International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: **Federal Competition Commission (CFC) of Mexico**

Date: **04.11.2009**

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.

CFC1. The Federal Law of Economic Competition (FLEC) defines a refusal to deal (RTD) as a relative monopolistic practice, i.e. a unilateral conduct subject to a rule of reason test.[1]

The term, as applied under the FLEC, partially match the definition provided in the introduction. Under the Mexican competition law, a «refusal to deal» is defined as the «denial to sell, commercialize or provide products or services available to others».

This definition includes:

- **Unconditional refuses to deal to a party when the required product or service is available to others.**
- **Practices performed by vertically and non-vertically integrated firms.**
- **It applies to acts performed by either an upstream supplier or a downstream purchaser. (E.g. A distributor providing services to upstream producers).**
- **Explicit and unjustified RTD, the use of delaying tactics, the refuse to reply requests to deal, and the refusal by a firm to allow another the access to its own networks or other infrastructure facilities.**

The RTD provision does not include "conditional" refusal to deal, which are enclosed in a separated provision, section VIII of article 10 of the FLEC.[2] **See responses 13 on conditional RTD and 14 about margin squeeze for further information. Non-cartel agreements consisting of joint refusals to deal are investigated as boycotts as provided in section VI of article 10 of the FLEC.**[3]

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)?

CFC2. The FLEC typifies refusal to deal (RTD) as a relative monopolistic practice (i.e. unilateral anticompetitive conducts), which are defined as follows:

> ***"Article 10.- Subject to verification of articles 11, 12 and 13 of this Law, relative monopolistic practices are considered to be those acts, contracts, agreements, cartels or combinations, which purpose or effect is to improperly displace other agents from the market, substantially impede their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals, in the following cases:***
> ***(…)***

[1] Article 10 typifies as relative monopolistic practices the following conducts: vertical market division, resale conditions maintenance, tied sales, exclusive dealing, refusal to deal, and collusive, vertical boycott, predatory pricing, loyalty discounts, cross-subsidization, discrimination in price or conditions of sale, and raising rivals costs.

[2] Section VIII of article 10 of the FLEC:

"ARTICLE 10.- (...) relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals, in the following cases: (...)

§ VIII. The concession of discounts or incentives from the producers or suppliers to the purchasers, with the requisite of not using, acquiring, selling, commercializing or supplying the goods or services produced, possessed, distributed or commercialized by a third party, or the purchasing or transaction subject to the requisite of not selling, commercializing or supplying a third party, the goods or services which are the object of the sale or transaction; (...)."

[3] Section VI of Article 10 of the FLEC defines boycott as follows: "§ VI. The agreement reached among several economic agents or the invitation extended to them to exert pressure against some economic agent, or refusal to sell, commercialize or acquire products or services to or from such economic agent with the purpose of discourage it from a specific behavior, to apply retaliations or force it to act in a specific manner; (…)."

V. The unilateral action consisting in refusing to sell, commercialize or provide to certain people goods or services available and normally offered to third parties."

As established in the first paragraph of article 10 of the FLEC, RTD is subject to the rule of reason criteria as defined by articles 11 (demonstration of infringement), 12 (determination of the relevant market) and 13 (assessment of substantial market power) of the FLEC.

The FLEC and its Rulings (RFLEC) do not explicitly refer to *constructive refusal to deal* or *margin squeeze*. However, article 10 of the FLEC typifies four relative monopolistic practices that may include the conducts that could be characterized as constructive refusal to deal in general or margin squeeze. The assessment of these practices has been undertaken following the legal form that the specific conduct takes, either as discriminatory pricing[4] or rising rival's costs[5] at wholesale level; predatory pricing[6] at retail level; or cross subsidization between wholesale and retail pricing[7].

There are not guidelines or specific implementing regulation for RTD conducts. However, interested parties may request guide on proceedings on possible violations of the FLEC through interviews with CFC's personnel and/or follow formal consultation proceedings pursuant Article 33 *bis* 4 of the FLEC.

In addition, the CFC offers public versions of its resolutions with the aim to provide information about the competition assessment of RPM and other violations to the FLEC, and as a deterrent to the sanctioned firms and to the business community from engaging in such practices.

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

CFC3. RTD provision only applies to firms with substantial market power in the relevant market. Firms that do not wield unilateral substantial market power are not responsible of violations to practices enclosed in Article 10 of the FLEC, including RTD. The FLEC does not enclose the concept of «joint market power».

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?

---

[4] Section X of article 10 of the FLEC: "§X. The establishment of different prices or conditions of sale or purchase for different buyers or sellers situated in equality of conditions (...)"

