

## Respuestas a las primeras siete preguntas del cuestionario de la Red Internacional de Competencia (RIC):

### *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.

A/ In general terms one can say that the Law for the Defense and Promotion of Competition (Law) includes among the practices prohibited by its effect to the actions related to the refusal to deal. The law does not specify this kind of behavior as such. However, a refusal to deal may be considered prohibited by the Commission for the Defense and Promotion of the competition (Commission) to the extent that it restricts, diminishes, impedes or infringes the process of free competition on production, supply or marketing of goods or services.

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

A/ The law provides a general provision which is in Article 7, paragraph 9). However, with respect to the second part of the consultation, the regime of protection of intellectual property rights contains provisions on exclusive rights that allow refusal to deal, provided that the objective is not to restrict, diminish, harm, impede or undermine the process of free competition. There is also special legislation in sectors such as telecommunications, financial, energy, airport services, among others, which regulates access to essential facilities.

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

A/ It only applies the prohibition of refuse to deal, if it is proved that the company has a notable market participation that exceeds the percentage participation of the relevant market that fixes Commission case by case. (Art. 8).

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/ In this regard, the Act (Law) stipulates that without prejudice of penal or civil actions, the violations to the precepts of the law and its regulations, must be punished administratively by the Commission. In the case of penal actions would be subject to the provisions of the law.

### *Experience*

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)?

A/ The Commission has almost 3 years operating, in December 2007 reviewed a case of acts of refusal to deal and resolved to declare inadmissible the case. In other words, there was not enough evidence on the performance of that act.

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

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.

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

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.

**A/ No applicable**

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.

A/ All cases can be reviewed judicially. Individuals can appeal to the Administrative Court to challenge the decisions rendered by the Commission on these acts of refusal to deal. Until now there is no known instance of this type.

### ***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?

A/ It focuses like a practice forbidden by their effect. Thus the conduct must have exclusionary effects on the opponent or rival.

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

A/ The damage and harm to consumers can be included following the refusal of treatment once it has demonstrated the restrictive practice.

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

A/ Third parties can perform civil actions to claim damages. Decisions of the Commission and the judgments of the Courts of Administrative Litigation will serve as evidence against the trader who made the prohibited practice.

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?

A/ Indeed, denial of treatment such as anti-competitive practice is discussed independently of the alternative procedures used for its solution. It always makes the analysis of the allocation to the competitive system. If there is not sufficient evidence, there are respect to the rules of the agreement between the parties.

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?

A/ The approach is to analyze each case.

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.

A/ The law does not recognize a crime different from that stated in the laws of specific sectors.

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.

A/ It is generally defined as ownership or lawful possession of an asset that is indispensable to enter a market, which means that only that or those that have effectively can provide the product or service.

In the second query no data.

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

A/ We analyze each case. Recognizes and guarantees the system of intellectual property protection. However, it is estimated the effect produced by these property rights in the competition regime.

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

A/ Indeed, in the patent system are considered anti-competitive effects, whereas the case of trade secrets are considered unfair competition.

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

A/ No data

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

A/ The analysis is independent of the regulation system, even when it has its own mechanisms to approach the practice in question. It is evaluated if the operator derives its restrictive behavior misusing the powers conferred on them by regulatory regime. In any case, the regulated sector is not performing a proper implementation of the competition on the side of behavior.

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

A/ We analyze each case. It checks if the operator derives its restrictive behavior misusing the monopoly position obtained previously.

#### ***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?

A/ **No applicable**

#### ***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?

A/ No data.

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?

A/ No data.

### ***Presumptions and Safe Harbors***

**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.

A/ No exist. Refusal to deal is investigated according to their effect.

**16.** 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.

**A/ Not applicable**

### **Justifications and Defenses**

**17.** 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.

A/ Behavior is evaluated by considering the economic efficiency gains, resulting from the practice under analysis favorably affecting the competitive process.

The types of justifications or defenses are associated with efficiency gains arising from the practice. Among those efficiency gains the Commission may consider the following:

a) The achievement of savings in resources that allow the operator to permanently produce the

- same amount of either cost less or greater quantity of good at the same cost;
- b) obtaining lower costs if there are two or more goods or services jointly than separately;
  - c) The significant reduction in administrative costs;
  - d) Innovation and technology transfer and trade information;
  - e) The lower cost of production and marketing resulting from the expansion of an infrastructure or distribution network.

The analysis of these justifications can be made in the preliminary investigation by the Commission or in the main investigation. If anyone invokes increases in economic efficiency and consumer welfare as a result of their acts should try such cases.

### ***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?

A/ No specific cases to illustrate. However, along with the order to cease and the act of refusal to deal, applied as a complementary measure, allowing access through an access charge through a negotiated sale, license or service via a fair price. Without prejudice to proceed according to special laws and regulations in the sector.

- 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?

A/ You can take into consideration the existing resource in the regulated sector, in order to appraise the license, sale or service, to apply in cases of non-regulated.

- 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.

A/ Not applicable.

### ***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?

A/ Indeed, the Agency takes into account the efficiency gains resulting from a restrictive practice, and determine that that practice does not limit or adversely affect the free competition, saying that increases in economic efficiency and consumer welfare, offset the negative effect the process of free competition.

**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.

A/ In the case of Honduras, with only three years of management, we consider very useful the opportunity to be continuously informed on legislative changes and the criteria applied in other cultural contexts, on the actions of refusals to deal.

The date information will enable us to take all relevant measures for the implementation of the Law.