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**Session II: Market Definition in the Oil & Gas Sector – Issues Note by the Secretariat**

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## *Latin American and Caribbean Competition Forum*

### *Session II: Market Definition in the Oil & Gas Sector*

#### *- Issues Note by Secretariat\* -*

##### ***Abstract***

*Oil and natural gas are major energy sources in the world and play a key role in the global economy including in Latin America and the Caribbean. They represent together around 67% of the world's total final consumption by energy source, followed by electricity related sources (i.e. hydroelectric, nuclear plants), biofuels, and coal. As for its main applications in Latin America, oil is largely used in road transportation and aviation sectors, whereas natural gas is largely purchased by various industrial and residential customers (IEA, 2021).*

*This note highlights the main issues of market definition in this sector in Latin America and the Caribbean, which includes both the particularities of the industry and the region. The main challenges relate to the legal provisions for market definition in the region, the product and the geographic dimensions of market definition, in addition to cooperation between competition authorities and energy regulators. International cooperation, including at the regional level in Latin America and the Caribbean, will remain a key instrument for assessing and tackling these challenges.*

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\* This paper was prepared by Paulo Burnier da Silveira and it benefitted from comments by Ori Schwartz, Antonio Capobianco and Lynn Robertson, all from the OECD Competition Division.

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## 1. Introduction

1. Oil and natural gas are major energy sources in the world and play a key role in the global economy including in Latin America and the Caribbean. They represent together around 67% of the world's total final consumption by energy source, followed by electricity related sources (i.e. hydroelectric, nuclear plants), biofuels, and coal. The figure is similar in Central and South America, where oil and gas account together for around 60% of total consumption by energy source. When considered the total supply of energy, they also represent a significant share and reach almost 90% of total energy supply in certain Latin American countries such as Mexico according to the International Energy Agency – IEA (IEA, 2021).

2. As for its main applications in Latin America, oil is largely used in road transportation and aviation sectors (around 50% and 10% respectively), whereas natural gas is largely purchased by various industrial and residential customers (around 40% and 10% respectively) (IEA, 2021). In fact, many of the energy related products that consumers use in a daily basis come directly from the oil and gas industries including gasoline, diesel, natural gas, engine oil/lubricants, and liquefied petroleum gas (LPG) used as fuel gas for household cooking.

3. The markets related to oil and natural gas are often divided in three main segments along their value chain: upstream, midstream, and downstream, according to the location of a given business activity in the supply chain. While the upstream segment focuses on the exploration, extraction and production of oil and gas, the downstream part is closer to final consumers and generally includes retailers (e.g. gas stations), larger distribution infrastructure (e.g. pipelines and gathering systems) and storage. The midstream segment relates to the refinement of petroleum crude oil and the processing of natural gas, which refer to intermediate improvements of these products for commercial purposes.

4. This note highlights the main issues of market definition in the oil and gas sector, with focus in the downstream segment of the sector. For information, the OECD has covered the topics of market definition and oil and gas sector in a few occasions related to competition policy, namely: (i) OECD Policy Roundtable on Market Definition (2012); (ii) OECD Policy Roundtable on Competition Policy for Vertical Relations in Gasoline Retailing (2008); (iii) OECD Policy Roundtable on Energy Security and Competition Policy (2007); and (iv) OECD Policy Roundtable on Promoting Competition in the Natural Gas Industry (2000).

## 2. Main issues for discussion

5. The main issues of the topic relate to both the particularities of the industry and the region. This section will present them in an integrated way, although mindful that the oil and gas sector encompasses several markets, with different competitive dynamics, such as fuel retail (e.g. gasoline, ethanol and diesel), natural gas including in its liquefied format (LNG; or GNL for its acronym in Latin America) and liquefied petroleum gas (LPG) used for household cooking.

