



Regional Competition Center for Latin America
presents:
Guidelines on exchanges of information among
competitors

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One of the main objectives of the Regional Competition Center for Latin America (or CRCAL by its acronym in Spanish) is to enhance competition agencies' technical capacities. Towards this end, and sponsored by the World Bank, the CRCAL has commissioned guidelines and exchanges of information among competitors based on best international practices. This article briefly introduces these guidelines.

The guidelines on exchanges of information among competitors are designed to serve two purposes. First, to provide the Antitrust Agencies of the member countries with guiding principles and a general framework for analyzing horizontal collaborations among competitors. Second, to provide guidance to businesses and their legal advisors on how Agencies may wish to assess the legality of these formal or informal agreements. The hope is that such guidelines will contribute to greater transparency and predictability of antitrust assessments, and to the adoption of pro-competitive collaborations while deterring anticompetitive ones.

The document recommends an analytical framework for the assessment of horizontal agreements among competitors based on best international practices. In this context, it refers to “competitor collaboration, or agreement” as a set of agreements or exchanges of information among competitors, which allows the pursuit of economic activity; it also extends to the economic activity itself resulting from such collaboration. The term “competitor” refers to both actual and potential competitors.

A collaboration has a horizontal nature if it is entered into by competitors. The most common agreements focus on research and development, production, purchasing, and processing, distribution and marketing. Horizontal agreements among competitors can lead to significant economic benefits which in turn can translate into significant consumer benefits, especially when such agreements take advantage of complementary skills. These agreements may allow for the development of new products, enhance the speed of development of such products, increase the quality and variety of options available, save costs or share risks. These outcomes may be achieved through the generation of market efficiencies when information is otherwise held asymmetrically, improve firms' internal efficiencies by learning about competitors' best practices and benchmarking against them, and they may also improve inventory management enabling faster delivery of products and better managing of unstable demand. Such collaborations

may also provide a direct improvement to consumer welfare by empowering consumers with more information and reducing their search costs.

However, horizontal agreements may also lead to competition concerns. That is the case when they enhance knowledge of competitors' market positions and strategies, weaknesses and strengths, facilitate practices which fix prices or output, fix the allocation of markets or customers, rig bids, or foreclose future competitors. Such agreements are likely to lead to consumer losses through increased prices or reduced quality, quantity or variety of output; they may also stifle innovation and new product development. They may also enhance the ability to foreclose a rival.

The analytical framework proposed in the guidelines is based on economic and legal principles for assessing horizontal agreements and the contexts in which they take place; it applies to agreements which are not *per se* illegal, and analyzed under a rule of reason. These are agreements relating to the integration of economic activity in which efficiency is enhanced, and which may be reasonably necessary to achieve the claimed pro-competitive effects. The question to address is whether these agreements are likely to produce anticompetitive effects, when compared to situations absent those agreements.

As a general overview of the framework of analysis, the first step is to examine the purpose of the agreement, following by the determination of whether the agreement creates or enhances the ability of the parties to influence market outcomes. The next step is to determine whether the agreement preserves the incentive and the ability of the parties to compete independently, which is followed by an evaluation of other market conditions to determine the likelihood of anticompetitive effects and their magnitude. The final step is to contrast pro-competitive against anti-competitive effects to determine the likely overall effect, or the actual competitive effect when the agreement has been in place.

A key economic principle in the analysis of these agreements is the extent to which the parties to the agreement have market power, or the extent to which the agreement enables or enhances the existence of such market power. But several other factors are also important. The final assessment of the competitive effect of a horizontal agreement among competitors under the rule of reason will be based on the facts of the case at hand. The other relevant factors include:

- The nature and content of the agreement;

- The possibility that the agreement may limit independent decision making by the parties through the control of key production factors or financial interests, or through the facilitation of coordination of market price or output;
- Particular features of the information exchanged between the parties in the context of the agreement, such as:
 - Parties' intent in sharing the information;
 - Nature, quantity and strategic importance of the information exchanged;
 - Age of the data exchanged;
 - Whether the information is exchanged publicly or privately;
 - Whether the information exchanged contains aggregate or individual information;
 - Whether the information exchanged involves individual current and future information or individual past information;
 - Whether the information exchanged involves individual data on prices and volumes or individual data on demand and costs;
 - Structure, control and frequency of the exchange;
 - Safeguards adoption by the parties;
- The relevant markets affected by the collaboration;
- The market shares and market concentration;
- The economic factors limiting the likelihood that the agreement will facilitate a collusive outcome such as:
 - The number of firms;
 - Homogeneity of the product;

- Symmetry among competitors;
 - Market transparency;
 - Market complexity;
 - Stability in demand conditions;
 - Multimarket contact;
 - Barriers to entry;
 - Low benefits to cheating;
 - History of collusion in the same industry.
- Other factors influencing the likelihood that the agreement will facilitate a collusive outcome, including:
 - Exclusivity;
 - Control over assets;
 - Financial interests in the collaboration;
 - Control of the collaboration's key competitive decision making;
 - Likelihood of anticompetitive information;
 - Duration;
 - The likelihood of entry;
 - The features of the exchanges of information among competitors, both multilateral and unilateral outside of an explicit agreement which may facilitate a collusive outcome;
 - The efficiencies generated – their size and likelihood of occurrence, which depends on the features of the information exchanged and of the relevant market;

- The reasonable necessity of the agreement to achieve the claimed efficiencies and whether they are likely to be passed on to consumers; and
- The overall competitive effect of the agreement.
 - Assessments without market evidence – opinion on the likelihood and magnitude of the pro-competitive and anticompetitive effects;
 - Assessments with market evidence – economic and econometric analyses of market outcomes to determine but-for market outcomes and estimate the agreement’s overall effect.

A *de minimis* rule is recommended, in which no challenge of a collaboration among competitors would be pursued when the combined market share for all parties is less than 15%, which does not apply to *per se* illegal agreements.

The analytical framework put forward in the proposed guidelines represents a recommendation on how competition authorities may wish to analyze these collaborations; it does not necessarily reflect the way in which any particular competition authority may decide to proceed with such an assessment.

The CRCAL expects this document to be an important reference for all its members when addressing horizontal collaborations among competitors. It will become available for Latin American countries and the public in the coming months, once the Webpage of the CRCAL becomes operational.

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methods. She has flagged potential anticompetitive behavior preceding large scale investigations, such on the alleged Libor conspiracy and manipulation, and has also used these methods to defend against allegations of such behavior. Her screens are used by competition authorities, defendants and plaintiffs worldwide. Her work is frequently featured in the press such as The Economist, Forbes, Bloomberg, Financial Times, The Wall Street Journal, Reuters and several other news outlets.