[5] Section XI of article 10 of the FLEC: "§XI. The action of one or several economic agents that has the object or effect, directly or indirectly, of increase the costs, or hinder the productive process, or reduce the demand of its competitors."

[6] Section VII of article 10 of the FLEC: "§VII. Systematic sales of goods or services at prices below their total average cost or their occasional sale below the variable average cost, when exist the elements to presume that those losses would be recouped through future price increases, in the terms provided in the RFLEC. (...)." The specifications on recoupment and distribution of costs that the LFCE refers to are set out in article 10 of the RLFCE, as follows:

"I. Distribution of average total cost and average variable cost amongst sub-products or co-products shall take into account technical features of production, distribution or commercialization processes, as well as the generally accepted accounting principles or financial information standards;

II. Whenever an investigation is initiated upon request, the plaintiff must submit to the Commission the methodology and elements that allow determining the cost distribution upon which the complaint is based, and

III. It will be presumed that an agent may recoup losses whenever, in addition to wielding substantial power, he also has sufficient financial strength or excess capacity or a record of affecting competition or free entry into the markets where it competes."

[7] Section IX of article 10 of the FLEC: "§IX. The use of profits that an economic agent obtains from the sale, commercialization or provision of a good or service to finance losses incurred in the sale, commercialization or provision of another good or service; (...)."

CFC4. RTD is a conduct sanctioned under a civil (i.e. administrative) law.[8]

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)?

CFC5. The CFC has 16 years of experience in enforcing competition law in Mexico. Since 2000 it has conducted 20 in depth investigations.[9]

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.

CFC6. In 10 cases, the CFC found and sanctioned illegal RTD practices. Five cases involved the refusal to provide access to essential services in telecommunications markets. One case dealt with refusal to provide contracts and distribution licenses of pay TV channels (i.e. IP licensing). One case concerned the RTD with stores that take part of the traditional distribution channel for carbonated soft drinks. One case involved a refusal to supply essential inputs for the production of tortilla. Finally, two cases implicated local authorities refusing to grant permits for public transportation (i.e. taxis).

In 8 of the 10 cases, sanctioned firms challenged CFC's administrative decisions before court and none of those was overturned. In one case, local authorities involved in the refusal to grant taxi's licenses promoted a constitutional controversy before the Supreme Court of Justice of the Nation (SCJN) that overturned the CFC's resolution. Case summaries are provided in the following paragraphs. In the other case related to a local authority's refusal to grant taxi's licenses, sanctioned entities did not promoted a judiciary proceeding. The case that involved the granting of licenses of pay TV channels had an early termination because the CFC accepted the binding commitments offered by the responsible party.

[8] Article 24, section IV of the FLEC establishes that if the CFC founds a criminal conduct (perjury) during any Administrative investigation, it shall report it to the public prosecution office.

[9] Investigation proceedings may have two stages. In the first stage the CFC verifies the facts under investigation. If the CFC collects enough elements to presume responsibility of an economic agent, it issues a notification of possible responsibility, which triggers the second stage of the investigation proceeding. For the purposes of this document, in depth investigations are those that passed to the second stage of the investigation proceeding.

a) ***Essential facilities in telecommunications markets*.-** Four out of the five cases in telecommunication markets involved access to essential facilities and services for fixed telephony markets. In those cases Telmex[10] was found responsible of illegal RTD practices against three downstream competitors in three cases and in one case, the affected party was a non downstream competitor. One case dealt with the refusal of Telcel[11] to provide interconnection services to Nextel essential for mobile Short Message Service (SMS).

1. ***Refusal to contract origination services for long distance services in public telephones.*[12]** One case was about the refusal to deal by Telmex that prevented Avantel to enter into a contract which would enable it to absorb the $0.50 charge for 1-800 number calls originated from public telephones, in order to free its users from this payment. Telmex refused the contract without justification, although it had already subscribed such agreements with foreign providers of 1-800 numbers. The investigation also included tying, rising rival's cost (by reducing its demand) and price discrimination. It was concluded on May 25th 2000.

2. ***Refusal to provide access to essential facilities and services for long distance services*[13].-** In 1999, Avantel, Marcatel and Alestra, all of them long-distance services providers, filed a complaint against Telmex related to: (i) the payment of tariffs for interurban transportation higher than the tariffs offered to final commercial users of long distance services (i.e. margin squeeze); (ii) restrictions in the supply of resale ports and leased lines for interurban transportation; (iii) delaying the supply of interurban services; and (vi) the imposition to use 2 Mbps leased lines, thus impeding the acquisition of lower capacities and co-sharing among carriers.