### 2.1. Market definition in Latin America

6. One particularity in Latin America is that certain jurisdictions have a legal requirement to define relevant markets in enforcement cases, which is sometimes required in different types of investigations that may include abuse of dominance and merger reviews (e.g. Costa Rica and Mexico). This raises an issue that includes the oil and gas

sector, but it is not specific to it, particularly on how competition authorities should factor this legal requirement into their assessments to ensure timely investigations and consistency in case precedents. Conversely, most jurisdictions may leave the precise market definition open, with a simple indication of the alternative plausible scenarios for the relevant market definition. In case all scenarios point toward the inexistence of market power, then both the assessment and the proceeding can be abbreviated.

### Box 1. Examples of legal provisions related to market definition in Latin America

#### *Brazil:*

**Article 88, §5** (Merger Control). Acts of concentration that imply the elimination of competition in a substantial part of the relevant market, that may create or reinforce a dominant position or that may result in the domination of the relevant market of goods, shall be prohibited.

#### *Costa Rica:*

**Article 13** (Proof of infringement). In order to consider the practices mentioned in the previous article to be in violation of this Law, it must be verified that a) the alleged perpetrator has substantial power over the relevant market and b) they are carried out with respect to the goods or services corresponding to or related to the relevant market.

#### *Mexico:*

**Article 54** (Abuse of Dominance). Relative monopolistic practices consist of any act, contract, agreement, procedure or combination, which: (...); II. Are carried out by one or more Economic Agents that individually or jointly exert substantial market power in the same relevant market in which the practice is executed, and; (...).

**Article 63.** To assess whether a concentration should not be authorized or should be punished in terms of this Law, the following factors shall be considered: I. The relevant market, in the terms established in this Law; (...).

Sources: Competition Law in Brazil (Law no 12.529/2011), Law for the Promotion of Competition and Effective Consumer Defense in Costa Rica (Law no 7472), and Federal Law of Economic Competition in Mexico (2015).

7. Furthermore, this particularity in Latin America may raise a discussion in relation to a recurrent debate of whether market definition is really needed (or not) to identify the existence of market power in enforcement cases (e.g. abuse of dominance or merger control cases). For instance, competition authorities could simply look at losses of rivalry between the firms involved in a given case, or use other techniques to assess market power (Kaplow, 2010).

8. As known, market definition serves to identify the boundaries of the market where companies compete, and is one of the most fundamental concepts of competition enforcement issues, such as mergers and abuse of dominance cases. It provides an analytical framework for the ultimate inquiry of whether a particular transaction or conduct is likely to produce anticompetitive effects since the exercise of market power will not be feasible if buyers can easily switch to other products (demand side substitution), or other companies are able to increase production or easily enter the market (supply side

substitution). In any case, market definition should be viewed as a preliminary tool to identify market power, but not as an end in itself (OECD, 2012).

## 2.2. Product dimension of market definition in the sector

9. In the oil and gas sector, competition authorities usually define relevant markets by following the same principles applicable to all markets, which includes the assessment of both the demand and supply sides of product substitutability. Most of the discussions in this sector are centred in the demand side substitution, namely if buyers can easily switch to other products, rather than in the supply side substitution. This is due to the high investments required for companies to enter into energy markets, which makes difficult the supply side substitution. In addition, the markets in the oil and gas sector are often subject to a strong and constantly moving regulation, which also plays a role in the market definition exercises since it tends to narrow down both the product and the geographic scopes of the market, namely to the areas covered by the regulation.

10. The regulatory framework is particularly important in Latin America and the Caribbean since many countries liberalised their energy markets in the last decades. Traditionally, strict legal frameworks regulated such markets, in which a monopolist incumbent (usually State-controlled) operated the entire energy market infrastructure. Then, a gradual liberalisation process enabled private companies to enter these markets, subject to an evolving regulatory framework that may affect the way relevant markets are defined by competition authorities.

