

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm>

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## Colombia

### Enforcement approaches to vertical restraints in data-driven economies

#### 1. Introduction

1. In May 16 2019, the panel of the Conference Breakout Session *Unilateral Conduct Working Group BOS – Online vertical restraints: recent enforcement experiences and challenges* discussed several challenges that competition agencies currently face when matters related to online vertical restraints come up. Particularly, matters involving, i) the competitive advantage that arises from the possession of big data; ii) access to data as a barrier to entry; iii) parity or MFN clauses; and finally, iv) soft enforcement approaches or other remedies. All of which was intended to contribute to a wider concern related to the adequateness of current antitrust approaches to digital economies. In this context, we will like to share in the OECD venue the key insights and questions that resulted from this exercise.

2. This document includes a short overview of the discussion held on the BOS and the key insights and questions posed by Colombia's Superintendence of Industry and Commerce during the discussion and for a further analysis. For this reason, our interventions were structured as follows: first, we identified the basic propositions and conjectures that arose from the topics suggested by the moderator of the panel; and second, we asked follow up questions to place in doubt consolidated positions in respect to those topics.

#### 2. Overview and key insights

3. After the presentation of the main findings of the Vertical Restraints Project by the moderator, which involved the analysis of hypotheticals concerning i) parity requirements between fictional Online Travel Agents (OTAs) and fictional accommodation providers, and also ii) online selective distribution models; the moderator asked the speakers and the audience to answer the question on their perspective on the need for authorities to be more active in looking at vertical restraints. This question led to emergence of some other problems regarding the pertinence of investigations from competition authorities in markets where there is healthy inter-brand competition, and also, led to question the need to build case law as opposed to the encouragement of commitment solutions.

4. The results from the poll, later analyzed by the ACCC's group in charge of the BOS, show that firstly, both the audience and the speakers believed that agencies should be more active in looking at online vertical restraints. And that commitment solutions are as important as taking cases when it comes to vertical restrictions in digital markets.

##### 2.1. Big Data and Network effects

5. We highlight the importance of issues related to the role of data as input to the development and consolidation of network effects and as a key factor of competition. On one hand, there are some circumstances that may raise concerns to competition authorities

regarding the control of big data by incumbents. For example, the possession of data and the control of the access to it by search engines and online shops. While, in respect to the issue on the impact of the EU General Data Protection Regulation (GDPR) over market power of data-reliant businesses like digital platforms, we certainly believe that the enforcement of this rules may overlap with the enforcement of antitrust laws by competition authorities.

6. To structure the debate about the relation between data and competition, it appears useful to consider beforehand how attractive to businesses are the network effects that result from the possession of Big Data. This is because they not only work as tools for a better target of consumers; through a data fusion strategy which occurs when data from different sources are brought into contact and new facts emerge, but also as safeguards or guarantees (to some extent) of a dominant position and monopoly in the case of emerging digital businesses.

7. Now, those network effects, could be seen as the first layer of usage of this valuable input.

8. And, initially, the competitive advantage that will result from that input, will be that from a “winner takes it all”, mirroring a model of competition for the market.

9. Having that in mind, there should be no objection in respect to the fact that the benefits of big data in the determination of an initial market structure for an emerging market are incontestable. This means that if a firm succeeds in the business of creating something new, and even more, satisfies the basic principle of network effects, which is to hoard every user/client as possible –hence its data–, it will at least receive benefits prone to its condition.

10. Still, given that the premise of digital markets is that they are continuously under technological evolution and enhancement, we shouldn’t be surprised by the varieties of ways in which that “winner” maintains its competitive advantage, and we must go a little bit further as to analyze resulting multisided markets, such as the ones presented in the Online Vertical Restraints Project.

11. In fact, one way in which the “winner” maintains its advantage is by acquiring sources of data through mergers or partnerships. The interesting thing about this strategy, for competition authorities to analyze, is that as time goes by, a value chain is formed and it is pertinent to study the way in which the business starts to integrate vertically subject to risks such as the enhancement of barriers to entry but in this case in all the levels of the chain.

12. Digital multisided platforms illustrate the case perfectly. In respect to these platforms, and the emerging vertical integration, we pose several questions and hypotheticals:

1. How does the possession of BIG DATA resulting from the “control” over various digital products, online services and apps, could work as a presumption of a potential anti-competitive effect on the downstream market?

For example, imagine a super app that holds several services and service providers, which transfer to the app holder competitively relevant data from its customers, how to assess parity requirements from the app towards its particular service providers given its position and business model?

2. Also, which is the effect on competition that result from the interdependence of market players that these multisided platforms foster? For example, issues related to coordination and clearance of past marketplaces where they used to operate?

Lastly, in respect to the impact of the GDPR over market power of data-reliant businesses like digital platforms and the evident tension between the legitimate aim of innovation and the means to get there throughout a variety of seemingly abusive behaviors:

3. When does the fact that a company that has dominant position in a specific market, from which it acquired/established a robust network, ventures in a new market with that data possession as a competitive advantage, surpasses merit and becomes suspicious to competitive processes?
4. How can we assess contemporary bundling / tying in digital markets, for example: suppose that a firm conditions its service to the acquisition of another service throughout a “to see this, log in through that” method, is that behavior pro-competitive or anti-competitive, given that the services offered are free and, could these agreements lead to a suspicious kind of merger?
5. How does a pronouncement from an authority, related to a breach on data and privacy protection rules by a data-driven incumbent, affects an ongoing study of a particular economic activity by a competition authority? How does it bias a further analysis?