   The CFC determined that such practices had the object and effect to impede or delay competitor's access to services and facilities in the relevant market of interurban transport services (i.e. resale), an essential input to provide long distance services to final users. In July 2002, the CFC sanctioned and fined Telmex as responsible for illegal price discrimination and was ordered to immediately eliminate the practices.

3. ***Refusal to provide circuits and leased lines for long distance services*[14].-** In August 1999, Avantel and Alestra filed a complaint against Telmex because its refusal to accept their requests for service involving the installation of circuits and leased lines, which the plaintiffs needed to provide long distance services.

   In February 2002, the CFC ruled that Telmex had engaged in relative monopolistic practice consisting on the refusal to receive requests to process more quickly priority services and payment for contracting access or interconnection services. This refusal reduced the demand that the plaintiffs had at hand, and also caused undue displacement of said companies from the markets for access or interconnection, which require these lines, and interurban transport, which includes circuits, and directly affects national and international long distance markets. The CFC therefore ordered Telmex to cease the above mentioned practices and imposed it a fine.

---

[10] Teléfonos de México, S.A.B. de C.V. is the incumbent carrier in fixed telecommunication industry.

[11] Radiomóvil Dipsa, S.A. de C.V., which operates under the name "Telcel," we provide mobile telecommunications service in all nine regions in Mexico.

[12] Files DE-07-1998 and RA-33-2000. English summaries are available in the CFC's 2000 Annual Report available at http://www.oecd.org/dataoecd/52/32/39554154.pdf; and enclosed in the document "Competition and Regulation Issues in Telecommunications" available at: http://www.oecd.org/dataoecd/48/39/1834399.pdf.

[13] Case files DE-03-99 y RA-18-2001. English summary enclosed in the document "Competition and Regulation Issues in Telecommunications" available at: http://www.oecd.org/dataoecd/48/39/1834399.pdf. Also available in Spanish at: http://201.161.46.75/index.php?option=com_content&task=view&id=1847&Itemid=120.

[14] Files DE-33-1999 and RA-78-2002. No English summary available. A summary of the final resolution is available in Spanish at: http://201.161.46.75/index.php?option=com_content&task=view&id=1854&Itemid=120.

4. ***Refusal to provide access for telephone emergency services.***[15] In May 2003, Sistema Computarizado de Emergencia, S.A. de C.V. (SCE) filed a complaint against Telmex alleging its refusal to bill and collect through its system the services provided by SCE, which consist of installing phone emergency systems in one urban area in Mexico.

   SCE provided a telephone number to communicate residents of an urban area with providers of public emergency services. It required Telmex's telephone billing system to bill and collect for its services, since it could not do so by other means without losing its economic viability.

   The CFC found that Telmex billed those services to other companies (i.e. it was available to other firms). Telmex claimed that it refused to provide the services to SCE due to the end of its contractual relationship, the denial of some final users to pay for SCE's services, and the filling of complaints against Telmex owing to the poor quality of SCE's services. The CFC determined that Telmex's arguments did not justify the RTD against SCE, and ordered it to the practice and imposed a fine.

5. ***Refusal to provide interconnection services for mobile short message services (SMS).***[16] In 2007, Telcel was found responsible of a illegal refusal to provide access to interconnection services essential for Nextel to provide to its subscribers the short messages service (SMS) from and to Telcel's subscribers. The interconnection services between networks are essential for any mobile carrier to offer to its customers the ability to send and receive SMS to and from users of networks of other carriers throughout Mexico. The CFC imposed to Telcel an order to suspend the RTD to Nextel and a fine.

b) ***Refusal to provide distribution licenses for pay TV channels (i.e. IP licensing).*** In 2007[17], the CFC found PCTV responsible for performing illegal refusals to provide distribution licenses and wholesale supply agreements to competing pay TV carriers. PCTV vertically integrates the production of TV channels; the acquisition of broadcasting rights over foreign TV channels; and the wholesale distribution of TV channels to cable TV carriers. Additionally, PCTV's shareholders participate in the downstream markets of retail distribution and commercialization of pay TV services in Mexico.

The complainant was a cable TV carrier, downstream client but not shareholder of PCTV. This cable TV carrier alleged that by refusing to provide wholesale licenses and contracts for specific and most demanded TV channels, PCTV has hindering its possibilities to conform competitive pay TV retail services to acquire and maintain its final subscribers; and by providing those TV channels to its shareholders, PCTV was creating unfair competitive conditions in the downstream market.

