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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**Session II: Efficiency Analysis in Vertical Restraints – Call for contributions**

**20-22 September 2021**

This document is circulated in preparation of the discussion under Session II of the Latin American and Caribbean Competition Forum that will take place in a virtual format on 20-22 September 2021 hosted by the OECD and IADB on the OECD Zoom platform. Delegations are requested to submit their written contributions to the Secretariat by 23 August 2021 at the latest. Advance notice of your intention to submit contributions before or by 26 July 2021 would be useful.

More documents related to this discussion can be found at [oe.cd/lacfc](http://oe.cd/lacfc).

Please contact Ms. Lynn Robertson or Mr. Wouter Meester if you have any questions regarding this document [[Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org) and [Wouter.Meester@oecd.org](mailto:Wouter.Meester@oecd.org)].

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## *Session II: Efficiency Analysis in Vertical Restraints* *– Call for contributions –*

### 1. Introduction

1. This year's Latin American and Caribbean competition Forum (LACCF) will feature a roundtable discussion on "Efficiency Analysis in Vertical Restraints". I am writing to invite you to prepare and submit a written contribution for the session.
2. This call for contributions aims to identify some topics that you may wish to address in your written and oral contribution. To further assist you with the preparation of your contribution, I refer you to (i) the Secretariat background paper which will be circulated in the next months and can be used as a starting point for discussions during this session, (ii) the more detailed list of questions included in the Annex and (iii) the suggested bibliography included at the end of this letter. Please note that the list of questions in the annex is neither prescriptive nor exhaustive, and you are free to raise other relevant issues that reflect your experiences.
3. I would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. I invite you to submit such a short summary (no more than one page) together with your contribution.
4. The LACCF webpage ([oe.cd/lacsf](http://oe.cd/lacsf)) will be the primary vehicle for conveying documentation and related links on this subject. Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site.
5. In order to ensure an effective preparation of the roundtable discussion, I would be grateful if you could advise the Secretariat by **Monday 26 July 2021** the latest if you are planning to make a written contribution on the topic. Written submissions are due by Friday **Monday 23 August 2021** and failure to meet this deadline may result in your contribution not being distributed in a timely fashion in advance of the meeting.
6. All communications regarding the documentation for this roundtable should be sent to Ms. Angélique Servin ([Angelique.Servin@oecd.org](mailto:Angelique.Servin@oecd.org)). Please address all substantive queries relating to this discussion to Ms. Lynn Robertson ([Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)) and Mr. Wouter Meester ([Wouter.Meester@oecd.org](mailto:Wouter.Meester@oecd.org)).
7. 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](mailto:Angelique.Servin@oecd.org)) and copied to Lynn Robertson ([Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)) and Wouter Meester ([Wouter.Meester@oecd.org](mailto:Wouter.Meester@oecd.org)) by **23 August 2021** at the latest. Country contributions will be circulated to participants through the LACCF website [www.oecd.org/competition/latinamerica/](http://www.oecd.org/competition/latinamerica/) (short url: [oe.cd/lacsf](http://oe.cd/lacsf)) and [www.oecd.org/competition/latinamerica/2021forum/](http://www.oecd.org/competition/latinamerica/2021forum/). Furthermore, if you would like to circulate other relevant material please submit a copy to the Secretariat before **23 August 2021**.

## 2. Background

8. It is quite common for firms active at different stages of the supply chain – for example, a manufacturer and a retailer or distributor of the product – to enter into an agreement rather than relying on spot market transactions. Such agreements and contractual provisions between firms that are vertically related may restrict the conditions under which firms may purchase, sell, or resell goods or services (so called **vertical restraints**).

