International Competition Network

Unilateral Conduct Working Group

Questionnaire

Agency Name:

Date:

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.

   The Spanish Competition Act (Act 15/2007, of July 3) explicitly recognizes refusals to deal as a particular form of abuse of a dominant position and thus as an infringement of the law. To be more precise, article 2 of Act 15/2007 states that

   Article 2. Abuse of a dominant position.

   1. Any abuse by one or more undertakings of their dominant position in all or part of the national market is prohibited.

   2. The abuse may, in particular, consist in:

   …

   c) The unjustified refusal to satisfy the demands of purchase of products or provision of 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)?

   There are no separate provisions for specific forms of refusal to deal in Competition Act 15/2007. However, the Spanish Competition authority has dealt with different forms of refusal to deal since these different forms of refusal to deal may be included in article 2.2.c. and the list of practices contained in article 2.2. is not exhaustive anyway.

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

   Only to dominant firms.

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?

   None of the infringements of the Competition Act are criminal violations. Alleged anticompetitive conducts may be dealt with by both the Competition authority and the *Juzgados de lo Mercantil* (Commercial Courts)[1].

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)?

[1] According to Act 15/2007, the *Juzgados de lo Mercantil* (Commercial Courts) shall have jurisdiction concerning the application of Articles 1 (anticompetitive agreements) and 2 (abuse of dominance) of the Act. These Courts were already competent in the application of EU Competition Law since May 2004 (when the Modernization Package entered into force). Moreover, also according to Act 15/2007, the CNC may provide information or submit observations to judges *(amicus curiae).*

The Spanish Competition authority has conducted around thirty in-depth investigations on refusal to deal in the past ten years.

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.

   Unlawful conduct was found in around half of the cases investigated.

   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.

   The decisions on refusal to deal finding violation have been challenged before the revision courts almost in all the cases. There are six cases still pending, but up to now, only 3 decisions on refusal to deal have been overturned. Two of these just partially, i.e., the fine was reduced, and one totally (Decision of 30 November 2001, Proceedings 508/00, *Abogados Granada*, explained later on).

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

   None of the above-mentioned cases were brought using criminal antitrust authority (see above).

   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.

   Summaries of the leading refusal to deal cases are provided throughout the set of answers to this questionnaire.

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.

   As previously mentioned, the *Juzgados de lo Mercantil* have jurisdiction to deal with alleged antitrust cases, and so also with refusal to deal cases. The number of refusal to deal judgments is very low, though.

   A refusal to supply case resulting of a complaint filed before a commercial court has recently been ruled by the revision courts: A service station had alleged an unjustified fall in supplies from its exclusive supplier while the supplier had counterclaimed that the station had breached the exclusive supply contract. The breach of the contract was considered demonstrated but not the refusal to supply.

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?

The Spanish Competition authority's decisions have followed three steps when assessing refusal to deal cases:

(1) Identification of the relevant market.

(2) Determination of whether the incumbent holds a dominant position in the relevant market.

(3) Examination of the evidence of the refusal to deal and finding of the abuse.

(1) The relevant product market shall comprise all the products/services which are regarded as interchangeable or substitutable by clients/consumers (normally). The relevant geographic market shall comprise the area in which competition conditions are sufficiently homogeneous.

The Competition authority often refers to the SSNIP test contained in the European Commission's Notice on the definition of the relevant market. However, it seldom applies the test as such, and usually relies on a general analysis of substitutability based on price, use and characteristics of the product or service. Where the cases are sufficiently near in time, it may simply refer to previous decisions adopted in the same market.

(2) The Competition authority applies essentially the same concept of dominance as defined by the European Court of Justice (ECJ) in Hoffman La Roche, based on the power of the undertaking to behave independently of its competitors, customers and consumers.

In Decision of 30 June 2008, Proceedings 2802, *Intereconomía/Sogecable*, the Competition authority found that Sogecable did not have a dominant position in the market for television platform services in Spain since *Intereconomía TV* had had other broadcasting options which had even greater coverage of homes than Digital + (Sogecable).

Case R 540/02, *Manufacturas de Acero*, was dismissed by the Competition authority on the basis that the incumbent did not have a dominant position since there were six other suppliers operating similarly in the national mesh steel market.

