Exclusive Dealing Questionnaire

As a general statement, we must say that vertical restraints in general and exclusive dealing in particular are not well developed aspects of our competition policy and law.

It is worth to mention that a main shift in our competition law system towards a market efficiency approach took place in 2004 when the new Competition Court was settled. This change in paradigm must produce an abandon of the idea of protecting business freedom of competitors in an asymmetrical bargaining power position ant to focus the unlawfulness assessment of vertical restraints in markets' effect.

The lack of a well established agency practice or legal guidelines on exclusive dealing just permits to answer the questionnaire on the basis of six recent adversarial and non adversarial cases (from 2004 until present) where the Competition Court has emitted some holdings about exclusive dealing covenants between private parties, assessing its exclusionary (market foreclosure) effect or its exploitative effect.

Legal basis and Specific Elements

1. A general provision in art. 3 of our competition law (D.L. N° 211, 1973, as amended in 2003) states: "*One who enters into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition or tends to produce such effects shall be liable…*"/ The second subsection of this article contains 3 exemplary descriptions of: agreements, abuses of dominance, and predatory pricing and unfair competition. The abuses of dominance description is as following: "*The abusive exploitation by a corporation or corporations having a common holding company, of a dominant position in the market, fixing purchase or sale prices, imposing on a sale that of another product, allocating market zones or quotas or imposing like abuses on others*".
So, there is not a special provision on exclusive dealing.

2. As a not well developed aspect, it's hard to list the criteria for an abuse of dominance based on exclusive dealing (beyond the general criteria for defining dominance positions in the market). It's easier to answer in terms of the main concerns of Competition Court's decisions when an exclusive dealing covenant was involved.

a) In two decisions, the Court has expressed its concern about the competition for the market, i.e., the competition for the selection of an exclusive supplier, particularly, when this selection is not done by the final user, but by an intermediary.

b) In two decisions, the Court focus was the exclusionary effect of the clauses; in one of them retaining the illegality, in the other –a non-adversarial case-, dismissing it.

c) In two decisions, the Court assessed the exploitative effect in downstream market of the exclusive dealing clause, in distribution and franchise contracts, dismissing an anticompetitive harm in both.

Exclusive Purchasing and Supply Arrangements

3. In general, the "exclusive" adjective is associated with the 100% of trade between the parties of the arrangement.
In one case, assessing the exclusionary effect of theses clauses, the covenant didn't mandated exclusivity in purchases of one brand but, exclusivity in marketing and publicity activities. The Court considered these exclusive marketing obligations were enough to create an objective limitation to the distribution of an alternative brand.

4. The duration of exclusive supply has not been considered by the decisions reviewed.

5. The exclusive dealing clauses analysis has not considered this.

6. There is not recent experience about it.

7. There is not recent experience about it.

Presumptions and Safe Harbors

8. No. The burden of proof of clauses' illegality rests on the private plaintiff or the enforcement agency (Fiscalía).

9. There are not special provisions on exclusive dealing.

Effects

10. Yes, when the exclusionary effect is assessed.

a. When an illegality of exclusive dealing clauses was retained by the Court because of its exclusionary effect, the latter was defined in terms of entry deterrence and the clauses as strategic barriers to entry.
b. In that case all the factors mentioned were considered.
c. The exclusionary effects were evident in some manner since the dominance of the defendant had not been challenged during a century!!!

11. In principle, an exclusive dealing clause may be challenged just by its exclusionary effect, without showing effects on consumer welfare.

Justifications/Defenses

12. The Court would be open to consider these kinds of defenses on a case-by-case approach, but has not yet the chance to evaluate them in an exclusive dealing case.

Enforcement

13. By the reasons exposed above, for answering the questionnaire we just considered six cases from 2004 until now, before the new Competition Court. 3 of these cases were in adversarial procedures with just one of them with illegality findings. The other half were the result of a non-adversarial procedure and in all of these cases the exclusivity dealing clause was considered legitimate.

14. Yes it does. First, private parties can directly file their complaints before the Competition Court. Indeed, in two of the non-adversarial cases reviewed the enforcement agency just filed a report as a technical expert but not as party. Second, in private law or private/constitutional law complaints, the exclusive dealing clauses must be challenged on the grounds of harming business freedom of one of the parties. The latter cases are not followed by competition authorities.