The definition of the relevant markets was critical to determine when TV channels distributed by PCTV constitute essential for pay TV carriers in order to reach final subscribers. The CFC concluded that each category of content constituted a separated relevant market, thus determining the existence of at least six relevant markets in the wholesale distribution and commercialization of TV channels. Namely, the relevant markets defined were the wholesale commercialization of TV channels in the following content categories: cultural, sports, entertainment, children's, music and movies programming.

The CFC found that each of those programming content categories is essential for pay TV carriers in order to compete in the retail market (i.e. to reach the subscribers); and that PCTV wield substantial market power in four out of the six wholesale relevant markets it participates. Thus, by applying a selective refusal to deal over the most valuable TV channels in each relevant market,

---

[15] A public version of the final resolution is available in Spanish at: http://201.161.46.75/images/stories/resoluciones/extractos_de_resoluciones/denuncia/DE-22-2003.pdf.

[16] Case files DE-11-2005. No English summary available. Final decision available only in Spanish at: http://201.161.46.75/index.php?option=com_content&task=view&id=5908&Itemid=122.

[17] Case file DE-01-2006. Final decision available only in Spanish at: http://201.161.46.75/images/stories/resoluciones/extractos_de_resoluciones/denuncia/DE-001-2006.pdf.

PCTV was found possible responsible to foreclosing specific pay TV carriers in the downstream markets and unduly favoring its shareholders.

Prior the issuance of a final resolution and pursuant Article 41 of the Rulings of the FLEC, [18] PCTV offered binding commitments to the CFC that included:

(i) To brought to an end the acts under investigation.

(ii) To provide access in non-discriminatory terms to all pay TV carriers that request PCTV's services.

(iii) To exhibit in its internet webpage and national newspapers: the terms to be shareholder-user and non-share holder-user, membership fees, and TV channels' tariffs.

(iv) To provide enough evidence and information about the compliance of all the assumed commitments.

On March 31, 2009 the CFC issue a final administrative resolution declaring PCTV responsible of an illegal RTD, accepting its commitments, and imposing a fine.

c) ***RTD with stores of the traditional distribution channel for carbonated soft drinks*[19]**.- In 2003, the CFC sanctioned and fined firms The Coca-Cola Export Company and fourteen of its bottlers (all together 'Coca-Cola') for illegal RTD and exclusivity agreements against traditional grocery stores that did not accepted to enter into exclusivity distribution (verbal) agreement that forbids them to sale products of Big Cola, a competing producer of carbonated soft drinks. In return for the exclusivity agreements, Coca Cola offered discounts, rebates, and financing. In particular, Coca Cola provided resources for stores maintenance and supplied (in gratuitous loan) refrigerators and coolers.

The relevant market was defined as the commercialization and distribution of bottled carbonated soft drinks[20] over the localities were the fourteen bottlers participated. TCCEC and its fourteen bottlers were considered one «economic agent» due to its power to adopt a common market policy, to act as a collective entity in the relevant markets due to economic links between them, the unique and coordinated policy making, and marketing and distribution processes they have established.

The CFC concluded that by imposing exclusivity contracts and RTD as retaliation to grocery stores that did not accept them, Coca Cola were foreclosing competing soft drinks producers from the distribution channel. The CFC also determined that Coca Cola's competitors did not had the economic capacity to countervail Coca Cola's practices; and that stores did not either countervailing buying power to negotiate for the supply of Coca Cola branded products.

d) ***Refusal to deal in tortilla markets.***[21] In 2001, the CFC sanctioned an illegal RTD in the market for production, distribution and commercialisation of corn flour for human consumption. The activity involved in this case had great economic relevance because corn flour is a basic input for tortillas, which are the main staple of the Mexican diet. The investigation revealed Harinera de Yucatán, a subsidiary of a major conr flour producer at that time, had celebrated agreements with mill and tortilla associations in two municipal districts in Yucatán by means of which the former refused to sell flour and machinery to businesses located within a given distance from already established ones[22].

---

[18] Article 41 of the Rulings of the FLEC is the implementing regulation governing early termination of the investigations when parties under investigation present sufficient and viable binding commitments. In 2007 the Rulings of the FLEC was amended and such provision was incorporated as article 32 bis 2 of the FLEC.

[19] Case files DE-21-2003, RA-12-2005, RA-13-2005 and RA-18-2005. No English summary available.

[20] The market definition was based on the fact that, as far as product characteristics and intended use are concerned, carbonated soft drinks could be distinguished from other beverages such as bottled juices, water, coffee, tea, isotonic and energy drinks.

[21] Files IO-11-2000 and RA-23-2001. An English summary of the case is available in the CFC's 2001 Annual Report, at: http://www.oecd.org/dataoecd/34/43/2488754.pdf.

