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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**-- Summary of discussion of the roundtable on Efficiency Analysis in Vertical Restraints --**

19th Meeting 20-22 September 2021, Virtual.

This document prepared by the OECD Secretariat is the summary of discussion of the roundtable on Efficiency Analysis in Vertical Restraints held as part of the nineteenth meeting of the OECD-IDB Latin American and Caribbean Competition Forum held on 20-22 September 2021 in a virtual format.

More documents related to the Forum can be found at: [oe.cd/lacsf](http://oe.cd/lacsf).

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## *Summary of Discussion of the roundtable on Efficiency Analysis in Vertical Restraints*

*21 September 2021, Virtual Zoom meeting*

*By the Secretariat*

1. On 11 June 2021, the Latin American and Caribbean Competition Forum held a discussion on Efficiency Analysis in Vertical Restraints chaired by Professor Frédéric Jenny.
2. **The Chairman** introduced the topic by providing some context about what vertical agreements are, why the topic is increasingly relevant for competition authorities and what the difficulties are with efficiency analysis in vertical restraints.
3. Vertical restraints – agreements or contractual provisions between vertically related firms – may restrict the conditions under which some actors can do business. Over the past decades there has been quite some interest, renewed interest, by competition authorities in vertical restraints, in particular as a result of the rapid growth of e-commerce and the digital economy.
4. The **Chairman** explained that vertical restraints present a number of challenges for competition authorities. First, a vertical restraint, such as an exclusive distribution agreement or resale price maintenance between the manufacturer and its retailers, may have contradictory effects on competition at each of the two vertically related levels. On the one hand, it may restrict competition between the retailers of a certain good or brand, called a restriction of intra-brand competition, but on the other hand competition may increase at the second level, namely between brands, called an increase in inter-brand competition. As a result, competition authorities need to weigh the pro- and anti-competitive effects in order to decide the overall impact on competition. Second, vertical restraints can be used to foster horizontal collusion, for example by making market and pricing more transparent. Sometimes vertical restraints are initiated by the retailers who want to lower competition among them, so they are not always imposed by the upstream level, and may be imposed in fact by the players at the downstream level as an anti-competitive device. Third, vertical restraints very often have efficiency benefits. Examples include the elimination of free riding among the retailers, the facilitation of coordination between the suppliers and the retailers, the guarantee that the image of the distributed product or the brand will be preserved, or the elimination of double marginalization. In fact, there is a general presumption that vertical restraints have efficiency benefits, so again, once competition authorities are faced with vertical restraints that restrict competition, they will need to weigh those efficiency benefits against the possible anti-competitive effects of the vertical restraint. A fourth dimension of the discussion is that the emergence of the digital sector and of e-commerce have increased the interest in vertical restraints. Consequently, there will be many more vertical restraints cases for competition authorities in the future. For example, when looking at platform ecosystems, there is a relationship between the core platform and the complementors, i.e. the people who use the platform, the people who distribute apps through the platform, or the people who are adding or selling through the platform. **The Chairman** mentioned the example of the Booking.com case, in which the platform (Booking.com) imposed restrictions on the hotels that were proposing the rooms through the platform. They were supposed not to offer those rooms at a lower price on other platforms than on Booking.com, which was considered in Germany, as well as in other

jurisdictions, to be anti-competitive and not necessary to promote efficiency in this case. The development of e-commerce also leads to a revival in the interest on vertical transactions because of the fact that traditional brick-and-mortar stores have to compete with online retail stores, with very different business models. This competition often is quite complex, and it raises a number of issues: can the traditional retailers sell on the online platforms, is this instead of or in addition to selling in their own stores, and under which condition should they be able to sell on the platform? Traditional retailers tend to want to protect themselves against the competition of online retail stores, which in turn tend to force or to push the suppliers to impose restrictions on the retail distribution online.