Finally, in respect to the assessment of harm and the possibility that authorities might get an idea of the way in which an economic activity works, – economic activity that is under scrutiny mostly because of its bigness and ongoing growth –, from an allegation regarding the way in which it gets access to data, controls it and maintains it. We posed the following question for a further discussion:

6. How will harms to consumers related to data protection and privacy may serve to anticipate a potential harm to competition? And, how may it help to the design of an optimal approach or remedy?

## 2.2. Effectiveness of soft enforcement approaches to vertical restraints and remedies

13. The premise from which one should address the question regarding remedies and enforcement approaches to vertical restraints is that the determination whether *soft enforcement approaches* are effective or not, relies necessarily on the way in which competition authorities understand the extent of their role facing market dynamics.

14. This answer, in turn, will be shaped by the foundations of each competition regime. Meaning, the goals and values that underlie it and that work as the fence within which the authority relies to decide to study or not, investigate or not, interact or not, or sanction or not.

15. So, depending on the particular understanding of the “*role hence enforcement approach*” the assessment of effectiveness of soft measures will definitely vary. For example, an authority may believe, according to its specific role and, of course, to a consistent set of previous decisions taken in respect to certain behaviors (precedent and probable doctrine) that the only way to secure outcomes when preserving competition is through cases; while another may be convinced that it can surely structure and shape markets (when that is its aim) without having to rely on hard enforcement. For instance, by

conducting studies that lead to recommendations and the identification of areas of further analysis. (That is the case of the ACCC's *Digital Platforms Inquiry* recently published).

16. In this respect, Rod Sims Chair of the Australian Competition and Consumer Commission (ACCC) said during his intervention in the 2019 ICN ANNUAL MEETING UCWG Plenary, that in some cases we should keep asking the same questions (which may be considered as the right questions) related to incentives and the commercial value of certain interactions. And he specifically said: "*The more we get exceptionally technical the more it hardens the analysis*".

17. Having that in mind, one more thing is pertinent. The approach itself towards different kinds of enforcement has implications. We should evaluate the solution on the basis of its adequateness, not of its strength. And that definitely requires i) context awareness, ii) interdisciplinary confrontations, iii) wide comprehension of other public and private entities; and especially, iv) a curiosity driven need to identify and understand the logic (or incentive) behind every particular choice made in the market.

18. So, we at the Superintendence of Industry and Commerce believe that alternative (rather than soft) enforcement approaches are effective in so far as they i) demonstrate that competition authorities can choose in between a robust set of tools, that not necessarily lead to the imposition of a constraint or a fine, when a concern related to an economic activity comes up.

19. Even more, our claim is that i) alternative approaches are ideal when the economic activity under scrutiny is characterized by being i) unprecedented and by ii) unfolding under conditions of uninterrupted technological evolution and enhancement, because in those specific cases, any official statement related to it may certainly impact market dynamics.

20. In fact, today, academics are analyzing Digital markets putting together different fields such as: economics, law, data sciences, media, public policy and even political sciences, because there's an obvious need to deal with multidimensional issues with multidimensional approaches.

21. An example that illustrates the potential impact of agencies' pronouncements over new technological driven solutions, is related to the emerging financial sector of FINTECH that poses questions regarding business competitiveness, intellectual property protection, tax regimes, data protection and so on. This new sector, as opposed to the traditional financial sector, works upon an idea of constant financial technological innovation, with aims towards the creation of new business models, applications, processes and products.

22. This enhancement aim shared mostly by every technological driven economic activity, goes hand in hand, just like the FSB says, with potential antitrust issues like mergers and abuse of dominance, and that can be identified so as to guarantee beforehand the promotion of competition.

23. As a matter of fact, the Payment Services Directive from the European Union brought forward guidelines regarding safer use of internet payment services and mandated open access to certain types of customers' banking data for non-bank licensed providers of payment initiation services. In a similar way, Mexican FinTech Law included requirements for financial entities, to open data through APIS to third parties and allowed fees to be collected. Likewise, in Australia, the government announced that a "consumer data right" will be applied sector by sector, giving consumers a right to direct that their data be shared with whom they authorize.

24. In such a manner, we can conclude, in respect to our stand towards an adequate enforcement, that our understanding of the role of the competition authority; which is to achieve i) free access to markets; ii) consumer welfare; and, iii) economic efficiency, allow us to address competition related issues and to enforce competition protection, throughout other measures such as: commitments to comply antitrust rules and advocacy work.

25. This doesn't mean that we dismiss traditional enforcement approaches, because, part of the holistic analysis of an economic activity and a determined behavior that distorts competition rules, is to identify the specific cases in which a fine or a constraint may deter or stop the anticompetitive behavior.

26. As a conclusion, an alternative approach is effective when it tackles the problem adequately based on a rigorous analysis of incentives and every possible outcome given special sets of facts.

27. Now, in respect to remedies, what really came to our minds as a strong concern worth of further analysis, is that there's really no consensus in respect to the most adequate way to address the bigness of the tech firms.

28. Particularly the concern goes to the debate regarding structural remedies such as break ups and the democratization of data as a counter power to barriers to entry that result from Big Data possession, control and use.

29. Our questions in that regard are as follow: How to distinguish between the data that can be disclosed in the case that a horizontal divestiture was proposed, given that in most cases direct owners of the information are consumers and not firms?

30. Given the diversity in thought regarding tech giants: ones may assert that the best and only way to tackle bigness and to stop any form of potential abuse, is through the breakup of the company. While others identify the need to understand and to, instead, pose recommendations related not to competition primarily, but to data and privacy protection. That last as implying that there's no real problem with dominance. Having that in mind, is it possible to think that the asset might be Big Data analytics instead of data itself?