11. In Brazil, there are two recent discussions related to the regulatory issues that affect the product dimension of market definition in the gas industry. The first refers to the so-called “regulatory gap” concerning the competitive dynamics between those who offer natural gas via pipelines, which is subject to a concession model via state regulation, and those who offer the liquefied format of natural gas – LNG (or GNL in Latin American acronym). While the first group have its economic activities limited to a given state, the latter is not subject to state regulation and may develop activity nationally including with industrial clients situated in the border of state limits. This element was key to assess the competitive pressures between natural gas (via pipelines) and its liquefied format (via trucks).<sup>1</sup> The other discussion concerns a new legal framework from 2021 related to the natural gas industry, which explicitly separated the activity of commercialisation from transport and distribution (Law n° 14.134 from 8 April 2021, known as “New Gas Act” in Brazil). This affected the market definition of a recent merger case, which made a clear distinction between these two markets for purposes of market definition<sup>2</sup>, marking an evolution from previous precedents that had an imprecise view on this difference.

12. In Mexico, an important reform of the energy sector took place in 2013, which included changes at constitutional level as well as new legislation related to the oil and gas industry. This reform terminated with the monopoly of *Petroleo Mexicanos* (PEMEX) and allowed for competition at different levels of the related markets. As a result, the structure of the market is under transformation and issues related to the former model still affect the competitive pressures, and thus the definition of relevant markets in this industry (e.g. current infrastructure, with significant heterogeneity across the country). An additional challenge refers to the constant changes in the regulatory framework, which may enable the co-existence of different business models within a given market and continuous re-

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<sup>1</sup> CADE’s Administrative Proceeding n° 08012.011881/2007-41 from 7 December 2016.

<sup>2</sup> CADE’s Merger Proceeding n° 08700.004540/2021-10 (Compass/Petrobras) from 22 June 2022.

assessment of substitutability of the demand for purposes of relevant market definition, as indicated in the Mexican written contribution to this session.<sup>3</sup>

13. Moreover, recent public policies related to sustainability and clean energy sources have led to the emergence of new products and services that affect the energy sector, such as mobility services providers for local public transportation (e.g. vehicles and bike sharing), the growing use of electric vehicles, and the increasing use of solar panel generators for both residential and industrial purposes. These technological changes create new competitive pressures, and are likely to keep increasing these pressures in future years given the wide policy efforts towards clean energy around the world.

14. These innovations will also affect the oil and gas industry. The electric vehicles provide a real example of this ongoing transformation to a “greener” future. Their sales doubled in 2021 from the previous year, reaching a record of 6.6 million new electric vehicles produced around the world. They are approximately 16.5 million nowadays; triple the amount in 2018, with global sales rising every year according to the International Energy Agency (IEA, 2022). The global market value of electricity for electric vehicles charging is projected to grow over 20-fold, reaching approximately USD 190 billion by 2030, which is equivalent to about one-tenth of today’s diesel and gasoline market value (IEA, 2022). This will increase electricity demand and reduce oil consumption. Although sales are still lagging in Latin America and the Caribbean, this may change in the near future with the production of more affordable electric vehicles for mass-market consumers. In Brazil, they represented only 0.5% of car sales in 2021, but it is the double of the previous year and may increase if supporting investments are in place including a suitable number of charging infrastructure (IEA, 2022). In Colombia, the energy transition is also a relevant element in the developments of market definition analysis as it affects the market reality and may create competing alternatives for both business and consumers.<sup>4</sup>

15. Similarly in Europe, the evolution of the regulatory framework and the debate concerning new energy sources may influence future developments related to market definition in the oil and gas sector. These developments include the liberalisation process in the sector, the efforts towards greater regional economic integration, as well as national specificities relating to the structure, the functioning and applicable legislation. The European Commission’s written contribution also highlights that market definition is not static over time and should reflect market developments, which includes EU’s sustainability objectives and recent political events that triggered a number of policy initiatives affecting the oil and gas industry.<sup>5</sup>

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<sup>3</sup> Contribution from COFECE-Mexico to this session on “Market Definition in the Oil & Gas Sector” (LACCF, 2022), paragraphs 74-78.