[22] As a related matter, is worth to mention that many local regulations set minimum distance requirements as a condition for mill and/or tortillería licenses issued by the municipal government. In this matter, the Supreme Court of Justice of the Nation has established that any regulation setting distance requirements between similar businesses is unconstitutional, since it is contrary to the individual right of freedom of work, contained in article 28, and interferes with free market access. Pursuant that SCJN's sentence, the CFC has issued several decisions and opinions advocating before local authorities for avoiding or

The CFC santioned and fined Harinera de Yucatán that in turn committed to suspend the those agreements and not to refuse dealing.

e) ***Local authorities refusing to grant permits for public transportation (i.e. taxis).***[23]

1. ***The case in Campeche, Campeche.-*** In 2001, the CFC declared that Campeche State Government, by enforcing the existent transportation state law, was committing an anticompetitive RTD in the granting of taxi permits to the members of a new association of drivers.

   The CFC initiated an *ex officio* investigation after receiving a complaint by the a new association of drivers alleging the denial of the Campeche State Government to grant them permits to provide taxi services in one city, whilst it granted all the available permits only to only established association. The CFC's investigation into the alleged refusal to grant permits to provide taxi services indicated that the transportation state law of the State of Campeche contained unjustified barriers to entry and by enforcing them, the State Executive was incurring in illegal discriminatory and RTD practices.

   The State Transportation Law granted discretional powers to the State Executive to limit the supply in the relevant market because, among other things, the declaration of public needs was not subject to objective and non discriminatory criteria; and favored the established association in the granting of new permits, causing the increase in market concentration and impeding the entrance of new participants.

   In 2001, final CFC's administrative resolution: (i) notified to the Executive of the State of Campeche that the enforcement of the State Transportation Law, in the matter of granting permits for taxi services, was in violation of the FLEC; (ii) recommended to Campeche Governor to elaborate a Draft Amendment to the State Transportation Law and present it to the CFC to issue an opinion prior its submission to the Congress of the State; and (ii) ordered the granting taxi permits subject to non discriminatory and competitive criteria enclosed in the FLEC, until the entry into force of the new law.

   Campeche Governor promoted a constitutional controversy against CFC's final decision, alleging that it had exceeded its enforcement powers and invaded or limited the sovereign rights of the States to issue its regulations in transportation matters. In January, 2004 the Supreme Court of Justice of the Nation resolved that authorities in exercise of the powers granted by legislations shall not be considered economic agents subject to the FLEC. In consequence, the CFC declared void its 2001 administrative decision in compliance of the court's sentence.

2. ***The Case in Oaxaca, Oaxaca.-*** In March 1995, a group of people from the State of Oaxaca informed the CFC about the existence of regulatory and administrative barriers that unduly restricted their access to the market for the local public taxi service. They stated that, in spite of having met the requirements for obtaining concessions as taxi service providers, the state authorities had only given them temporary permits. They also stated that their problems in obtaining concessions were on account of their having left the Unión de Organizaciones de Taxistas de Oaxaca, A.C. and the consequent lack of support from the Union in their requirements. Subsequently, the temporary permits notwithstanding, the same authorities prevented them from going about their business.

   After these facts had been presented to the CFC by the affected parties, the state government issued a decree suspending the issue of new concessions for a period of two years. Excluded from this provision were requests dated prior to that date, which were to

---

eliminating the setting of minimum distances between tortilla-makers and other food sellers. For further information, see the CFC's 2004 Annual Report available at:
http://www.oecd.org/dataoecd/51/46/35111139.pdf.

[23] Case files IO-17-99, RA-44-2000 and RA-45-2000 and Constitutional Controversy Suit 11/2001. A summary in Spanish of the final administrative decision is available at:
http://201.161.46.75/index.php?option=com_content&task=view&id=1946&Itemid=120.
And the Sentence in Spanish of the SCJN is available at:
http://201.161.46.75/images/stories/Poder%20judicial%20y%20CFC/CC_11-2001.pdf.

be resolved within one year. Shortly afterwards, a resolution revoking the temporary permits was issued. The reasons given for this measure included, notably, the following: the permit bearers' lack of a corresponding concession document, and the fact that the permits had been issued by an authority without competence in that matter.

The Commission's investigation also revealed that one of the Union's functions is to coordinate the issuing of concessions between its members and the local authorities. This power is supported by the state authorities' requirements for granting concessions, one of which is a letter of consent or support from the Union's taxi bases.