5. The **Chairman** introduced the two invited expert speakers:

- **Priscila Brolio Gonçalves** is the owner of the law firm Brolio Gonçalves Advogados. She has over 20 years of experience as a competition practitioner and is a non-governmental advisor for CADE at the ICN's Unilateral Conduct Working Group since 2009. She is also Director of Publications at the Brazilian Institute for Antitrust, Consumer and International Commerce Institute, Director of Events for Women in Antitrust and a member of the American Bar Association antitrust section.
- **Javier Coronado** is a PhD in Economics by the Pompeu Fabra University, he is currently Economic Director Counsel at Garrigues' competition, regulation and intellectual property practice in Lima. Javier was previously CEO and Chief Economist at Indecopi, and consultant at NERA and CRAI in Europe. He is an affiliate at the Barcelona GSE, UDEP and Catholic University in Peru.

6. Finally, the **Chairman** set the objective of the session, namely to give practical indications to competition authorities on how they could evaluate and assess the trade-offs between pro-competitive benefits of vertical restraints and potential anti-competitive effects.

7. Then the Chair gave the floor to the **OECD Secretariat** (Wouter Meester), to briefly summarise the background paper that was prepared for the session.

8. **The Secretariat** firstly elaborated further on the concept of vertical restraints, and explained that they are competition restrictions in agreements between firms at different levels of the value chain, for example a manufacturer that signs an agreement with a distributor to deliver certain products to the final consumer. There are many different types of restraints that can be included in such vertical contracts, including:

- agreements on the price that can be charged by the distributor, or resale price maintenance;
- exclusive dealing, where distributors commit to only sell products of one particular manufacturer – in Latin America, most cases pertain to exclusive dealing cases;
- exclusive distribution, which concerns one distributor for a specific territory or group of customers; and
- selective distribution, which means there's not one distributor, but a restricted number of them.

9. The Secretariat also confirmed the renewed interest as a result of the drastic growth of e-commerce and the digital economy. It then reiterated that some vertical restraints can be anti-competitive, for instance by foreclosing competitors, softening competition, decreasing intra- or inter-brand competition, or facilitating collusion. The overall consensus, however, remains that the large majority of vertical restraints, notably those without the presence of significant market power, can address externalities and are actually pro-competitive, or at worst competitive neutral. The main types of efficiencies include:

- overcoming hold-up problem to incentivize certain client-specific investments;
- addressing vertical externalities and vertical co-ordination problems, such as the elimination of the double marginalisation problem;
- addressing horizontal externalities and avoiding free-riding, for instance when a retailer can free ride on the investments of one of its competitors, such as in promotion activities or pre-sales services;
- protecting brand image, for example by ensuring that a product is not sold for a price that is too low; and
- achieving economies of scale in distribution.

10. The Secretariat then went on to explain that for the background paper, it had conducted an analysis of 64 cases, namely 20 from Latin America and 44 from Europe, to see the extent to which efficiency arguments appeared in decisions. The analysis showed a number of interesting things. First, efficiency considerations are only found in a minority of the cases, largely due to the nature of the cases that end up being investigated by a competition authority; vertical restraints are most often not reviewed by competition authorities, exactly because they are presumed to be pro-competitive. This assessment starts with determining the presence or absence of market power as economic theory dictates that in the absence of significant market power, either upstream or downstream, vertical restraints are likely to be pro-competitive, as they serve efficiency purposes. In most jurisdictions in Latin America, as well as the US for instance, there needs to be market power before efficiencies are invoked or considered. In other words, if there is no market power these arguments are not required. However, the flipside is that once there is significant market power, it is rather complex to offset competitive restraints combined with this market power. In Europe, the Commission's Vertical Block Exemption Regulation (VBER) applies a 30% market share threshold for the parties on the relevant market. However, an additional condition in Europe is that the restraints does not concern a hard core or 'by-object' restriction. These are presumed anti-competitive, and therefore illegal. Most vertical restraints cases in the US indeed involve hard core or 'by-object' cases, as a result of which illegality is presumed and efficiency arguments in such cases are a lot more complicated.

