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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session II: Efficiency
Analysis in Vertical Restraints**

-- Contribution from Panama --

20-22 September 2021

The attached document from Panama is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 20-22 September 2021 via a virtual Zoom meeting.

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Session II: Efficiency Analysis in Vertical Restraints

– Contribution from Panama –

1. Significance of vertical restraints

1. In recent years, there have generally been few investigations into vertical restraints in Panama, which are analysed under the rule of reason. The right granted in the Competition Act to economic agents to submit a written request for an opinion to the Consumer Protection and Competition Authority (ACODECO) regarding whether an act, contract or practice they intend to carry out constitutes an absolute or relative prohibited monopolistic practice helps reduce the number of investigations.
2. A natural increase in the use of vertical restraints arising from supplier-customer relationships is expected, mainly due to increased access to the Internet, which is encouraging the growth of e-commerce. The economic literature concludes that vertical restraints can have both positive and negative effects on consumer welfare. In this new context, the net effects of vertical restraints, which depend on the particular characteristics of the markets subject to the vertical restraints, competition conditions and the type of restraint used, should continue to be analysed in more depth.

2. Assessment of vertical restraints

3. Act No. 45 of 2007 and the relevant regulations contain normative provisions on the analysis of vertical behaviour. ACODECO has the power to develop technical guidelines to enable it to carry out its duties more effectively. According to the regulations, it may issue instructions or guidelines for public use, which may concern identifying the relevant market and substantial power, among other matters. In accordance with the Act and the regulations, ACODECO has issued guidelines on the analysis of vertical behaviour, which set out the regulatory framework for analysing vertical behaviour in greater detail.
4. Act No. 45 of 2007 prohibits any act, contract or practice that restricts, hampers, harms, impedes or otherwise threatens free competition and free participation in the production, processing, distribution, supply or marketing of goods or services.
5. The Act defines unlawful relative monopolistic practices as those that diminish or impede free competition or free market participation among economic agents, which may also include behaviour that implies vertical relationships between economic agents, among other issues.
6. According to the guide, vertical behaviour comprises those acts, agreements or arrangements that take place between economic agents that compete or participate at different stages of the production, distribution and marketing chain for products (goods and services) in the relevant market being investigated with regard to these restraints. It is possible that some economic agents might operate at more than one stage of the production, distribution and marketing chain.
7. When analysing presumed unlawful relative monopolistic practices, ACODECO considers the following factors:

8. Whether the situation concerns any of the behaviours described in Article 16 of Act No. 45 of 2007. Article 16(9) provides that any act that unreasonably harms or impedes free competition or free market participation is unlawful. This open clause allows ACODECO to investigate behaviours that are not specifically identified in the article.

9. Whether it concerns practices that diminish or prevent free competition or free market participation among economic agents. The behaviour must be shown to have the purpose or effect of unreasonably displacing other market agents, unreasonably denying them access to the market or unreasonably establishing exclusive advantages in favour of one or more economic agents.

10. How the relevant market in which the practice is alleged to have taken place should be defined.

11. That the economic agents carrying out the practice have substantial power, either individually or collectively, over the relevant market defined, in accordance with the criteria set out in Article 19 of Act No. 45 of 2007.

12. In the case of vertical unlawful relative monopolistic practices, ACODECO should also establish:

13. The type of behaviour under investigation, i.e. whether it is unilateral or concerted.

14. Whether the economic operators involved in the behaviour or affected by it have a vertical relationship with one another.

15. According to the guide, an economic agent's unilateral or concerted action causes unreasonable harm when, in the exercise of substantial market power, in a vertical relationship, it restricts free competition or free market participation and cannot be justified in terms of economic efficiency. Any action that has a net negative effect on society may not be justified in terms of economic efficiency. Conversely, a unilateral or concerted action of a vertical nature undertaken in the exercise of substantial market power, which generates increases or net increases in economic efficiency from which the consumer benefits and potentially or actually enables effective competition, does not unreasonably harm free competition and free market participation.

16. Vertical behaviours can pose problems for competition between brands. Vertical restraints between different brands of competing products (inter-brand restraints) are more harmful to competition than restraints affecting a single brand (intra-brand restraints). For this reason, when analysing vertical agreements or arrangements, ACODECO applies a balancing test to establish whether the pro-competitive inter-brand effects outweigh the anti-competitive intra-brand effects, in which case it considers whether the efficiencies obtained through the behaviour under investigation benefit the economy and/or consumers.

2.1. Efficiency analysis in vertical restraints

17. The Act establishes that any act, agreement, partnership, association or contract that produces an increase in economic efficiency and does not harm the consumer will not be considered to restrict, diminish, harm, impede or threaten free competition and free market participation. The burden for proving that this is the case lies with the economic agent making this claim. Such a claim of an increase in efficiency must be reasonable, verifiable and quantifiable.

18. In this respect, the regulation establishes that agreements, arrangements or acts that produce increases in economic efficiency and do not harm the consumer do not unreasonably restrict, diminish, harm, impede or threaten free economic competition and free market participation.

19. Increases in economic efficiency include improvements in the conditions of competition, production, processing, distribution, supply, marketing or consumption of products or services, and the promotion of technical or economic progress, provided that it is demonstrated that such improvements meet the following requirements:

1. They cannot be obtained in any other way than through economic concentration.
2. They do not impose restrictions on the economic agents concerned unless such restrictions are indispensable to the attainment of those objectives.
3. They are lasting.
4. They do not significantly increase prices, reduce supply in the market, significantly inhibit innovation in the market, or significantly decrease consumer choice, thereby reducing consumer welfare.
5. They do not afford companies the opportunity to eliminate competition in respect of a substantial part of the products or services in question.
6. They compensate, at least, for possible negative effects on free competition and free market participation.

20. Improvements in the conditions of competition, production, processing, distribution, supply, marketing or consumption of products or services may include, but are not limited to:

1. Price reductions to levels lower than prices prior to the entry into force of the contract, arrangement or act in question.
2. Increases in product or service quality without a corresponding price increase.
3. Decreased distribution, search and transaction costs.
4. Increased information about the products or services available.
5. The availability of new or improved products and services due to new technological advances.
6. Decreased production or marketing costs resulting from the expansion of an infrastructure or distribution network.
7. Significant decrease in administrative costs.
8. The transfer of production technology or market knowledge.
9. The use of perishable products.
10. Cost reductions resulting from the creation of new production techniques and methods, integration of assets, increases in the scale of production and the production of different goods or services with the same production resources.

21. According to the guide, the following information, among other details, will be taken into account when investigating the likely economic benefits of vertical behaviours:

- The physical characteristics of the marketed product.
- The dependence of the reputation of the product on the service offered by the distributor.
- The level of differentiation between the relevant regional markets.
- The importance of distributors' sales efforts for suppliers' performance.

- The possibility for the producer to reward distributors individually based on the sales efforts made.
 - The level of investment by producers in after-sales services delivered through distributors.
 - The generation of positive externalities, due to the investments made by suppliers, for their competitors.
 - The level of distributor investment in services.
 - The generation of positive externalities, due to the investments made by distributors, for their competitors.
 - The offer of after-sales services, such as technical advice, user training and quality certification.
 - The impact of economies of scale or scope on distribution and whether these are passed on to consumers.
22. The economic benefits of vertical restraints stem mainly from the savings arising from the elimination of the problems associated with opportunistic behaviour between distributors and suppliers, and double marginalisation.

Bibliography

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Guía para el análisis de las conductas verticales [Guide for the analysis of vertical behaviour]

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