15. Summary of the decisions overviewed:

a) Two decisions where the Court has expressed its concern about the competition for the market, i.e., the competition for the selection of an exclusive supplier, particularly, when this selection is not done by the final user, but by an intermediary.

- For making a choice of the exclusive supplier of the dress uniform of a private school, the school didn't make a public auction and didn't take the opinion of the students, their fathers nor the teachers.
  The Competition Court dismissed the complaint of abuse of dominance or abuse of economic dependency, but emitted an injunction to the school in order to secure transparency in the procedures of choice of exclusive suppliers, giving access to stakeholders. And the auction conditions must always leave safe the chance for students to purchase the dress uniforms from an alternative supplier, respecting the intellectual property rights that might be involved.
  (**Sentencia N° 21/2005, de 06.07.2005**)

- A contract with an exclusive provider of the services of special legal assistance and medical mal-praxis insurance was imposed to the physicians affiliated to a private health center. Contracts with physicians that didn't agree would be dismissed.
  The Competition Court dismissed the complaint of abuse of economic dependency. Neither the defendant (which didn't participate in the legal assistance or insurance market) nor the exclusive provider, were dominants in the relevant market. But among its holdings, the Court again states about transparency of the procedure of choice of the supplier and leaves safe the physicians' chance for contracting those services with an alternative supplier.
  (**Sentencia N° 42/2006, de 06.09.2006**)

b) Two decisions where the Court focus was the exclusionary effect of the clauses; in one of them retaining the illegality, in the other –a non-adversarial case-, dismissing it.

- In the whole sale cigarettes market, some exclusive dealing clauses were assessed as part of a strategic behavior aiming at the exclusion –and deterring the entrance- of rivals.
  The complaint by private plaintiff Phillip Morris succeeded in the sense that the Court stated that the defendant, being in dominance in the market, had imposed artificial barriers to entry of new competitors.
  The Court ordered the defendant to cease in the conduct and declared as voided all the exclusive covenants of contracts and to refrain to introduce that kind of clauses in future contracts. The Court also fined the defendant in 650 000 USD aprox. This decision of the Competition Court was affirmed by the Supreme Court.
  (**Sentencia N° 26/2005 de 05.08.2005**)

- In the whole sale gamming market, an idea of "exclusive supplier" was implied in the analysis of a refusal to deal in a non-controversial case before the Competition Court. In fact, the Court had to decide if it was lawful, in a duopoly market, for a business to refuse dealing an agency/distribution contract to another business vertical integrated with the rival of the former, i.e. if the condition of non-integration or "exclusive supplier" was reasonable.
  The Court dismissed any competition problems in this case, the condition of non-integration was reasonable.
  (**Resolución N° 17/2006 de 13.09.2006**)

c) Two decisions where the Court assessed the exploitative effect in downstream market of the exclusive dealing clause, in distribution and franchise contracts, dismissing an anticompetitive harm in both.

- In a franchising contract, the Competition Court made an interesting holding in regard the links between this kind of contracts and a dominant position: "*Even though franchise contracts are voluntary consented between parties, once they come into force, the franchisee rest under the economic dependency of the franchisor and that's why the conditions for the latter to abuse are settled, notwithstanding it might not be an abuse against free competition*." / "*However, when the franchisor has dominance in the relevant market, he might abuse of it by imposing, into the contract content, abusive conditions that independent businesses need to accept mandatory. In the same context, and if the franchise contract is reproduced in the same terms among the actors in the market, two kind of anticompetitive effects might be produced: in one hand, in the whole sale market, the reduction of the potential size of the market of access to distributors for the rivals of the franchisor; on the other hand, in the retail market, the lessen of competition intensity* ."
  In regard of the exclusive dealing clause in the franchise contract, the Competition Court hold that this kind of clauses (exclusive purchasing) was of the very essence of a franchising relationship.
  (**Resolución N° 15/2006 de 03.08.2006**)

- In a distribution relationship, the competition concerns where rapidly dismissed considering that the principal had little market share (12,5% or 56%, depending on market definition). In the case, some customers where allocated in exclusivity. (**Resolución N° 16/2006 de 17.08.2006**)

16. N.A.