11. Secondly, while in approximately 30-40% of the analysed cases, efficiency arguments were considered, such efficiency arguments have rarely been successful. Reasons for this differ. In some cases, for instance, parties fail to show the benefits for consumers. However, the most used reason for authorities not to accept efficiency arguments is that parties generally fail to prove the indispensability of the restraints for the achievement of its objectives. In other words, competition authorities concluded there were other less restrictive means to achieve the same objective. A third interesting finding was that efficiency claims in our sample of cases were never quantified or substantiated. This makes balancing of anti-competitive and pro-competitive effects very difficult; if you cannot measure or quantify them, they are hard to balance? A fourth finding is that in Latin America, only little of the reviewed 20 cases dealt with vertical restraints in an online

context. Instead, the majority of the cases pertained to exclusive dealing in an offline setting. Efficiency arguments focused mostly on the prevention of free-riding, the reduction of illegal activities such as counterfeiting, or the improvement of operational efficiencies. To compare, in Europe, most cases dealt with an online setting, and efficiency defences mostly revolved around the preservation of a brand image or claimed lower prices for consumers. Such online cases may appear more often in Latin America in the near future. While e-commerce in Latin America is still rather modest, in comparison to other regions in the world, the region has shown the highest growth rate in the world last year, with the growth rate of e-commerce sales of 37%. Given this growth and given the pro-competitive character of many vertical restraints, efficiency considerations should be expected as well.

12. The **Chairman** made a number of observations. The first one related to the large difference in cases between Europe and Latin America. He considered that one of the reasons for this may be that one of the objectives of European competition law is the creation of the single market, and one of the ways in which manufacturers, who sell in different countries, can separate markets between those different countries is by establishing selective or exclusive distributorships. In Europe, aside from the limitation to competition and the possible efficiency benefits of vertical restraints, such arrangements were seen to separate national markets, and therefore were against European competition law. As such, there's a bit of specificity with regards to the sensitivity of European authorities to vertical restraints. The second observation relates to the rare success of efficiency defences in vertical restraint cases. The Chair anticipated that during the session we will hear from several jurisdictions about cases where efficiencies were surely admitted as compensating a possible anti-competitive effect. However, an important issue is the appropriate standard of proof that is requested by the competition authorities to accept an efficiency defence. In Europe, both in the case of vertical restraints or merger review, there is a very high standard of proof for accepting an efficiency defence. As such, perhaps we need to conclude that the standard of proof is too strict in Europe with respect to efficiency defences. The third observation relates to the link with market power. We are not necessarily concerned with whether one or another competitor is excluded, but rather whether vertical restraints create an exclusion that affects the market as a whole because the implementer of the restrictions has sufficient presence on the market to make a difference on how the market works.

13. Then the Chairman introduced the first speaker, **Ms. Priscila Brolio Gonçalves** to discuss the role of efficiencies in vertical restraints in Brazil in light of the legal framework, in particular how efficiency arguments are often used as arguments for assessing the proportionality of some restraints.

14. **Ms. Priscila Brolio Gonçalves** started by explaining that competition is a constitutional matter in Brazil, meaning that the Brazilian Federal Constitution prohibits the abuse of economic power (article 173, para 4). Brazil has a competition law since 2011, which is very similar to the relevant constitutional provision. Article 36 of the competition law deals with horizontal behaviour, cartels, and vertical behaviour, where, similar to the European system, there is a distinction between illegal behaviour by object and illegal behaviour by effect. Usually cartels and other horizontal behaviour such as boycotts or collective boycotts are considered to be illegal by object, while all vertical behaviour is usually considered by effect as a result of their general pro-competitive character. This means that one needs to assess the effects, or the potential effects. The Brazilian competition law includes a non-exhaustive list of behaviour that could be considered as illegal, such as cartels, price agreements and behaviours such as RPM, and other types of behaviours such as discrimination. She furthermore mentioned that while efficiencies are very commonly used in merger control, balancing pro- and anti-competitive effects, the law does not provide a requirement of such analysis for vertical restraints as the law is very

