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NEW GUIDELINES OF THE NATIONAL ECONOMIC PROSECUTOR FOR VERTICAL RESTRAINTS

1 Introduction In June, 2014 the National Economic Prosecutor (Fiscalía Nacional Económica – FNE) issued its guidelines for the Analysis of Vertical Restraints. This document is a new effort of the FNE to promote free competition, on the basis of the review of the best practices on the matter and the study of the problems associated with vertical restraints. These guidelines are intended to provide a framework concerning the concept of vertical restraint used by the FNE, the main features of these kinds of provisions, their type, anticompetitive risks and potential efficiencies. The guidelines are not mandatory to the Antitrust Court (Tribunal de Defensa de la Libre Competencia). Nonetheless, the FNE may file a claim before the Antitrust Court based on these guidelines and claim violations to competition law.

2 The guidelines In their investigations, the FNE will consider a presumption of legality of a particular vertical restraint whenever none of the parties involved holds a market share over 35%. In the event that a buyer or seller is subject to similar terms with other sellers and buyers, respectively, these restrictions will remain within the presumption of legitimacy to the extent the market share of all buyers and sellers that are subject to those provisions do not exceed 35%. However, this presumption of legality may be rebutted under certain circumstances. The FNE will take into consideration the following aspects:

- The market share of the economic agents subject to the restriction;
- The anticompetitive effect (actual or potential) rising from the vertical restriction; and,
- The efficiencies arising from the same that cannot be achieved through other measures less restrictive to competition.

2.1 Positive and negative aspects of vertical restraints The guideline recognizes possible efficiencies of vertical restraints, such as avoiding:

- Double margin in the producer/distributor relationship;
- Free riding¹, mainly in the provision of retail services;
- Hold-up², that is, long term investments (such as sunk costs) in vertical relationships and the opportunistic behavior of taking advantage of them when made by the counterparty.

¹The FNE recognizes in its guidelines that the presence of these kinds of externalities could produce a disincentive to offer complementary services, producing a sub-provision of the same. Depending on the type of product, this sub-provision could negatively affect the intensity of the inter brand competition. ² The possibility of an opportunistic behavior ex-post (such as hold up) reduces the incentives to invest ex-ante by the entity that could be subject to the opportunistic behavior. The FNE considers that the risks of sub-inversion will be significant and therefore there will be efficiencies associated to the vertical restraints if the following copulatives characteristics are met: i) The investments are specific; ii) A long term investment; iii) The investment must be asymmetric, meaning that a party should invest significantly more than the other party.



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However, the guidelines also recognize some potential risks to competition, regarding the following aspects;

- Promote or facilitate collusion or coordination of producers or distributors;
- Block or delay the entrance or expansion of competitors.

2.2 FNE analysis If the FNE considers that vertical restraints may produce some risks to competition, those risks shall be measured against the efficiencies claimed by the parties.

The analysis considers three consecutive stages:

- **First:** determination of the market shares of the economic agents subject to the vertical restriction.
- **Second:** actual or potential effects on competition.
- **Third:** efficiencies (which cannot be achieved by other alternatives which are less restrictive to competition).

Once it is established that the efficiencies are truthful and justifiable, the FNE will perform a qualitative analysis to determine whether those efficiencies serve as effective counterweight to the risks generated by the restriction, that is, if the efficiencies compensate for the risks. If the analysis reveals that those efficiencies do not effectively counterbalance the identified risks, the FNE shall consider this vertical restriction contrary to free competition.

3 Conclusion The guidelines are an effort of the FNE to make public its internal criteria that it will use in its investigations of vertical restraints for determining whether a vertical restraint is against free competition. Thus, by making public such criteria, economic agents will be informed of the possible reaction of the FNE and take into account the foregoing while making a decision on the matter.