9. The use of vertical restraints has been rapidly increasing in the last decade, in particular due to the rapidly increasing e-commerce and digital economy. The possibility to sell and buy goods and services online reduces search and transaction costs for consumers, increases transparency for both consumers and suppliers and increases the geographic reach and scope of both manufacturers and retailers. Indeed, the European Commission signaled an increase in use of vertical restraints in its E-commerce Sector Inquiry (2017).<sup>1</sup> Latin American competition authorities are also facing an increase, albeit on a smaller scale. Competition authorities in the region have prosecuted cases in which vertical restraints were found in markets related to digital goods or services. The Brazilian competition authority (Conselho Administrativo de Defesa Econômica – CADE), for example, came to a settlement in 2018 with the main Online Travel Agencies (OTAs) to eliminate restrictions in their contracts with hotels.<sup>2</sup> Similarly, the Federal Telecommunications Institute in Mexico (IFT) sanctioned two companies in 2018 for signing exclusive dealing contracts in pre-paid mobile services.

10. Vertical restraints have the potential, depending on the context and environment, to produce both anti- and procompetitive effects. Anti-competitive effects can include market foreclosure (raising barriers to entry or expansion for other suppliers or buyers), the facilitation of collusion and softening of competition (intra-brand, competition between firms for the same brand, or inter-brand, competition between firms for different brands). Pro-competitive effects through increased efficiency in the supply chain can relate for instance to (i) solving a "free-rider" problem" (one distributor free-riding on promotion efforts of another distributor), (ii) the stimulation of investment by addressing the hold-up problem of relationship-specific investments or (iii) the protection of a high-quality brand image, amongst others.

11. Different jurisdictions adopt different approaches to the types of vertical restraints they prohibit – some restraints may be prohibited “per se”, some may only be prohibited if they have the effect of harming competition, and some may not be prohibited at all.

The prevalent legal approach in several jurisdictions, as in the US, is that the assessment of vertical restraints is subject to a “rule of reason”, which requires to balance, on a case by case basis, the effects on consumer welfare of the agreement. Meanwhile, in the EU, through the various regulations and guidelines, the European Commission has built a series of relative presumptions (both of legality and of illegality). The general presumption is that, absent a significant market power either upstream or downstream, vertical restraints are likely to be pro-competitive as they serve efficiency purposes.<sup>3</sup> When the general

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<sup>1</sup> According to the report, online retailers face multiple vertical restraints due to contractual arrangements. Limitations include pricing limitations (or recommendations) (faced by 48% retailers), limitations to sell on market places (18%), limitations to sell on its own website (11%), limitations to sell cross-border (geo-blocking) (11%), limitations to use price comparison tools (9%) and limitations to advertise online (8%).

<sup>2</sup> Case No. 08700.010789/2012-7.

<sup>3</sup> This general presumption admits some exceptions. Some practices are qualified as hard-core restrictions. For them the general presumption is reversed: even if none of the parties seem to enjoy

presumption does not apply because one or both of the parties have significant market power (e.g. a market share above 30%), each practice must be assessed on its own merits balancing the evidence in favour or against its legality.

12. Considering the high and increasing relevance of vertical restraints and differences in legal and analytical frameworks, competition authorities rely on some operational tools to distinguish benign and malicious practices by assessing pro-competitive efficiencies of the vertical restraints and compare them with anti-competitive effects.

13. It is well established in the economic literature that vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies. Despite this recognition, there is substantial debate about what types of efficiency gains are relevant in the analysis of vertical restraints, e.g. within-firm efficiency gains, between-firm efficiency gains and/or innovation benefits, since not all vertical agreements necessarily produce each of these efficiencies and if they do, their intensity may vary. Measurement and substantiation of claimed efficiencies are also important and are often the reason why efficiency claims are not often brought forward or, if they are, fail to succeed.

14. Relevant considerations in this regard concerning the identification of pro-competitive efficiencies are (i) who bears the burden of proof with regards to whether an agreement falls within the scope of the law and whether efficiencies offset any potential harm to competition; (ii) what types of efficiencies should be considered (e.g. static versus dynamic or short-term versus long-term); (iii) how to measure the efficiencies claimed and (iv) how to balance the expected efficiencies against the restrictions of competition.