In Decision of 29 November 2007, Proceedings r 706/06, *Cines Andalucía 3*, the Competition authority ruled that the accused companies (*Columbia Tristar Films de España, S.A., Hispano Fox Film, S.A.E*. and *Aurum Producciones, S.A*) did not have a dominant position in the relevant market since their market shares did not exceed 18% individually and 30% collectively.

The revision courts totally overturned the Competition authority's Decision of 30 November 2001, Proceedings 508/00, *Abogados Granada,* by arguing that the refusal by the *Colegio de Abogados de Granada* to grant clearance to a lawyer to exercise in Granada, could not be considered abusive. The reason was that the lawyer could anyway work in Granada since he had already been enabled by a different lawyer's professional body. On the contrary, in Decision of 19 November 1999, Proceedings 446/98, *Arquitectos Madrid*, the Competition authority held that the professional body's dominance was clear, since it was the only one able to grant the certificate needed to carry out the relevant activity. The refusal to grant such certificate *was* considered an abuse of dominant position for which the *Colegio Oficial de Arquitectos de Madrid* was imposed a fine of € 54.000 (the case was partially overturned, i.e. the fine was reduced to € 30.000).

The dominance attributed to *Aventis Cropscience España (Aventis)* in Case 581/04, *CERAFRUT/BAYER*, was considered inexistent because alternative substances to the one refused to supply, patented by Aventis, were available.

(3) Regarding the finding of the abuse, the analysis includes:

- The confirmation that there was an explicit request for supply. For a refusal to deal to be found, an unjustified refusal to meet the demands for the products or services or to gain access to a facility has to be proven. And thus, an explicit request needs to have been made.

The Competition authority dismissed Case 498/00, *Funerarias Madrid*, on the basis of the absence of an explicit request to access the incumbent's facilities, among other arguments. In Decision of 26 March 2009, proceedings 638/08, *Gas Natural 2*, the Competition authority considered proven that the complainant had asked for connection to the incumbent's network.

Whether there was a pre-existing commercial relationship between the incumbent and the petitioner does not seem relevant.

- The determination whether the product/service/facility concerned is essential.

There is no legal definition of "essential" but the issue has been dealt with in the doctrine, which is in line with the Oscar Brönner EU doctrine. Thus, for a refusal to deal to be found illegal, the goods or services concerned have to be considered "essential" in the sense of Oscar Brönner.

In Case 616/06 *Tanatorios Castellón*, a group of funeral homes in Castellón were accused of refusing access to their premises to independent florists. Following the ECJ doctrine in Oscar Brönner, the Competition authority analyzed whether the refused product, service or facility was essential in the sense that its delivery or access was indispensable for the client to carry out its commercial activity, there was no real or potential alternative available, the product or service could not profitably be replicated, and by denying access the incumbent had the capacity to eliminate competition. The Competition authority ruled that these conditions were not met in this case.

In Case *Special Prices/Binter Canarias* (Decision of 12 April 2007, Proceedings R 713/07), Binter, a regional airline that held a dominant position in the market for inter-island air passenger transport in the Canary Islands, refused to publish car hire advertisements on its magazine. The Competition authority ruled that such conduct did not prevent users to obtain the same information because the magazine was not the only means to obtain it, i.e. Binter's magazine was not essential.

In Case 621/06, *CST/AENA*, CST alleged that *AENA* was abusing its dominant position by refusing to supply information about unscheduled (non-regular) flights, whilst it provided the same information to INECO, under the control of AENA. In Decision of 2 August 2007, the Competition authority considered that the information requested by CST was not essential as far as CST's operating market was the wider market for transport consulting, i.e. it had alternatives to compete, and the product it was planning to offer on the basis of that information had no proven demand, i.e. no harm to competitors or consumers could be proved.

In Resolution of 26 March 2009, Proceedings 638/08, *Gas Natural 2*, Gas Natural was found to have abused its dominant position as owner on an essential facility -the network for gas transport and distribution-, by refusing access to it to Gas Alicante, a competitor in the downstream market for commercialisation of gas. The fine imposed on the infringer amounted to € 492.000.

In case *Tubogas/Repsol*, Decision of 7 March 2002, Proceedings 513/01, the information owned by Repsol Butano as gas distributor was considered essential for the operators of the downstream market for end users' facilities periodic official revisions. Repsol Butano was found to have abused its dominant position by denying access to the information concerning the dates of due official revisions and was imposed a fine of € 300.000.

