International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Fiscalía Nacional Económica FNE (National Economic Prosecutor's Office)
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Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports

of this Working Group, in particular the Report on Tying and Bundled Discounting (June 2009) and the Report on Exclusive Dealing (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

Chilean jurisprudence has defined this behaviour as an exclusionary conduct that consists in unjustifiably refusing to deal, abusing a dominant position. It has further stated that this conduct will amount to an infringement inasmuch as it impedes an economic market agent to freely access, under equal conditions as his rivals, those goods or services that are essential for the performance of his economic activity.

The jurisprudence has also stated that whoever produces or manufactures goods of any kind or that supplies services to third parties, if he does so in an establishment open to public, will be, in principle compelled to sell such goods or provide such services to anyone that requires it and that accepts the supplier's usual trade terms[1]. The supplier may refuse to provide the goods or services only when he has set general, objective and reasonable conditions and these are not met by the client[2]. Having said this, it is important to mention that neither the Chilean Competition act nor the jurisprudence define the concept of refusal to deal as such. Rather than doing so, the jurisprudence has set the specific conditions that have to be concurrently met for a refusal to deal conduct to be considered an infringement of the competition act: that a) the affected party's business be substantially impaired, or that the affected party be incapable to carry on business as a result of not being able to obtain adequate supplies of a product on usual trade terms; b) the inability to obtain adequate supplies must result from a lack of competition among suppliers; and c)the affected party must be willing to meet the supplier's usual trade terms.[3]

[1] Decision Nº 1016, Preventive Central Commission, August 22, 1997
[2] Decision Nº 16/2005, Competition Tribunal
[3] Decision 19/2006 (non adversarial proceeding) and Ruling N°88/2009, Competition Tribunal

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal.

Our jurisdiction does recognize refusal to deal as a potential violation of Chile's competition legislation in a general manner. The several cases that have been dealt with about this conduct have been based on the general provision of article 3 of Decree Law 211, (the Competition Act) that establishes

"Whoever executes or enters into any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalized (...)

Among others, the following shall be considered as acts, agreements or conventions that hinder, restrict or impede free competition, or which tend to produce said effects

(...) b) Abusive exploitation by an economic agent or a group of economic agents, of a dominant position in the market, fixing sale or purchase prices, tying a sale to the purchase of another product, allocating territories or market quotas or imposing other similar abuses".

Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

No

3. Do the relevant provisions apply only to dominant firms or also to other firms?

As stated above, the several cases that have been dealt with about this conduct have been based on the general provision of article 3, b): Abusive exploitation by an economic agent or a group of economic agents, of a dominant position in the market. Thus, the relevant provisions apply to dominant firms only.

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

A refusal to deal, as any other violation of the Competition Act, is an administrative infringement.

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

N/A

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behaviour, please describe the anticompetitive effect and the circumstances that led to the finding.

Our agency found unlawful refusal to deal conducts in five cases investigated during the past ten years. The FNE may investigate either as an inquiry to decide whether to prosecute or by request of the Tribunal in the context of ongoing legal proceedings. So, the five cases in which the FNE found unlawful refusal to deal conducts encompass investigations opened by the FNE as an inquiry and those initiated at the request of the Tribunal.

For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

Only in one of the two refusal to deal cases brought to the Competition Tribunal by the FNE, did the Tribunal found an infringement. It is important to clarify that the investigations that the FNE performs may be done either as an inquiry to decide whether to prosecute or by request of the Tribunal in the context of ongoing legal proceedings. That is why the answer to the previous question is five, although of those investigations only two were actually cases brought by the FNE to the Tribunal.

Please state whether any of these cases were brought using criminal antitrust authority.

Chilean competition law does not define refusal to deal conducts, or any anticompetitive conduct for that matter, as criminal offences.

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction,

and, if available, a link to the English translation, an executive summary, or press release.

In October 2009, the Competition Tribunal fined the mobile network operator company, Telefónica Móviles de Chile S.A (TMCH) for infringing the Chilean Competition act, abusing its dominant position through margin squeeze and refusal to deal conducts against several GSM gateways operators. GSM gateways are devices that contain one or more subscriber identity modules (SIMs) for one or more mobile networks, which enable calls from fixed telephones to mobile telephones to be routed directly into the relevant mobile network . A call made via a GSM gateway appears to the mobile network to have originated from a mobile phone registered to that network and so will have a cheaper call rate than an ordinary fixed to mobile call.

To provide their services, the GSM gateways operators have to purchase numerous subscriptions with each different mobile network operator in order to route the landline originated calls of their costumers to the respective called party in the respective mobile network.

The activity of GSM gateways operators was originated due to a market distortion created by the price difference between the interconnect price – the price the mobile network operator request from its interconnecting partners (off-net tariffs)– and the price that the network operator charges its subscribers (the minute price paid by the subscribers using their own SIM cards) (on-net tariffs)

In this case, the Tribunal identified two markets: the respective mobile network in the upstream market (TMCH's mobile network), and the fixed to mobile on-net call termination services market in the downstream one. The Tribunal found that TMCH held a dominant position on the upstream market and that such position provided TMCH with significant advantages in the downstream market. Furthermore, the Tribunal deemed that the subscriptions to TMCH's mobile network in the upstream market constituted an input that was essential for the complainants to provide the downstream in-net call termination services.