generic. There is no provision about how to deal with efficiencies when assessing vertical behaviour in Brazil. She then mentioned that an interesting issue is that in Brazil, the threshold for assuming the existence of a dominant position is a market share of 20% or more in the relevant markets. This is often argued to be a low threshold, but a company can dispute this and demonstrate that although it has a 20% market share, it does not have a dominant position. **Ms. Priscila Brolio Gonçalves** then went on to explain that in 1999, CADE issued guidelines (resolution No. 20/1999) for investigations of conduct cases, both horizontal and vertical. It covers both cartels and vertical restraints and outlines a step-by-step analysis for a case: i) establishing the behaviour (based on the evidence), ii) determining the market definition, iii) analysis of the market dominance with market shares and other aspects, iv) analysis of the harm (to consumers / end users), v) estimation of economic efficiencies/other benefits, and vi) balancing harm and benefits. The burden of proof rests almost entirely on CADE, except for the demonstration of potential economic efficiencies. She went on to say that many cases regarding vertical restraints do not pass the dominance tests and are consequently abandoned by CADE. However, once a dominant position is established, CADE assesses the behaviour's harm to consumers. The defendants can then provide potential efficiencies that could justify the behaviour. Finally, CADE will need to balance the pro- and anti-competitive effects. Then **Ms. Priscila Brolio Gonçalves** explained that ever since, these guidelines were never updated or withdrawn, despite the introduction of a competition law in 2011. Therefore, many case handlers and practitioners use them when conducting their analysis. While there have been many vertical restraints cases, a few have been successful for CADE, having led to a conviction. Most of the vertical restraints cases in Brazil are analysed under a "rule of reason" approach (as opposed to a *per se rule*), as a result of which efficiencies should be discussed. RPM cases (especially minimum RPM cases such as the SFK case) are an exception and are often found illegal by object. She then explained how CADE includes potential efficiencies in its analysis. The examination of efficiencies by CADE exists usually of two elements: indispensability (what is the rationale behind the restrictions and to what extent were the restrictions necessary) and proportionality (could benefits have been reached with a less restrictive behaviour). According to **Ms. Priscila Brolio Gonçalves**, the harm or efficiencies have never been quantified in CADE's past cases. She also emphasised that efficiencies should be specific to the case. Sometimes parties use literature for theoretical efficiency defences that are associated with their alleged behaviour, but they are unable to demonstrate those efficiencies in the specific case. She ended her presentation with the discussion of two retail cases that had led to a conviction: Ambev/Tô Contigo (beer) and Unilever/Nestlé (ice cream). Both cases involved exclusive dealing and included efficiency arguments. In the first case, parties argued theoretical efficiencies typically associated with exclusive dealing and fidelity discounts (leading to "de facto" exclusivity). However, the efficiencies were not considered by CADE as they were not case-specific. Moreover, even if these efficiencies theoretically existed, CADE argued, they were not passed on to the consumer. The Unilever case involved the potential justification of freezer exclusivity (of freezers provided by Unilever to retail stores) and certain volume (quantity) clauses. Unilever laid out a detailed efficiency analysis that was partly accepted by CADE. The efficiency argument revolving around the protection of investments in the retail stores (the refrigerators) was accepted as it was regarded as a "reasonable economic justification". However, the volume discounts (through "bonifications" or incentives policies, leading to "de facto" exclusivity) was not, as it was not shared with end users.

15. **The Chair** thanked **Ms. Priscila Brolio Gonçalves** and passed the floor to the Brazilian delegation for their intervention, noting that he was in particular interested in why Brazil states in its contribution that CADE lacks a consistent standard of analysis and whether this has already changed as a result of the increase in digital cases.

16. **Brazil** started with the comment that most of CADE's vertical restraints decisions so far relate to RPM. This is relevant because the cases discussed in the contribution, as well as the statement that CADE lacks a consistent standard of analysis, actually pertain to exclusive contract cases. According to the delegate, digital markets can potentially change the analysis in exclusive contract cases, as the iFood case (a possible abuse of dominance in the food delivery sector, where Rappi Brasil filed a complaint against iFood) may illustrate. **Brazil** continued with the standard analysis in exclusivity cases. Exclusivities are analysed under the abuse of dominance provisions and the key is to prove potential foreclosure of competitors. Only after understanding the scope of such exclusionary effects, efficiencies can be considered. **Brazil** then explained that, for the purposes of its contribution, CADE had reviewed the 19 contract exclusivity cases identified in CADE's case law. Of these 19 cases, approximately 47.3% was abandoned (or archived), 39.5% led to a conviction and 21% of these cases ended in a settlement. **Brazil** concluded by stating that since the last OECD peer reviews of Brazilian competition law, Brazil has witnessed a "third wave of antitrust", with increasing vertical restraints cases. Last year, out of 76 open investigations, 35 dealt with cartels and 30 with unilateral conduct. This was a large change as, historically, Brazil has three-to-one cartel cases compared to unilateral conduct cases. This change is largely driven by digital markets. The iFood decision this year is an example, although no final decision has been taken yet. The change in the iFood case is that CADE has adopted an interim measure based on an analysis of the level of foreclosure as a result of certain exclusivity clauses. This interim measure was a result of an analysis of digital markets, which indicate that the CADE is going into a different direction, including a more standard approach of analysis.