- The analysis of real or potential effects of the allegedly anticompetitive conduct.

Following the ECJ Oscar Brönner doctrine, for the conduct to qualify as an abuse of dominant position in the form of a refusal to deal, there is a need to find that, by denying access to the essential product/service/facility, the incumbent has the capacity to eliminate competition in the downstream market. Thus, there is a need to prove either real or potential effects of the practice.

In Judgment of 14 September 2006, which dismissed an appeal on Decision of 12 September 2005 by the Competition authority, the revision courts distinguished *first degree* abuses (those causing harm to competitors' interests in the relevant market where the supplier holds a dominant position), *second degree* abuses (those damaging clients' interests, restricting competition in their respective markets), and *exploitative* abuses (those hurting end consumers' interests) (exploitative abuses).

Normally, we find that the incumbent somehow (directly or indirectly, through a firm over which it holds participation, for example) competes with the petitioner in a related market (typically in a downstream market). And so, it has an incentive to deny access to the essential product/service/facility to its downstream competitors.

In Case 627/07, *Estación Sur de Autobuses,* where the incumbent was a concessionaire of an essential facility -a bus station-, the Competition authority took into consideration the fact that the legal monopoly had abused its dominant position by refusing access to the essential facility to a *competitor*, since the regular passenger transport firm who was denied access was a direct competitor of another over which the concessionaire held control.

In case *Gas Natural 2*, already mentioned, the Competition authority put the emphasis in the harm caused to competitors and to end users. Gas Alicante had failed to comply contracts with clients in due manner, at the subsequent reputation cost, and had to make additional investments in order to supply clients with other types of gas. On their side, clients suffered delays in the introduction of gas supply in their homes and were obliged to use energy sources of less quality.

- The absence of alleged objective justifications

Once again, as stated by the ECJ Brönner doctrine. The burden of proof of objective justifications lies on the supplier.

The fact that a client suddenly and substantially increases the volume of its orders so that the incumbent cannot meet them, may amount to an objective justification for a refusal to deal (Decision of 13 October 2004, Proceedings R 611/04, *Spain Pharma/Glaxo*).

The revision courts' Judgement of 14 September 2006, which dismissed an appeal against the Competition authority's Decision of 12 September 2005 on Case C586/04, *Electromechanical Applications,* concluded that there was no abuse because the defendant had an objective justification to deny connection of the complainant's installations to its electric power distribution network. The justification consisted in the complainant's failing to fully isolate its electric panels, as imposed by law.

In Decision of 28 September 1999, Proceedings 442/98, *Eléctrica de LLémana*, the Competition authority considered that the incumbent's refusal to increase its energy supply power lacked of an objective justification and therefore was abusive. The incumbent alleged that the power increase was not necessary, that the petitioner had requested it in previous years and had not used it, that the services provided by the petitioner were of bad quality, and that the petitioner had a previous unpaid debt with the supplier. In particular, the Competition authority argued that the alleged bad quality of the petitioner's services could not be proven and that contractual conflicts between the parties needed to be solved before a judge but did not constitute an objective justification for the refusal to supply.

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.

   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.

   See above

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

    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?

In IP refusal to deal cases, the Competition authority has ruled that, where access to IP is vital for the complaining firm's business, a refusal to provide access to it would be considered anticompetitive unless there is an objective justification, as stated in Q8. According to the IP Rights Act, the possibility of using an IP related input is subject to the right of the author to deny access in a non-discriminatory manner and to his right to get an equitable remuneration, if access is granted. In *Iasist/3M* (Case 517/01), *agrupadores* and *analizadores* are complementary software products that are jointly used. Thus, consumers -hospitals mainly- ask their suppliers to provide both products altogether. 3M and Iasist were the only competitors in the market for *analizadores* and 3M was dominant in the market for *agrupadores* -not only it held more than 65% of the market but its *agrupador* was dominating in a market that tends to homogenise due to network effects-. In its

Decision, of 5 April 2002, the Competition authority found that 3M had committed an abuse of its dominant position in the market for *agrupadores* either by limiting the supply of the licences of its *agrupador*, or by refusing to provide Iasist with the price list for the *agrupador* unless Iasist disclosed the list of its potential clients, or by imposing prices that squeezed Iasist's margins.