<sup>4</sup> Contribution from Colombia to this session on “Market Definition in the Oil & Gas Sector” (LACCF, 2022), pages 1-2.

<sup>5</sup> Contribution from the European Commission to this session on “Market Definition in the Oil & Gas Sector” (LACCF, 2022), pages 14 and 19.

### Issues for discussion:

#### Product dimension of market definition in the oil and gas sector

- How does your regulation affect the product dimension of market definition in this sector?
- How does new energy sources (e.g. wind and solar) affect traditional energy sources (e.g. oil, gas and coal)?
- Which energy sources/products are considered close substitutes (e.g. natural gas and its liquefied format; different types of motor fuels including for hybrid-fuel vehicles)?
- Do you make a distinction related to the type of end-users (e.g. industrial customers vs. households and commercial customers)?

### 2.3. Geographic dimension of market definition in the sector

16. The geographic dimension of a relevant market includes the area in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas based on the conditions for competition. Cases may define a relevant geographic market as local, national, regional, or global for instance. In addition to importation and transportation costs, evidence may include that buyers have shifted purchases between different geographic locations in response to changes in price, as well as the timing and costs of switching suppliers.

17. In the oil and gas sector, the main issues for discussion are related to the transportation costs and the timing required for users to switch suppliers. On the supply side, the transportation costs may concern the need of large pipeline infrastructures, while the construction of competing parallel networks may not be economically viable (e.g. natural gas pipelines). On the demand side, the behaviour and constraints of users, for instance the time they require to switch to an alternative supplier (e.g. fuel station), seem a common element in several markets of this sector.

18. Different techniques and methodologies exist to define the geographic dimension of the relevant market. In all of them, information is often a key element, which includes challenges related to both the collection and the use of data for competition analysis. For this purpose, the information needs to be available and reliable, which is not always the case in this industry. In addition, both quantitative and qualitative data should be considered whenever necessary to properly examine the competitive constraints of the potential relevant markets.

19. On the data collection front, competition authorities may seek support from energy regulators (see section below on co-operation with energy regulators). As for the use of data, several competition authorities have applied catchment area exercises to identify the boundaries of competition between firms in this industry. These include the traffic flows between petrol stations and, more broadly, commercial flows between geographic areas (e.g. Elzinga-Hogarty test).

20. In Colombia, the *Superintendencia de Industria y Comercio* (SIC) has recently analysed a merger in the retail fuel sector that defined a radius of 4 kilometres around the gas station for urban areas, and 10 kilometres for rural areas. It also questioned whether



dual highways should be considered a competitive alternative since consumers might not be willing to switch lanes to use a petrol station in the other side of the highway.<sup>6</sup> In addition, a recent merger case in the wholesale of fuel distribution has changed the way SIC defines the geographic scope of the relevant market, which has been reduced from national to a sub-national level (more precisely, 13 different sub-national regions in Colombia). To achieve this finding, SIC gathered information from the Ministry of Mines and Energy, namely on prices, volume of sales and geographic location of fuel storage plants on a monthly basis for the period from January 2016 and December 2018.<sup>7</sup>

21. In Mexico, the *Comisión Federal de Competencia Económica* (COFECE) also considered the geographic areas of influence as a key element to define the relevant markets related to fuel retail, which include both the time and the distance that users were willing to take to find alternative fuel options.<sup>8</sup> In addition, commercial flows techniques were applied by COFECE in an antitrust investigation, more precisely in the market of distribution of liquefied petroleum gas (LPG) used for household cooking in 2021. The case assessed the interrelation between commercial flow areas to define 220 relevant markets, and then analyse the patterns of price variations given the presence of a homogenous product and transportation costs that could explain the price differences.<sup>9</sup>