17. The **Chair** thanked Brazil for its intervention and made one additional point. While from a legal perspective, certain vertical restraints are different, from an economic perspective the effects of those vertical restraints can be identical. For example, granting exclusivity to a retailer may have the same effect as RPM, namely to establish high margins for the retailer, incentivising the retailer to sell as much of that product as possible. Nevertheless, while having similar effects, oftentimes vertical restrictions are not treated similarly in the legislation; while in many jurisdictions RPM is *per se* prohibited, exclusivity is not.

18. The **Chair** then asked to **Mr. Javier Coronado** to make his presentation on exclusive dealing and specifically on the challenges of how to establish a sensible standard to consider efficiency claims large enough to countervail any welfare losses from a decrease in intra-brand competition. **Mr. Coronado** started his presentation with a brief summary of efficiencies in some of the main vertical restraints from two perspectives: inter and intra-brand competition. Regarding intra-brand competition, **Mr. Coronado** highlighted problems arising such as externalities, double marginalization, free riding, and uncertainty that could explain the need to use vertical restraints such as RPM, quota fixing, exclusivities, and franchise fees, among others, to solve privately those problems. In light of inter-brand competition, he mentioned hold-up problems and low incentives to invest as potential reasons to implement exclusive dealing or RPM strategies. Positive effects of vertical restraints that are less explored, according to **Mr. Coronado**, are exclusivity as a means for the retailer to differentiate itself as well as exclusivity in the context of intellectual property rights. **Mr. Coronado** then proceeded to discuss two recent cases in Peru, in particular two exclusive dealing cases, as this type of cases has been most relevant in recent years. In the first case, the food court company Arcos Dorados (the world's largest independent McDonald's franchisee) filed a complaint against Jockey Plaza (owner of, at the time, one of the largest malls in Lima), and Sigdelo (a company that operates the Burger King and Pizza Hut restaurants in Peru) for refusing to lease spaces in the mall to Arcos Dorados. Although the decision was revoked in the second instance by Indecopi, due to a

different market definition, the first analysis evaluated efficiencies presented by the parties. Parties argued that the vertical restraint was meant to allow tenants to recover their investment and initial risk, which in turn would lead to an interesting initial tenant mix. However, Indecopi established that the vertical restraint was not reasonable because food companies do not require a very significant investment, the restraint was limited to Arcos Dorados and there was no joint strategy to develop the business to favour consumers. Hence, Jockey Plaza and Sigdelo were found to have abused their dominant position and the efficiencies were rejected. **Mr. Coronado** then moved to the second case which related to exclusivity agreements with regards to the Pay TV market. The company Tele Cable filed a complaint against Telefónica Multimedia (now Telefónica Movistar) for using exclusivity agreements with content producers and programmers – Fox and Turner and national producers (Canal N) – to exclude it from the Pay TV market. However, Indecopi concluded that Telefónica and Turner developed campaigns and investments in favor of consumers, while Telefónica and Fox did not demonstrate efficiencies but the effect on the complainant was marginal. Then **Mr. Coronado** referred to a very similar case that was decided by OSIPTEL, the telecom regulator in Peru. This case also involved exclusivity agreements with Fox and Turner and national producers. Telefónica argued that the exclusive agreements were justified because of the need to differentiate themselves from their competitors and to avoid free-riding in national broadcasting, as Telefónica was investing to develop content for the national market to be offered to their consumers. OSIPTEL, however, reached different conclusions for national and international producers: it concluded that the Fox and Turner exclusivity contracts were not justified as they do not generate efficiencies because of a lack of investments, while contracts with national producers (Canal N) were justified as they are programming development agreements that require joint investments and have high uncertainty of success. This year, OSIPTEL has concluded that Telefónica is an important provider in the wholesale market, and as such has obliged it to offer its Pay TV content to the public in Peru. This means that any franchise can ask Telefónica to resell the complete programs, which is linked to the fact that Telefónica maintains these exclusivity agreements with local channels, including Canal N, the football channel, as well as channels that have their own content. OSIPTEL considered these agreements to be strategic barriers that were hindering competition. Moreover, OSIPTEL stated that it does not consider efficiencies, a differentiated offer that is beneficial to the consumer, or a custom business model focused on the joint development of content for the final consumers. As a result, public debate has focused on the intellectual property rights of programmers, and the risk of reducing investments and the quality of local content. **Mr. Coronado** concluded with four take-aways. The first take away is that in Peru there is little empirical evidence (e.g. investment expenses) regarding economic justification of exclusivity contracts and vertical restraints. As a result of limited empirical evidence, and this is the second take away, different efficiencies have been argued with varying credibility, often depending on the extent of uncertainty for defendants and the required investment. The third relates to product differentiation that could allow for a less stringent standard of proof. Namely, differentiated products, and this is the fourth take away, can be a justification for externalities and free riding when focusing on models of service level agreements. Without exclusivity agreements, companies would not develop certain products that will differentiate them, hurting consumers.