The CFC ruled that the procedures established by the Oaxaca State Government for the granting of concessions affected competition and free market access by hindering the entry of new suppliers and facilitating agreements between competing economic agents intended to restrict the supply of taxi services in the state. To bring about the lifting of these barriers to efficient market functioning and equal, non-discriminatory market access, the CFC resolved to issue an opinion on the aspects affecting competition and free market access contained in those procedures, under the power granted to it by section VI of article 24 of the FLEC. Thus, pursuant to section VIII of article 24 of the Commission's Internal Regulations, its President sent a recommendation to the Governor of Oaxaca, emphasizing greater freedom in access to concessions, their granting to holders of temporary permits, and the removal of Union recommendation from the concession requirements.

In May 1998, Oaxaca Governor notified the CFC the granting of taxi concessions in compliance of its resolution.

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.

CFC7. No. Private parties only can challenge monopolistic practices, including RTD, before the CFC. Once the CFC issues a final administrative decision, the private parties affected by a RTD practice have the right to file a civil lawsuit in order to compensate financially the damage produced by such conduct.

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?

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

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

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?

CFC8. In order to determine if the conduct fulfills the RTD provision, the CFC must demonstrate the following elements:

- **That the party requesting a good or service actually requested it to the party that may provide it.**
- **That the requested person has unjustified refused to provide the product or service or does not replay the request to deal in a *reasonable* period of time.**
- **That the requested party normally provides the product or service to third parties. When a vertically integrated firm is involved, the CFC may consider that self-provision fulfills the condition that the product or service is provided to third parties.**

Evidence of the previous dealing between the parties is not a requirement to find liability, but is useful to demonstrate that the deal is feasible (i.e. that there are not a technical justification for a RTD).

In order to identify whether a RTD conduct is illegal or anticompetitive, the CFC shall assess the following elements:

- **The alleged responsible party has substantial power in the relevant market. This determination entails an analysis of market concentration and entry barriers.**
- **The RTD concerns products or services in the relevant market.**
- **Evidence of intent or effect actual or likely to hinder competition, either that the conduct: is aimed at displacing agents, hindering access or establishing an exclusive advantage; may produce such effects; or actually generates them.**

The Supreme Court confirmed that[24] unilateral conducts can be appraised on the basis of its object and actual or likely effects in the markets by stating:

> ***"(…) According to the [article 10 of the FLEC] an act can be considered a relative monopolistic practice in any of the following hypothesis: a) when it has the purpose to displace another agent from the market; b) when apart from its objective, it may produce those effects; and c) when, [it] has any of those effects; in the first assumption, the law fundamentally refers to the objective of whoever performs the conduct, while the second considers the real risk of the act. Thus, in those hypothesis the Law has a preventive goal, and in the last hypothesis, the Law refers to the actual effects of the act, regardless the aim of its author, thus, it has a suppressive goal; (…)."***

This jurisprudence provides a clear standard for the burden of proof of the effect test: the CFC must prove that the conduct has the purpose and/or actual or likely effects forbidden by law. This is an interpretation of the statute and not of the specific case, and therefore it can be evoked in CFC's decisions on relative monopolistic practices, including RTD cases.

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.

[24] Appeal for Review 2589/96, Grupo Warner Lambert México S.A de C.V. v. Federal Competition Commission, p. 202. In this sentence, related to a predatory price conduct, The Supreme Court established judicial interpretation of the effect test established in the first paragraph of article 10 of the FLEC.

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.

CFC9. The FLEC does not provide an «essential facility» definition and neither exist a judicial *doctrine* about it. However, in making a market power determination requires the identification and assessment of the existence of substitutes as well as the effects of barriers to entry on competition conditions. Criteria used to identify *essential facilities* in competition cases are:[25]

- **Control of the facility by an economic agent with substantial market power and no substitutes.**
- **A competitor's inability to develop alternative facilities.**
- **The importance of financial costs or the costs of developing alternative channels, access to financing and the term for recouping the required investment, and determining whether costs are effectively sunk.**
- **The existence of normative barriers: exclusive rights over key facilities as barriers to entry.**

The Commission is empowered to know and resolve the relative monopolistic practices in any economic activity within the Mexican territory, whenever those conducts fulfil the specific provisions of article 10 of the FLEC. Thus, the CFC is also empowered to apply the FLEC over essential facilities under specific access regimes imposed by sectoral regulations; and when necessary, to impose access remedies.[26]

The CFC applies the FLEC criteria in a consistent manner both assessing competition conditions in regulated markets and those alleged relative monopolistic practices involving access controversies over essential facilities subject to the duty to deal.

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?

CFC13. The legal RTD definition may enclose "constructive" refusal to deal, including margin squeeze practices, as defined in the introduction of this Questionnaire.

However, in practice the CFC has addressed constructive RTD as price and non-price discrimination, rising rival's costs, cross subsidization or predatory pricing, depending on the means of by which a firm with substantial market power can or attempt to foreclosure a competitor from the market.