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

    The analysis does not change if the refusal to deal occurs in a regulated industry, but if the undertaking operates in a recently liberalized market or enjoys special or exclusive rights, the infringement will be considered as very serious[2]. In case *Gas Natural 2,* since the abuse had been committed in a recently liberalised market, the infringement was considered as very serious. The fine imposed amounted to € 492.000.

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

    The case where the abuse has been committed from a position deriving of a former state-created monopoly may fall, with high probability, within the category explained in Q11.

    Where there is a current legal monopoly the assessment of whether an abuse of dominant position in the form of a refusal to deal has been committed does not change. However, once found, the abuse may be considered as particularly serious because of that circumstance. In Decision of 1 February 1995, Proceedings 350/94, *Teléfonos en Aeropuertos*, the Competition authority held that *TELEFONICA*'s infringement had been particularly serious because the company had taken advantage of it holding a legal monopoly in the Spanish market for final services and telecommunications carriers, and abused such dominant position in a related market (the airports' telephones), by closing up such market to a competitor.

    We could also mention cases where firms holding privileges granted by the Public Administration have been sanctioned for abusing of such privileges. In Decision of 31 of March 2008, Proceedings 627/07, *Estación Sur de Autobuses*, the Competition authority qualified the abuse as very serious because the offender, who managed a publicly-owned bus station as a concessionaire, had unjustifiably denied access to the essential facility to a competitor taking advantage of its granted dominant opposition. The fine imposed amounted to € 464.781, equivalent to 10% of 2005 total revenues.

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

[2] CA, Article 62.4.b):
"The following are very serious infringements:
(…)
b) The abuse of a dominant position typified in Article 2 when it is committed by an undertaking that operates in a recently liberalised market, has a market share near monopoly or which enjoys special or exclusive rights.
(…)".

whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

The Spanish case law does not expressly recognize the concept of "constructive" refusal to deal. However, some of the Competition authority's Decisions contain analyses that could approach the concept as set forth in this questionnaire.

We have already explained the case Iasist/3M, where the refusal to deal took many forms: either direct –denial of the license- or indirect/"constructive" – obligation to provide a list of final clients of the petitioner or imposition of prices which squeezed the petitioner's margins.

In Decision of July 7, 1999, *Electra Avellana*, the Competition authority found an abuse consisting on the change in the trade policy that a dominant electricity generator had applied to a distribution company (a customer in the upstream market with whom it competed in the downstream market). This generator had terminated the electricity supply contract and subjected the increase in contracted power to more onerous economic conditions (i.e. a surcharge on the fare and bank guarantee). The competition authority imposed a fine of €120.202.

In Proceedings 2763/07, *RENFE-OPERADORA*, the complainant argued that *RENFE-OPERADORA* had abused its dominant position by attempting to impose unfair trade terms (higher prices for access to the essential facility) under the threat of breaking off commercial relations. In its Decision of 29 July 2008, the Competition authority found that there was not such abuse since there was a need for RENFE to change the terms of its contracts with its clients deriving from a legal reform and these clients has been warned in advance.

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?

    The Spanish Competition Act does not expressly recognize the concept of "margin squeeze" but it can be anyway pursued, either under the frame of the abuses expressly recognised by Law (2.2.c. refusal to deal) or under the frame of article 2 of the Competition Act, since the list of abuses in such article is not exhaustive.

The Spanish competition authority has dealt with several "margin squeeze" cases in the last ten years[3], but only in one case the infringement was found and the incumbent sanctioned (case Iasist/3M previously mentioned)

In the rest of the cases, all in the telecoms sector, in the mobile phone sector to be more precise, the conduct could not be proven. In one of them, because the incumbent did not have a dominant position in the relevant market. In the other three, because the margin squeeze test could not be carried our since the relevant costs could not be isolated. Mention was made of the difficulty to apply such tests where there are economies of scope and complementarity of costs. Also, the competition authority recognised that the operators' pricing strategies were closely followed by the telecoms regulator and that there were no complaints on the side of that regulator that the incumbents were not fixing cost-oriented prices.

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.

Not really. For a refusal to deal to be deemed illegal the conditions referred to in response to Q8 have to be met.

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.

Article 4 of Act 15/2007 refers to conducts exempted by law[4]. If a refusal to deal by a dominant firm stems from the application of a Law, it does not constitute an infringement. Nevertheless, such an exemption does not apply if the refusal to deal derives from the exercise of administrative powers or is caused by the action of public authorities or public companies.