15. In some of the competition authorities in Latin America, such Colombia, Mexico and Peru, the investigated parties bear the burden of proof to identify efficiencies and demonstrate that they offset the anti-competitive effects. For example, in the cements case in Peru<sup>4</sup>, the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI) did not evaluate efficiencies due to the fact that they were not explicitly presented by the parties. The Superintendence of Industry and Commerce (SIC) of Colombia has followed a similar approach. In the IBOPE case<sup>5</sup> in 2011 on agreements to foreclose the market by restricting access to key statistics, the efficiencies that were evaluated by the authority were the ones presented by the parties.

16. This session will cover: (a) a brief overview of the concept of vertical restraints; (b) a discussion on the assessment of different potential anti-competitive and pro-competitive effects of vertical restraints; and (c) a discussion of relevant issues for assessing potential efficiencies of vertical restraints, including relevant factors to consider for this assessment, the burden of proof and the standard of proof.

17. The quality and utility of this session will be strengthened by written contributions from participants. It will be especially helpful if you include a discussion of relevant enforcement cases from your jurisdictions.

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market power, the agreement is presumed to fall within the scope of Article 101(1) TFEU and to fail to meet the conditions of Article 101(3) TFEU. In these circumstances the vertical restraint is presumed to be illegal, but the parties have the possibility to plea for a legal exemption in individual cases.

<sup>4</sup> Resolution 10 of 2013.

<sup>5</sup> Resolution 23890 of 2011.

## Annex. Suggested Questions for Consideration in the Country Contributions

### Session II: “Efficiency Analysis in Vertical Restraints”

#### 1. *Relevance of Vertical Restraints*

1. Have you noticed an increase or decrease in the frequency of cases concerning vertical restraints in your jurisdiction in recent years? What has been driving this increase or decrease in your view?
2. Are there specific types of vertical restraints (e.g. resale price maintenance, selective distribution, exclusive distribution or others) that your agency has had to deal with most in recent years?
3. Are there certain sectors or industries (e.g. online travel agencies, e-commerce, media content distribution platforms, software/hardware distribution) in your jurisdiction in which competition concerns related to vertical restraints have been increasing recently?

#### 2. *Assessment of Vertical Restraints*

1. Please explain the legal and analytical framework in your jurisdiction that applies when assessing vertical restraints.
2. Do you rely on formal guidelines or other documents in place to provide guidance on how to deal with vertical restraints?
3. Which theories of harm have arisen in your jurisdiction when dealing with vertical restraints cases?

#### 3. *Efficiency Analysis in Vertical Restraints*

1. In your jurisdiction, has there been any case in which pro-competitive efficiencies of vertical restraints were claimed and/or reviewed in detail? If so, please describe the claim and/or your assessment, including:
  - a) What has been the framework of analysis?
  - b) How were efficiencies assessed (and possibly quantified), and what information did you use?
  - c) What is the standard of proof when assessing potential efficiencies?
  - d) Vertical restraints that raise immediate competitive concerns may still have a positive net effect on consumer and total welfare in the long term. In this case, were dynamic efficiencies with a longer timeframe claimed and/or assessed? If so, please describe the claim and your decision.
  - e) How were the potential anti-competitive and pro-competitive (efficiency) effects weighed against each other and what made the difference?
2. In your view, what are the relevant factors for agencies to determine which efficiencies are specific to a certain vertical restraint? For example, Article 101(3) TFEU requires three factors to be satisfied for successful efficiency claims: fair share for consumers; indispensability of the restrictions; and no elimination of competition. In your jurisdiction, do you have criteria or factors to consider when assessing the presented efficiency claims?
3. How do you allocate the burden of proof in the assessment of vertical restraints? Who is supposed to demonstrate whether a restraint in question creates anti-competitive or pro-competitive effects and infringes the law? What is the rationale for this allocation of the burden of proof?

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