

Agency Name: Fiscalía Nacional Económica, Chile

Date: 2008-10-23

Tying & Bundled Discounting

This part of the questionnaire seeks information on ICN members' analysis and treatment of tying and bundled discounting. The information provided will serve as the basis for a report that is intended to give an overview of law and practice regarding tying and bundled discounting in the respective jurisdictions.

Unless otherwise stated, the questions concern unilateral conduct by a dominant firm or firm with significant market power.

For the purposes of this questionnaire, "tying" is defined as the sale made by a dominant firm (or firm with substantial market power) of one product with the condition that the buyer also purchases a different product or service (the tied product), or agrees that it will not purchase the tied product from another supplier. It also includes the sale of products or services that could be viewed as separate but are sold only together as a bundle.

For the purposes of this questionnaire, "bundled discounting" is defined as discounts or rebates based on a buyer's purchase of two or more different products or services. Unlike tying, bundled discounting arrangements do not prevent buyers from purchasing individual products separately, but a matter to be considered is that the aggregate price of the individual components is typically higher than the price of the bundle.

This part of the questionnaire covers only tying and bundled discounting, and not other practices such as exclusive dealing, single branding, single-product loyalty discounts or rebates. Your responses should therefore not address these practices unless they have a clear and relevant connection to the analysis and treatment of tying and bundling.

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., rather than speculation.

Experience

- 1. Please state the statutory provisions or legal basis for your agency to address tying and bundled discounts.**

Article 3, paragraph 1 of Decree Law 211 states that any person "...who enters into o executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition shall be liable to the measures...." Moreover, paragraph 2.b. of article 3 states that "Among others, the following deeds, acts or contracts shall be regarded as preventing, restricting or hindering free competition:the abusive exploitation by a corporation or corporations having a common holding company, of a dominant position in the market, imposing on a sale that of another product...or imposing like abuses on others".

Are tying and bundled discounts a civil and/or a criminal violation of your jurisdiction's antitrust laws?

In Chile, they are civil violations.

Do these provisions apply only to dominant firms or to other firms as well?

According to the text of Art. 3b of Decree Law 211, these provisions apply only to dominant firms

2. If your jurisdiction has specific criteria for analyzing tying or bundled discounting, please describe them and state their source. (e.g., legislation, court decisions, or agency policy statements).

Our jurisdiction analyses whether the conduct/act of the dominant firm would allow this firm to leverage its market power in the tying good onto the tied good market, and the likelihood or presence of market foreclosure effects.

3. How many in-depth investigations (i.e., beyond a preliminary review) of tying arrangements and (separately) of bundled discounting arrangements has your agency conducted during the past ten years?

Institutional records do not currently allow us to report on this period of time.

4. State the number of tying arrangements and the number of bundled discounting arrangements your agency found to be unlawful over the past ten years (1999 to date)...

Institutional records do not currently allow us to report on this period of time.

5. Does your jurisdiction allow private parties to challenge tying or bundled discounting in court?

Yes.

If yes, please provide a short description of representative examples of these cases. If known, indicate the number of cases (or an estimate thereof) brought by private parties.

In one case, a mobile phone service company was accused of tying the sale of mobile phones operated by it to that of SIM cards, and at the same time of locking the SIM cards to restrict its use only to the mobile phone operated by the company. The Competition Tribunal dismissed the charge based on the fact that both products (the mobile phones and the SIM Cards) could also be purchased separately.

In another case, a school was accused of tying its educational service to the purchase

of its own made uniforms, which use was compulsory for all of the school pupils. The Competition tribunal partially sustained the charge and instructed the school to refrain from restricting the number of uniform providers, unless the supply of uniforms were made by contracts awarded through bid processes.

Evaluation of Tying Arrangements

- 6. In your jurisdiction, is the term tying used in a manner different from the definition in the introductory paragraphs above?**

No

_____ **If so, how?**

- 7. Please explain the competitive concern(s), if any, generally associated with tying in your jurisdiction, e.g. maintaining dominance/substantial market power in the tying market, distortion of or harm to competition in the tied product market, exploitation of consumers, exclusion of competitors, price discrimination, other.**

The main competitive concerns our jurisdiction addresses are whether the conduct/act of the dominant firm would allow this firm to leverage its market power in the tying good onto the tied good market, and the likelihood or presence of market foreclosure effects. The analysis also includes considerations about exploitation of consumers.

- 8. What specific tests, if any, are applied to determine under the competition law whether two products or services are separate rather than a single integrated product?**

There is not a specific test that has been applied on these cases. However, the FNE is currently considering the introduction of some state of the art tests into its internal analyses of these types of cases.