Article 5 of Act 15/2007 refers to conducts of minor importance and states that "*[t]he prohibitions included in Articles 1 to 3 of this Act shall not apply to conduct which, due to their scant importance, are not capable of significantly affecting competition. The criteria for demarcating conduct of minor importance shall be determined according to regulations, taking into account, among others, the market share".* Royal Decree 261/2008 of 22 February 2008 develops the above provision in article 1[5], on the basis of market share thresholds of 10-15%.

[3] Case 517/01 Iasist/3M; Case 571/03 Uni2/Telefónica móviles; Case 572/03 Uni2 y Worldcom/Vodafone; Case 573/03 Worldcom/Amena; Case R699/06 Astel/Telefónica 2.

[4] "1. Without prejudice to the eventual application of the Community provisions regarding competition, the prohibitions of this chapter shall not apply to conduct those results from the application of an Act.
2. The prohibitions of this chapter shall apply to situations restricting competition which are derived from the exercise of other administrative powers or are caused by the action of public authorities or public companies without this legal protection".

[5] Article 1 of Royal Decree 261/2008 states that the conducts that shall be considered of minor importance, without the need for prior declaration to such effect, are:
"a) Conducts between actual or potential competitor companies whose combined market share is no greater than 10 percent in any of the affected relevant markets.
b) Conducts between companies that are neither actual nor potential competitors, if neither one of them has a market share of more than 15 percent in any of the affected relevant markets.
c) Where it is not possible to determine if the case involves conduct between competitors or between non-competitors, the 10 percent threshold will be tested in each of the affected relevant markets.

However, such provisions will not normally apply to refusal to deal cases as far as dominant firms rarely have a market share of less than 10 to 15 percent in the relevant market.

On the other hand, a refusal by a dominant firm to supply a third party who is not part of its network of official or authorized distributors in the context of a selective distribution system, should not be deemed illegal.

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.

    See above.

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?

    The decisions of the Spanish Competition authority -generally, and therefore also the ones sanctioning unlawful behaviour consisting on refusals to deal- expressly require the offender to stop its conduct and refrain from committing the same practices in the future, and to publish the decision at their cost.

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?

    Up to now, remedies imposed in regulated markets cases have not been different from the ones imposed in non-regulated markets cases.

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 expain your response.

    No.

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?

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d) When competition is restricted in a relevant market by the cumulative effect of parallel agreements for sale of goods or services reached by different suppliers or distributors, the market share percentage thresholds fixed in the foregoing subparagraphs will be lowered to 5 percent. A cumulative effect will not be found to exist if less than 30 percent of the relevant market is covered by parallel networks of agreements".

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.

There are cases which we doubt to classify as refusal to deal cases (remember that the list of conducts amounting to an abuse of dominant position in the Competition Act is not exhaustive and so the Competition authority need not frame every anticompetitive conduct made form a dominant position in a concrete paragraph of article 2.2. does not have to find ere the anticompetitive conduct could)[6]:

In the telecoms sector, the Competition authority imposed a fine of € 900.000 on *Telefonica* (Case 518/01 *Telefónica/Internautas*), based on an abuse of dominant position. *Telefonica*, having contracted access to the local loop -an essential facility necessary to enter the ADSL related market- to competitors in a certain moment, conferred its subsidiary, *Telefonica Data*, the same access earlier in time. The local loop was considered.

In case 620/2006, *Jazztel/Telefónica*, Jazztel complaint that Telefónica had abused its dominant position in the wholesale market for broadband Internet access by continuously delaying access to the local loop. In Decision of 22 October 2007 the Competition authority ruled that the abuse had not been proved and that some or even all of the delays could have been due to objective reasons not attributable to Telefónica.

In the electricity sector (cases 552/05, *Empresas Eléctricas*; Case 602/05, *Viesgo Generación*; Case 601/05, *Iberdrola Castellón*; Case 624/07, *Iberdrola*; Case 625/07, *Gas Natural*), taking advantage of the continuous and systematic market power that some generating stations hold in a particular region or at certain moments of the day, the incumbents remove their offer from the daily market giving place to the market for *technical restrictions*, where they can get higher prices for electricity. In this framework the Competition authority has imposed fines that altogether amount up to more than € 56.5 million.

[6] These cases have not been considered under chapter "Experience"