---

[25] Articles 12(relevant market-substitutes) and 13 (market power-barriers to entry) of the FLEC.

[26] Those dispositions authorises the regulator to impose price regulation, access controls, and use other regulatory instruments if the CFC issues a finding of an absence of effective competition in the relevant market or, in telecommunications, the CFC's finding would relate to the existence of an economic agent possessing a dominant position in the market. The CFC may also make a subsequent determination to fade away regulatory controls once effective (sufficient) competition is established.

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?

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?

CFC14. As mentioned before, in Mexico «margin squeeze» practices are not standalone conducts sanctioned either by neither the FLEC nor sectoral regulations. Nevertheless, the FLEC provides the economic criteria and the legal standard to deal with «margin squeeze» allegations under other akin unilateral conducts but not RTD, which are:

a) Discriminatory (access or wholesale) pricing.- The vertically integrated firm charges low input (wholesale) prices to its own operations, relative to the input prices charged to its rivals, with no cost justifications. When analyzing price discrimination, the identification of price discrimination becomes increasingly tenuous the further we move away from a situation of homogeneous products and equal costs. Because of that situation, mark-ups rather than margins are the CFC's benchmark in order to identify the existence of discriminatory pricing.

b) Predatory pricing in the provision of the final (downstream) goods and services. – The vertically integrated firm charges a retail price that does not even cover the wholesale rate that it charges to its competitors. Thus, it is incurring in a below cost commercialization of the final (retail) products, thereby forfeiting its profits in order to unduly deter competitors from entering the market.

c) Cross subsidization between retail and wholesale goods or services. – The vertically integrated firm uses excess revenue generated in the provision of the essential facility (i.e. the non- competitive wholesale market) in order to subsidize below-cost prices in the provision of the final goods or services (i.e. the competitive retail market) so as to undercut competing providers.

The vertically integrated firm raises the price of the wholesale product and lowers the price of the retail product, and without the ability to cross subsidize competitors and new entrants are not able to match the prices of final products and services offered by the vertically integrated firm.

d) Rising rival's costs.- The integrated firm charges excessive prices in the provision of the essential facility (input), at which competitors in the upstream market could no longer stay or grow in the final market, and the prices offered in the upstream market (the essential facility) are higher than what could be objectively justified.

> **The "excessive terms" are assessed under the same standard as a (downstream) discriminatory pricing, for example when the vertically integrated firm offers to sell the essential input to its rivals at a price higher than the price it charges to its own operations.**

Complainants commonly present predatory, discriminatory and cross subsidizing pricing allegations in an alternative manner.

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.

CFC15. RTD is presumed illegal if it fulfills the following legal standards enclosed in the first paragraph of article 10 of the FLEC, namely when the act has the object or effect of: (i) displacing agents, (ii) hindering access, and/or (iii) establishing an exclusive advantage in favor of determined economic agents.

In all cases, the presumed responsible may refute CFC's conclusions with an efficiency defense. See response to question 17 for further information.

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.

CFC16. As mentioned before, the CFC has not issued guidelines or references for safe harbors. According to the FLEC, only economic agents that do not wield substantial market power may refuse to deal without incurring in a violation of the FLEC. The CFC publishes surveys and public versions of its decisions in order to provide information to economic agents about its assessments and decisions under the FLEC criteria, and provide references about wheter their practices are likely to be challenged under the competition law. Transparency plays a major role in promoting competition culture, enhancing inquiries about probable anti-competitive practices and deterring them.

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.

CFC17. Responsible parties with substantial market power may present efficiency arguments and other elements to the CFC, on the gains in efficiency deriving from a relative monopolistic practice and its favorable influence on the process of competition and free market entry, which must be taken into consideration in the evaluation of any vertical restriction referred to in Article 10 of the FLEC.

The FLEC provides the opportunity of an efficiency defense for which the responsible party carries the burden of proof. Last paragraph of article 10 of the FLEC establishes what an

efficiency defense stands for.[27] The procedure does not explicitly define how efficiency gains should be assessed by the CFC. However, pursuant the purpose of the FLEC, the overall assessment of vertical restrictions is applied under a total welfare standard, in which efficiencies are directly balanced against the anticompetitive effects on a case-by-case basis.[28]

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?

CFC18.

Remedies as sanctions

Pursuant article 35 of the FLEC, and regarding relative monopolistic practices including RTD, the CFC may order to suspend, correct or eliminate the practice in question; and impose the applicable fine.

In all cases the CFC ordered responsible firm to provide access to the product or service; and that this access has to be non-discriminatory and that the fees or prices charged shall be cost oriented.