The Tribunal ruled that by discriminating prices against costumers and by increasing the subscription prices paid the complainants (the input), TMCH was in fact margin squeezing the latter thus not allowing them to compete in the downstream market of in-net call termination services. The Tribunal also found that TMCH had abuse its dominant position by refusing to deal with the defendants.

The Tribunal imposed a fine on TMCH of approximately US$2.5 million. It further prohibited the company to charge discriminatory prices to GSM gateways operators with respect to those charged to the rest of its mobile network customers; and ordered it to refrain from practicing any discriminatory conduct unless such discrimination is justified on objective circumstances.

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

Yes, our jurisdiction allows private parties to challenge a refusal to deal before the Competition Tribunal

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

According to the jurisprudence, the specific Conditions that have to be concurrently met for a refusal to deal conduct to be considered an infringement of the competition act are that a) the affected party's business be substantially impaired, or that the affected party be incapable to carry on business as a result of not being able to obtain adequate supplies of a product on usual trade terms; b) the inability to obtain adequate supplies must result from a lack of competition among suppliers; and c)the affected party must be willing to meet the supplier's usual trade terms[4].

b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?

[4] Decision 19/2006 (non adversarial proceeding) and Ruling N°88/2009, Competition Tribunal

No.

c. Does intent play a role, and if so what role and how is it demonstrated?

No, intent does not play a role in the determination of the infringement. However, intention is taken into account when determining the amount of fines.

d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

No

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

The jurisprudence has stated that whoever produces or manufactures goods of any kind or that supplies services to third parties, if he does so in an establishment open to public, will be, in principle compelled to sell such goods or provide such services to anyone that requires it and that accepts the supplier's usual trade terms. The supplier may refuse to provide the goods or services only when he has set general, objective and reasonable conditions and these are not met by the client. However the jurisprudence has defined what will be understood by general, objective and reasonable conditions, saying that objective conditions are those established without regard to the quality or kind of the person, that is to say, those that do not subjectively discriminate against two buyers on equal conditions; general conditions are those applicable to every person willing to purchase the product or service offered, without favouring any of them to the detriment of others; and reasonable conditions are those which source are a law or regulation, those imposed for the efficiency of the market, those determined by the quality or image of the product or service offered, which purpose is to ensure that commercialization systems comply with the legal framework and with criteria of economic rationale.

According to these concepts, the fact that the dominant firm has had a course of dealing with firms that are not rivals or potential rivals or that it sells its product to everyone except its main rival should have an effect on the evaluation of a refusal to deal conduct.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector specific regulatory provisions rather than the competition laws.

Despite the fact that the essential facility doctrine has been developed in parallel to the refusal to deal rules, the jurisprudence has gradually tended to combine both. If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

The basic elements established in Chile's competition jurisprudence[5] *in order to regard a facility as essential is that the facility be controlled by a monopolist, that competitors be unable to technically or economically duplicate the facility, that the monopolist denies access to competitors to the essential facility and that it is feasible for the monopolist to provide the facility to competitors*

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

No

a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

[5] Ruling Nº 88/2009, Competition Tribunal

11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

It could in the sense that if there is a pre-existing duty to deal with, the burden of proof would be on the party denying access to the facility.

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

No

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

No, it does not

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

Chile's competition law describes anticompetitive behaviours in general terms, providing some examples of conducts that are to be deemed illegal (refer to question 2). Despite margin squeeze is not among these examples, it has already been brought up in a few cases as a specific anticompetitive conduct.

You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the

margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

Presumptions and Safe Harbours

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

No

16. Are there any circumstances under which there is a safe harbour for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbours.

No

Justifications and Defences

17. What justifications or defences are permitted for a refusal to deal? Are there any particular justifications or defences for specific types of refusal? Please specify the types of justifications and defences that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

Chile's competition jurisprudence has stated that a refusal to deal may be justified by the existence of technical restrictions or by the lack of capacity to provide the facility/input to competitors. The existence of such restrictions or the lack of such capacity has to be proved by the party making such claims.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

The remedies found in Chile's jurisprudence are mandated access and orders to cease the conduct. Moreover, in one case, though ended in conciliation, the Tribunal ordered the inclusion of a price adjustment clause establishing an indexation method.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

In one particular case, where the defendant was the concessionaire of an airport that was abusing its monopoly power against its sub-concessionaries, one of the remedies imposed by the Tribunal was that the concessionaire should only charge the sub-concessionaries in the manner set in the original concession agreement.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please explain your response.

No

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

The policy considerations that our jurisdiction takes into account with respect to a refusal to deal case would be the same as in any competition case, i.e. the protection of free competition as a means to safeguard/enhance social welfare.

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.