



**International Competition Network  
Unilateral Conduct Working Group  
Questionnaire**

**Agency Name:** Commission for Promotion of Competition (COPROCOM), Costa Rica  
**Date:** 28-10-2009

**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.*

Although is not defined as such in our legislation, our jurisdiction recognizes refusal to deal as a possible violation of Law N.7472.

*Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?*

The Law for the Promotion of Competition an Effective Defense of Consumers, Law number 7472, article 12. Paragraph g):

- g) In general, any deliberate action to take away from the market competitors or prevent their incorporation.

COPROCOM doesn't have specific guidelines or separate provisions for refusal deal.

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

The article 12 applies only to firms with substantial market power.

3. *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?*

Refusal to deal is an administrative violation of the Law N.7472 and it can be penalized with fines and corrective measures, and revised by the courts of justice.

## **Experience**

4. *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)?*

In the last 4 years the agency has conducted three refusal to deal cases, all of them involving access to essential facilities.

5. *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 behavior, please describe the anticompetitive effect and the circumstances that led to the finding.*

Two of the cases have been penalized; the other one is still in process. In both cases found unlawful, the anticompetitive effect was to block the entry of rivals to a market, in one case to provide cable television and in the other to provide internet. The access to the electricity pole network that was essential for the enterprises to supply these services and it was denied by the electricity network operator.

*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.*

Both Commission's decisions have been challenged in courts, but final decision has not been taken.

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

None.

COPROCOM has found unlawful conduct in two cases; both cases are related with essential facilities. The third case is still in investigation.

Both cases found illegal were against Electricity Suppliers that denied access to other agents to use their networks. One of the cases was to compete in the cable television market and the other was for entering the internet (via cable) market.

The case that is in process is for the same reason.

6. *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.*

In the Costa Rican jurisdiction parties have to exhaust administrative procedures, and then they can attend to the judicial system.

#### ***Evaluation of an actual refusal to deal***

7. 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?

Our legislation defines three different analysis steps:

- Definition of the anticompetitive conduct in the law.
- Analysis of substantial market power in relevant market.
- Analysis if the conduct has **o can** have the effect or objective to reduce competition.

As referred before, even the threat to exclude rivals can be penalized.

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

No, consumer harm must not be demonstrated.

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

Yes, intent plays a role, but the way it is demonstrated is determined case to case.

- 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?*

- 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?*

8. *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.*

*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 term essential facility is not defined in the competition law.

The conditions under which refusals to deal have being found unlawful were explained in question number 6.

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

COPROCOM has never had a case of refusal to deal involving IP.

- 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?*

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

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

### ***Evaluation of constructive refusals to deal***

12. 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?

The term is not defined in our legislation.

### ***Evaluation of “margin squeeze”***

13. 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?

No, it is not recognized in a specific way. But, it could be included in the same article referred in answer number 1.

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 Harbors***

14. 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.

15. Are there any circumstances under which there is a safe harbor 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 harbors.

### **Justifications and Defenses**

16. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses 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.

As the refusal to deal is not specified as an anticompetitive practice, the legislation does not

provide any permitted justifications.

In the essential facilities cases that were described before, any justifications were not proved by the electricity companies.

### ***Remedies***

17. 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?

Yes in both cases COPROCOM ordered to provide access to the rivals, but the price was not fixed, because the Commission does not have the power of setting or fixing prices.

18. 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 the moment that decisions were taken by the Commission, the applied remedies could be used for any refusal to deal.

19. 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.

So far, the remedies imposed have depended on the circumstances of each case; but they are not specified in the legislation.

The availability and administrability of any remedy has to be considered.

### ***Policy***

20. 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?

21. 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.