- 9. In what market(s) – e.g., the tying or the tied market – must effects, if any, be shown to demonstrate an illegal tie?**

In the tied market

- a. What specific types of effects must be shown, e.g. market distortion, market foreclosure, harm to consumer welfare?**

Mainly, market foreclosure

- b. What degree of proof is required? Must the effect be actual, likely, or potential?**

The effect may be actual, likely, or potential

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

The existence of a proscribed conduct is ascertained regardless of the presence or absence of any actual intent to carry out such conduct. However, intent may be considered when establishing fines, which may be lessened if lack of intent is proved.

Evaluation of Bundled Discounting

11. In your jurisdiction, is the term bundled discounting used in a manner different from the definition in the introductory paragraphs above?

No

If so, how?

12. Please explain the competitive concern(s), if any, generally associated with bundled discounting in your jurisdiction, e.g. maintaining dominance/substantial market power, distortion of or harm to competition, exploitation of consumers, exclusion of competitors, price discrimination, other.

The main competitive concerns our jurisdiction addresses are whether the conduct/act of the dominant firm would allow this firm to leverage its market power in one market onto another market, and the likelihood or presence of market foreclosure effects. The analysis also includes considerations about exploitation of consumers.

13. Does price-cost comparison play a role in the evaluation of bundled discounting? Yes/No. If yes, please describe the comparison used and the role that it plays. Please also indicate if recoupment plays a role and, if so, what role it plays.

No information available

14. What sort of effects, if any, must be shown to demonstrate an illegal bundled discount? For example, must market distortion, market foreclosure, harm to consumer welfare or any other effect be shown?

Mainly, market foreclosure

a. What degree of proof is required? Must the effects be actual, likely, or potential?

The effect may be actual, likely, or potential

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

The existence of the conduct is ascertained regardless of the presence or absence of any actual intent to carry out such conduct. However, intent may be considered when determining, which may be lessened if lack of intent is proved.

Presumptions and Safe Harbors

15. Are there circumstances under which tying or bundled discounting is presumed illegal?

No

_____ If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

16. Are there any circumstances under which there is a safe harbor?

No.

Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

No

Justifications and Defenses

17. What justifications or defenses, if any, are permitted (e.g., reduced manufacturing or distribution costs, meeting competition, product reputation, technological linkages) for tying or bundled discounting?

Economic efficiency considerations

- a. Please specify the types of justifications and defenses that your agency considers in the evaluation of tying arrangements, the role they play in the competitive analysis, and who bears the burden of proof.
- b. Please specify the types of justifications and defenses that your agency considers in the evaluation of bundled discounts, the role they play in the competitive analysis, and who bears the burden of proof.

Policy

18. What policy considerations does your jurisdiction consider with respect to tying and bundled discounts?

Currently, there are no formal policy considerations on this matter.

16. You may wish to address the following sorts of issues: Are tying and bundled discounting common?

Yes.

Does your jurisdiction generally consider them to be procompetitive?

Generally, our jurisdiction considers them either procompetitive or innocuous

Does your answer depend on whether the firm is dominant?

If the firm is not dominant, there will be no case.

Does your jurisdiction view tying and bundled discounting by a dominant firm as generally anticompetitive?

No, but only when the tying and bundled discounts are carried out by a dominant firm, there will be grounds for conducting an investigation.

What competitive concern(s), if any, are generally associated with tying and bundled discounts in your jurisdiction?

The main competitive concerns our jurisdiction addresses are whether the conduct/act of the dominant firm would allow this firm to leverage its market power in one market onto another market, and the likelihood or presence of market foreclosure effects. The analysis also includes considerations about exploitation of consumers.

- 17. Please provide any additional comments that you would like to make on your experience with tying and bundled discounting and enforcement 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 tying and bundled discounting.**

In our jurisdiction, tying and bundling discounting practices have rarely been addressed as anticompetitive.

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Single-Product Loyalty Discounts and Rebates

This part of the questionnaire seeks information on ICN members' analysis and treatment of loyalty discounts and rebates. The information provided will serve as the basis for a report that is intended to give an overview of law and practice regarding loyalty discounts and rebates in the respective jurisdictions.

Unless otherwise stated, the questions concern unilateral conduct by a dominant firm or firm with significant market power.

For this questionnaire, loyalty discounts and rebates are defined as discounts or rebates on units purchased of a single product, conditioned upon the level or share of purchases.

This part of the questionnaire concerns only treatment of single-product discounts rather than pricing practices involving multiple products (bundling, tying, and related practices).

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., rather than speculation.

Experience

- 1. Please state the statutory provisions or legal basis that allow your agency to address loyalty discounts and rebates.**

There are not explicit provisions in our legislation addressing loyalty discounts and rebates. However, when these conducts may possibly result in harm to competition cases could be addressed by referring to the general clause in paragraph 1 of art 3 of Decree Law 211 which states that any person “....who enters into o executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition shall be liable to the measures....” Besides, art 3b states that:“Among others, the following deeds, acts or contracts shall be regarded as preventing, restricting or hindering free competition:the abusive exploitation by a corporation or corporations having a common holding company, of a dominant position in the market, imposing on a sale that of another product...or imposing like abuses on others”

Are tying and bundled discounts a civil and/or a criminal violation of your jurisdiction’s antitrust laws?