22. In the UK, the Competition and Markets Authority (CMA) applies traffic flows exercises to define relevant markets related to fuel retail. In 2015, the CMA analysed an acquisition of 90 petrol stations of Shell group by MFL. The Parties overlapped in the retail supply of road fuel (petrol and diesel), auto-LPG, and grocery retailing. The CMA has assessed each of these areas of supply from as separate product markets and has examined the transaction at national and local level. Concerning the retail supply of road fuel, the CMA assessed the effect of the transaction from off-motorway sites at a national and local levels. The Parties' combined national share of supply of road fuel were below 10% by number of sites and below 10% by volume. At the local level, in line with previous decisions, the CMA used drive-time isochrones of 10 minutes (for urban areas) and 20 minutes (for rural areas) to define the geographic scope of the relevant market. Although the merging parties' sites were geographically close to each other, certain petrol stations of Motor Fuel were situated off the main road in a residential area, and was therefore not located on the same traffic flow, which was also used for purposes of market definition.<sup>10</sup>

23. The abovementioned enforcement experiences indicate that catchment areas techniques are applied by competition authorities in the region to define geographic

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<sup>6</sup> Contribution from Colombia to this session on “Market Definition in the Oil & Gas Sector” (LACCF, 2022).

<sup>7</sup> SIC's Merger Proceeding n° 35210 from 9 August 2019. Available here: <https://www.sic.gov.co/sites/default/files/estados/032020/RESOLUCIÓN%20No.%2035210-%2009%20DE%20AGOSTO%20DE%202019%20-%20INTEGRACIÓN%20%20-%20TERPEL%20y%20DISCCO%20-%20PÚBLICA.pdf>.

<sup>8</sup> COFECE's Merger Proceeding n° CNT-022-2020 from 25 March 2021. Available here: <https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6074/3/5417961.pdf>.

<sup>9</sup> COFECE's Proceeding n° DC-001-2021 from 23 November 2021. Available here: <https://www.cofece.mx/wp-content/uploads/2021/12/DOF-01diciembre2021-01.pdf>. The opinion is from COFECE's Investigative Authority, and a final decision from COFECE's Board of Commissioners is still pending.

<sup>10</sup> CMA's Merger Proceeding n° ME/6534/15 from 24 September 2015. Available here: [https://assets.publishing.service.gov.uk/media/5603b26240f0b61ba7000005/MFL-Shell\\_Decision.pdf](https://assets.publishing.service.gov.uk/media/5603b26240f0b61ba7000005/MFL-Shell_Decision.pdf).

markets. Indeed, they serve as a relevant instrument in the processing of quantitative data, and should be complemented by qualitative elements whenever possible and necessary. In any case, tools and techniques may need to evolve in time in order to improve the analytical exercises and overall utility for competition analysis.

### Issues for discussion:

#### Geographic dimension of market definition in the oil and gas sector

- How does your regulation affect the geographic dimension of market definition in this sector?
- What kind of methodology and techniques do you use to define the geographic scope of relevant markets in this sector?
- If applicable, how do you apply catchment area exercises? Please expand on your experience and challenges.

## 2.4. Co-operation with energy regulators

24. The co-operation between competition authorities and energy regulators can largely benefit competition analysis in the oil and gas sector. In addition to the sectoral expertise, energy regulators have data from the sector, which can be key for merger review, investigations and market studies (e.g. data related to market players such as corporate structure, turnovers and pricing practices). Similarly, competition authorities can also support energy regulator's mandate, for instance through joint capacity building activities and competition advocacy initiatives. For this purpose, institutional design and application of instruments of co-operation may facilitate co-operation and promote consistency (OECD, 2019).

25. In Brazil, a similar co-operation agreement exist between the *Conselho Administrativo de Defesa Econômica* (CADE) and the *Agência Nacional do Petróleo, Gás Natural e Biocombustíveis* (ANP), which contains the possibility of the exchange of confidential information when requested by the head of these institutions.<sup>11</sup>

26. In Chile, the *Fiscalía Nacional Económica* (FNE) entered into an agreement with the *Comisión Nacional de Energía* (CNE) since 7 February 2014, which includes the exchange of public information, mutual capacity building activities, and competition advocacy.<sup>12</sup> The exchange of information covers the use of CNE's Online Information Price System, which enables the FNE to access the CNE's database that provides an online access to the general public of the real-time retail fuel prices proposed in all gas stations of the country.