19. The Chair thanks **Mr. Coronado** for his presentation and noted that the mall case is an example of how arguments on efficiencies (unsuccessfully raised) can work for both offline and online markets and used the analogy with Apple's AppStore commercial practices. Then, he gave the floor to **Colombia** to discuss a RPM case in the perfume market and explain how they accepted an efficiency claim in RPM when this is usually not the case for such conduct.

20. **Colombia** explained the case and the conduct and emphasised that the relevant market could be divided into segments according to quality of the products, is imports intensive, has economies of scale and is highly concentrated. The investigation had been initiated after a complaint in 2014, which indicated that prices were almost the same for different retailers. With regards to the efficiency claims, the SIC recognized the importance of brand protection. **Colombia** then discussed the price analysis performed by the SIC, where they concluded that the similarities came from international price references and not from the conduct of specific agents in the value chain. As a result, it decided to close the investigation. **Colombia** concluded its intervention by highlighting the importance of a case-by-case analysis in vertical restraint cases in Colombia, and that sometimes product differentiation could be justified, for example by IP rights or brand image protection.

21. **The Chair** then asked **Mr. Coronado** if he had any comments on this perfume case. **Mr. Coronado** requested some more details on the price analysis and **Colombia** explained that the higher price volatility in the higher (premium) segment indicated that the absence of intra-brand was offset by higher inter-brand competition.

22. Then **the Chair** turned to Mexico and asked COFECE two questions, namely whether their assessment of vertical restraints differs from that in abuse of dominance cases, and whether it could elaborate on the accepted efficiency defence in a tying case in e-commerce.

23. **Mexico** started her intervention by explaining the legal framework in Mexico to analyse vertical restraints. Vertical restraints are considered a relative monopolistic practice in the substantial market power provisions, meaning that only if the party in question has a certain market power, COFECE analyses the conduct. This assessment is, in essence, analogous to the one they perform for abuse of dominance investigations. **Mexico** then presented a case in the digital sector that was closed by COFECE because of a lack of evidence during the investigation. It involved a case where an online retailer (Mercado Libre) was potentially tying the use of their platform to the use of a specific payment system (Mercado Pago). However, after analysing the market, COFECE had concluded that the payment system was needed to perform transactions in the marketplace, and that integrating both services brought efficiencies, such as the elimination of information asymmetries, which also translated to higher welfare to consumers.

24. **The Chair** thanked **Mexico** and observed similarities between the discussed case and the Apple Pay case. He then gave the floor to **Honduras** to explain the beer case and the efficiencies raised, in particular the issue whether it was acceptable to prevent retailers from distributing other beers in its own refrigerators.