They could be civil violations

Do these provisions apply only to dominant firms or to other firms as well?

According to the text of Art. 3 of Decree Law 211, these provisions apply only to dominant firms.

- 2. How many in-depth investigations (i.e., beyond a preliminary review) of loyalty discount and rebate programs has your agency conducted during the past ten years?...**

Currently, institutional records do not allow us to report on this period of time.

- 3. State the number of loyalty discounts and rebate programs that your agency found to be unlawful over the past ten years (1999 to date)...**

Currently, institutional records do not allow us to report on this period of time.

If your agency has found any loyalty discounts and rebate programs to be unlawful, please describe the anticompetitive effect and the circumstances that led to the finding.

In one case, among several abusive contractual terms contained in the dominant firm's supply contracts, there was a loyalty discount given upon condition that 96 to 99,5 % of the retailers' (customer) product sales had to be dominant firm products. This discount clause was deemed to have significant market foreclosure effects.

(Data not available for the rest of the question).

4. Does your jurisdiction allow private parties to challenge loyalty discounts and rebates in court?

Yes.

If yes, please provide a short description of representative examples of these cases. *The claim was brought by Philip Morris (PM) against Chiletabaco (CCT), the dominant firm, for abuse of dominant position. Among several abusive contractual terms contained in the dominant firm's supply contracts, there was a loyalty discount given upon condition that 96 to 99,5 % of the retailers' (customer) cigarette sales had to be CCT cigarettes. This discount clause was deemed to have significant market foreclosure effects.*

If known, indicate the number of cases brought (or an estimate thereof) by private parties.

Data not available

Evaluative Criteria

5. In your jurisdiction, is the term single-product loyalty discounts and rebates used in a manner different from the definition in the first paragraph above?

No

If so, how?

6. What are your jurisdiction's criteria for evaluating the legality of loyalty discounts and rebates?

a. What anticompetitive effects or other criteria make loyalty discounts and rebates abusive?

They must produce or tend to produce artificial barriers to entry or market foreclosure effects.

Must the practice exclude or threaten to exclude rivals from the market? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other factors are considered?

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

The existence of a proscribed conduct is ascertained regardless of the presence or absence of any actual intent to carry out such conduct. However, intent may be considered when establishing fines, which may be lessened if lack of intent is proved.

b. Does price-cost comparison play a role?

No.

If so, please describe the comparison(s) used and the role that it plays.

In your answer, you may wish to address the following sorts of issues: What cost measures are used (e.g., average variable cost, average avoidable cost, average total cost)? Are price and cost compared with respect to all of a firm's sales to a particular customer or only with respect to incremental sales? How significant a role does the cost test play (e.g., is pricing below the relevant cost measure required or a pre-requisite to prove illegality? Does pricing above cost prove legality)? Please also indicate if recoupment plays a role and, if so, what role it plays.

Presumptions and Safe Harbors

7. Are there circumstances under which loyalty discounts or rebates are presumed illegal?

No.

If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

8. Has your jurisdiction developed any safe harbors governing loyalty discounts or rebates?

No.

If yes, please explain the terms of the safe harbor.

Justifications and Defenses

9. What types of justifications and defenses, if any, are available to the dominant firm (e.g., efficiencies, meeting competition)? Please specify the role they play in the competitive analysis and who bears the burden of proof.

Policy

10. What policy considerations does your jurisdiction consider with respect to loyalty discounts and rebates?

You may wish to address the following sorts of issues: Are loyalty discounts and rebates common?

Yes.

Does your jurisdiction generally consider them to be procompetitive?

Yes.

Does your answer depend on whether the firm offering the discounts is dominant?

Yes.

Does your jurisdiction view loyalty discounts and rebates by a dominant firm as generally anticompetitive?

No.

What competitive concern(s), if any, are generally associated with loyalty discounts and rebates in your jurisdiction?

They may produce or tend to produce artificial barriers to entry or market foreclosure effects.

11. Please provide any additional comments on your experience with loyalty discounts and rebates. You may wish to address whether there are significant policy and/or practical considerations that may lead to greater or lesser agency enforcement against loyalty discounts and rebates pursuant to your unilateral conduct rules, e.g., concern with the risks of false positives/false negatives and/or the presence or lack of evidence of consumer harm.

In our jurisdiction, loyalty discounts and rebates have rarely been addressed as anticompetitive, and therefore we have little experience in the type of analyses the investigation of these conducts entails.