27. In Mexico, an agreement between the *Comisión Federal de Competencia Económica* (COFECE) and the *Comisión Reguladora de Energía* (CRE) was released in 2018. The main objective was to establish a framework for coordination of the activities of

<sup>11</sup> Agreement on co-operation between CADE and ANP from 2013. Available here: [www.gov.br/cade/pt-br/aceso-a-informacao/convenios-e-transferencias/acordos-nacionais/acordos-com-agencias-reguladoras](http://www.gov.br/cade/pt-br/aceso-a-informacao/convenios-e-transferencias/acordos-nacionais/acordos-com-agencias-reguladoras).

<sup>12</sup> Agreement on co-operation between FNE and National Commission of Energy from 2014. Available here: [https://www.fne.gob.cl/wp-content/uploads/2014/09/conv\\_01\\_2014.pdf](https://www.fne.gob.cl/wp-content/uploads/2014/09/conv_01_2014.pdf).

both institutions in common areas including the exchange of information in order to improve the quality of their assessments and overall performance.<sup>13</sup>

**Issues for discussion:**  
**Co-operation with energy regulators**

- How does formal and informal cooperation between competition authority and energy regulators take place?
- How does the exchange of information work? Are the exchanges limited to public information, or do they also cover confidential/restricted data?
- Have you developed capacity building activities or competition advocacy strategies together with energy regulators?

### 3. Conclusion

28. The topic of market definition in the oil and gas sector will remain important, with possible developments in the coming years to consider updates related to the issues addressed in this note. The industry has indeed particular characteristics that justify a special degree of attention, including the guarantee of a reliable supply, the homogeneity of many energy products, and the inelasticity of consumer demand, in addition to other public policy objectives such as environmental considerations. Competition authorities may also be involved in shaping new regulations, which may favour new entrants and ensure the supply of energy at the lowest possible price. For this purpose, international co-operation, including at the regional level in Latin America and the Caribbean, will remain a key instrument for assessing and tackling these challenges.

29. The box below summarizes the main issues for discussion raised in this note, which may provide guidance to further discussions.

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<sup>13</sup> Agreement on co-operation between COFECE and CRE from 2018. Available here: [www.cofece.mx/wp-content/uploads/2017/12/convenio-cre.pdf](http://www.cofece.mx/wp-content/uploads/2017/12/convenio-cre.pdf).

## **Box 2. Summary of main issues for discussion**

### ***Market definition in Latin America and the Caribbean:***

- Does your legal framework require the definition of relevant markets for competition law enforcement? If yes, in which types of cases (e.g. merger control, abuse of dominance and cartels)?
- How does your case law evolves in this context, in particular to ensure timely/efficient investigations and consistency of legal precedents?

### ***Product dimension in the oil and gas sector:***

- How does your regulation affect the product dimension of market definition in this sector?
- How does new energy sources (e.g. wind and solar) affect traditional energy sources (e.g. oil, gas and coal)?
- Which energy sources/products are considered close substitutes in your jurisdiction (e.g. natural gas and its liquefied format; hybrid-fuel vehicles such as flex gasoline/ethanol)?

### ***Geographic dimension in the oil and gas sector:***

- How does your regulation affect the geographic dimension of market definition in this sector?
- What kind of methodology and techniques do you use to define the geographic scope of relevant markets in this sector?
- If applicable, how do you apply catchment area exercises? Please expand on your experience and challenges.

### ***Co-operation with energy regulators:***

- How does formal and informal co-operation between competition authority and energy regulators take place?
- How does the exchange of information work? Are the exchanges limited to public information, or do they also cover confidential/restricted data?
- Have you developed capacity building activities or competition advocacy strategies together with energy regulators?

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