25. **Honduras** started his intervention by explaining the importance of economic efficiency in Honduras' competition law and that efficiencies have to be raised by the defendants as they have the burden of proof. With regards to the beer case, this pertained to exclusivity conditions by the dominant beer company with regards to the use of refrigerators by cafes and restaurants to prevent other competitors from entering that market. The case was initiated by a complaint filed with the Commission by Bay Island Brewery Company S. A. against Cervecería Hondureña S. A. The Commission for the Defence and Promotion of Competition in Honduras analysed the definition of the relevant market, the position of the parties on the relevant market and whether there was a dominant position. **Honduras** then explained that the efficiencies raised related to the increase of consumer welfare, the promotions and benefits retailers could access, efficient use of space, and the achievement of economies of scale. The authority assessed them and concluded that the vertical restraint was not needed to achieve such efficiencies and that they could have been replaced by less restrictive clauses, therefore sanctioning the company.

26. **The Chair** thanked Honduras and turned to **Mr. Coronado** for his comments on the case.

27. **Mr. Coronado** mentioned that Indecopi had a similar case in Peru, in the railway industry, that was closed because of the lack of dominance. He added that the cases prove that market definition still plays a key role in these investigations.

28. **The Chair** wanted to know from Honduras what prevented the competitor from following a similar strategy by making the same kind of offer, or even better, to the bars and restaurants. Why didn't they offer another refrigerator, with better loans or better conditions, which would have led the restaurants and the cafes to switch from one beer to the other?

29. **Honduras** answered that having multiple refrigerators is not possible because of the limited space in the bars and restaurants, nor attractive as they consume a lot of energy. Switching entirely between suppliers is unlikely because the defendant had a dominant position with nearly 95% market share.

30. **The Chair** thanked Honduras again and turned to Panama for its presentation. Panama has developed guidelines for the analysis of vertical restraints and the Chair asked what the scope and content of these guidelines are and what prompted the authority to develop such guidelines.

31. **Panama** started its presentation by stating that the authority had issued its guidelines as part of its duties, which includes providing guidance on many topics including vertical restraints. The competition law in Panama includes a general provision on monopolistic practices within which vertical restraints are considered. Any conduct that can harm inter-and/or intra-brand competition can be analysed under the legislation, especially when a company has certain market power, and for this the authority collaborates with the prosecution to investigate the case. When conducting the analysis, both anti-competitive and pro-competitive elements need to be investigated. With regards to efficiencies, they need to be demonstrated by the parties and proven to be reasonable and quantifiable. They pertain to vertical restraints cases as well as merger cases, and have to meet six criteria. With regards to these criteria, **Panama** noted that these criteria are not very easy to assess for a judge as they are subjective, such as "restraints do not lead to a significant increase in prices". Honduras concluded by saying that parties can file "viability requests" for their vertical restraints, which provide the opportunity of the competition authority to give its opinion on some of the contractual practices, decreasing the number of monopolistic practices. The guidelines have also helped in this regard.

32. **The Chair** thanks Panama for the presentation and concluded that the development of the guidelines in Panama was a desire of the competition authority to help judges and companies with the assessment of vertical restraints. He then asked **Ms. Brolio Gonçalves** if she had any final comment to make.

33. **Ms. Brolio Gonçalves** made a final comment on the beer case as Brazil had had a very similar case. This case was closed by CADE with a settlement, and the efficiencies were used to reach the settlement. After the decision, the market opened up and market positions of the different players became more balanced.

34. **The Chair** concluded the session with a number of observations. Even though there have not been many vertical restraints cases in Latin America, these cases were in a variety of markets (from malls, drinks to digital platforms) and mostly on exclusive dealing. The number of vertical restraints cases will likely increase due to the increasing importance of digital markets. The assessment of market power and market definition will keep playing important roles in such investigation as they decide the outcome. The indispensability and specificity of efficiencies are essential both from a legal and economic perspective, although this results in a high threshold for efficiency defences. The same is true for a point raised by Mr. Coronado, namely that the benefit of vertical restraints can be that transactions or investments won't happen in the absence of them. The need to show the absence of certain investments if it wasn't for the restraint results in a high standard of proof. The final point was that Panama had shown that informal guidance, either case-specific or by issuing guidelines, can be very valuable for legal certainty.

35. **The Chair** thanked the expert speakers, the delegations, the secretariat and the participants and concluded the discussion.