locally? Do consumers travel and how far to obtain better deals when shopping for groceries?
- Have you ever used quantitative techniques such as UPP or merger simulation, as an alternative or complement to market definition?
- How do you define prices in this type of markets? Do you consider a basket of goods and how do you build such a basket?

What were the main competitive effects you considered, e.g.:

- Unilateral effects (loss of local or national rivalry)
- Co-ordinated effects (tacit collusion)
- Buyer power or vertical theories of harm affecting suppliers – and if so, did you consider the effects on downstream consumers?
- Other effects, such as the portfolio of land or rights to branded products that might result from the merger.

What remedies have you imposed?

What special considerations do mergers in this sector raise? For example, was the assessment particularly technically complex, because of the presence of so many local markets? If so, how did your agency cope with the demands? Is a merger in this sector particularly politically sensitive and if so how have you dealt with that in the past? Are some purchasers (e.g. large –format or foreign retailers) seen as particularly problematic from a social, political or PR perspective?

Session 2: possible anti-competitive conduct and practices

What other competition cases have you carried out relating to the groceries sector in the past five years: abuse of dominance (or equivalent), vertical agreements and cartels? Have you carried out market studies or similar non-enforcement activity? Has the government or another public body intervened, for example with regulations that might affect competition between retailers or the way in which retailers interact with suppliers?

Have you assessed retailer-supplier practices relating to pay-for-display or category management? Have you assessed matters of buyer power, whether in general or focusing on specific practices such as retrospective discounts? Please describe any such cases, including the legal provisions you made use of, and discuss how the interests of consumers and rival suppliers can be taken into account. Were any remedies imposed?

Overall, how do you monitor developments and operate in the grocery sector? Does it raise particularly strong political or public concerns, and if so is this interest a help or a hindrance to effective promotion of competition and law enforcement in the sector?

Management of the LACF session

Are there other topics relating to the sector that you would like to discuss in the LACF 2015? Please feel free to add any other experiences you would like to discuss, or questions for the panel and other competition agencies present at the meeting.

SUGGESTED READING LIST

Basker and Noel (2012), Regional Competition Center for Latin America Presents: Competition Challenges in the Supermarket Sector:

- Summary at <https://www.competitionpolicyinternational.com/assets/Uploads/LA2-14-2013.pdf>
- Full report (English and Español) at <http://www.crcal.org/guias-y-estudios/estudios/estudios-de-sector>

Bicrourp, Boutin, Verge (2008) “The effects of retail regulations on prices”, *Economic Journal*.
<http://onlinelibrary.wiley.com/doi/10.1111/ecoj.12045/pdf>

Carlton, D (2011) “Proper Treatment of Buyer Power in Merger Review”,
http://www.researchgate.net/profile/Dennis_Carlton/publication/227194880_Proper_Treatment_of_Buyer_Power_in_Merger_Review/links/02e7e539714680355c000000.pdf

Farrell, J. and Shapiro, C (2010) “Upward Pricing Pressure and Critical Loss Analysis: Response” *The CPI Antitrust Journal*, February 2010. <https://www.competitionpolicyinternational.com/assets/Free/Shapiro-FarrellFEB10.pdf>

UK Competition Commission: *Groceries Market Investigation* 2008
<http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry> Article summarising the report here:
<http://ageconsearch.umn.edu/bitstream/53210/2/Peter%20Davis%20Beijing%20Paper%20-final.pdf>

CNC Spain: Informe sobre las relaciones entre fabricantes y distribuidores en el sector alimentario.
Available at <http://www.lamoncloa.gob.es/espana/eh15/agricultura/Documents/CNC-MDD.pdf>

US Federal Trade Commission (2003): *Slotting allowances in the retail grocery industry*,
<https://www.ftc.gov/sites/default/files/documents/reports/use-slotting-allowances-retail-grocery-industry/slottingallowancerpt031114.pdf>

OECD Competition Committee Roundtable discussions (all available at <http://www.oecd.org/daf/competition/roundtables.htm>)

- Competition issues in the food chain industry (2013)
- Monopsony and buyer power (2008)
- Land use restrictions as barriers to entry (2007)
- Resale below cost law and regulations (2005)
- Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling (2004)
- Buying Power of Multiproduct Retailers (1998)

Hosken, Olsen, Smith (2012), “Do Retail Mergers Affect Competition? Evidence from Grocery Retailing”, *US FTC working paper* <https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0evidence-grocery-retailing/wp313.pdf>

Autorité de la Concurrence (2010): Opinion No 10-A-26 of 7 December 2010 on affiliation agreements of independent retailers and the terms for acquiring commercial land in the food retail sector
<http://www.autoritedelaconcurrence.fr/pdf/avis/10a26.pdf> (French)
http://www.autoritedelaconcurrence.fr/doc/10a26_en.pdf (English)

Informe sobre las relaciones entre fabricantes y distribuidores en el sector alimentario. Available at <http://www.lamoncloa.gob.es/espana/eh15/agricultura/Documents/CNC-MDD.pdf> (Spanish)