Depending on the cases CFC's resolutions would either take the form of compulsory rules for economic agents; and/or of non- compulsory recommendations or guidelines for authorities.

Remedies for early termination

Article 33 bis 2 of the FLEC allows economic agents to present remedies to suspend, eliminate, and correct an anticompetitive practice or prohibited merger. After a request of this sort is filed before the Commission, it shall suspend the proceeding and issue a resolution in a period of 15 days. This modification, aimed at preventing the excessive use of resources which instead can be used for other relevant enforcement cases, has allowed the CFC to resolve anticompetitive practices and restore healthy competition conditions and avoid the complex process of judicial review

Under article 33 bis 2 of the FLEC, the responsible party shall offer to the CFC credible measures to suspend, suppress, or correct the alleged relative monopolistic practice. The economic agent must show that the competition process has been or will be effectively restored in order for the case to be concluded.

---

[27] Last paragraph to Article 10 spells out the efficiency gains that may be claimed by defendants. The main ones are the introduction of new products; a better use of outlet, damaged or perishable goods; cost reductions stemming from the creation of new techniques and production methods; increases in the production scale or production of new products with the same production factors; introduction of technological innovations that produce new or better products; improvements in quality, investments and their recoupment. That statute provides that defendants will also be allowed to claim that the alleged illegal exclusionary practices: "(...) do not cause a significant price increase, or a significant reduction of consumer choice, or an important inhibition in innovation within the relevant market, as well as all others that demonstrate that the net consumer welfare gains stemming from such practices offset its anticompetitive effects."

[28] The welfare standard adopted by the CFC takes into account the welfare effects of the two sides of the market: suppliers and consumers. According to Motta (2004), *"(…) economic welfare is the standard concept used in economics to measure how well an industry performs (…) It is a measure which aggregates the welfare (or surplus) of different groups in the economy. In each given industry, welfare is given by total surplus, that is the sum of consumer and producer surplus*."

Early termination of proceedings may be based either on (i) the adoption of a formal decision finding an infringement with a discounted fine in exchange for a guilty plea; or (ii) the adoption of a decision terminating proceedings (no finding of infringement) in exchange for certain commitments previously negotiated with the authority.

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?

CFC19. The remedies applied by the CFC could be used for unlawful refusal to deal in regulated and non regulated industries.

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.

CFC20. The article 33 bis 2 of the FLEC empowers the CFC to impose remedies either behavioral or structural in order to bring an infringement to an end. The legal conditions that have to be fulfilled for a remedy to be imposed are: the effectiveness and economic viability to prevent or lead to the elimination of the infringement.

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?

CFC21. When assessing RTD, the CFC recognizes the freedom to deal of all economic agents and the existence of legitimate reasons to (justified) refuse to supply others economic agents, competitors and not competitor. The competition assessment is focused on the question of whether an economic agent can legitimately refuse to deal with its competitors.

Under the FLEC criteria, a firm that wields substantial market power cannot take advantage of that power to damage other businesses, including by refusing to deal or by offering to do business on such unrealistic terms that it is tantamount to refusal to deal. However, this does not mean that the supplier has to supply everyone. The business must show that the supplier's action was taken to unduly deter or prevent them from entering or competing in that market.

In addition, the FLEC provides an opportunity to presumed infringers to present an efficiency defense in order to determine the overall effect of the conduct in the competition process in the markets, including the effects on innovation and investment.

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.

CFC22. So far, RTD allegations have come up mainly in sectors where the holder of the essential facilities is subject to a statutory duty to deal. In particular, in the telecommunication sector, were the interconnection regime has failed to solve access controversies between operators, who have presented complaints before the CFC.

In order to improve the effectiveness of sectoral access regimes, the CFC intervenes in analyzing market conditions in order to identify whether it is necessary to establish additional ex ante regulations to control anticompetitive abuses by dominant participants.

In the enforcement of both powers granted by the FLEC and sectoral regulation, the CFC follows the criteria included in the competition law in order to identify essential facilities, relevant markets, market power, and the effects of the conducts.

Under this approach, the effectiveness of the CFC to give a consistent treatment to conducts that may be akin to a RTD (e.g. constructive refusal to deal or margin squeeze) depends on the amount and quality of the information gathered during the initial stages of the investigation.

Major developments in assessing RTD practices is occurring in the efforts to reduce possibilities of false positives in identifying infringements to the FLEC, mainly on innovation and proprietary-resource based industries. Those efforts aim to protect competition whilst preserve the incentives for infrastructure owners or IP rights holders to invest in their facilities, improve and innovate them.