International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Superintendencia de Competencia (El Salvador)
Date: Nov. 4, 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.

   There is no definition of "refusal to deal" in the Salvadorian legislation, but it is included in the Abuse of dominant position. Both the Competition Law and its Regulation, list

some indicators of abusive conduct, which includes creating difficulty of access to inputs (also essential facilities). Article 30 letters a) and b) of the Competition Law (see question 2).

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 neither separate provisions nor specific forms of refusal in our legislation. It is all considered as abuse of dominant position. The articles of the Competition Law are:

Art. 29.- The following should be considered to determine whether an economic agent holds a dominant position in the relevant market:

a) The participation of the economic agent in said market and the possibility of fixing prices unilaterally or restricting the supply in the relevant market, without making it possible for the competing agents to act or potentially counteract this power;
b) The entry barriers and the elements that may alter those barriers and also other competitors offers;
c) The competitors existence and powers; and,
d) The possibility the economic agent and its competitor have to access the input sources.

CHAPTER III - ABUSE OF DOMINANT POSITION
Art. 30.– Any action that constitutes an abuse of dominant position by economic agents in a given market is forbidden, such as the following, amongst other cases:

a) The creation of obstacles to impede the entry of competitors or the expansion of existing competitors;
b) When the action has the purpose to limit, impede, or displace in a significant way Competition in a market;
c) The systematic reduction of prices, below the cost price, with the purpose of eliminating one or several competitors or impeding the entry or expansion of the same; and,
d) The sales or rendering of services in a given part of the territory of the country at a price that differs from the price charged in another part of the country, with the intention or the effect to reduce, eliminate, or displace competition from that area of the country.

The articles from the Competition Law Regulation are:

CHAPTER V - ON THE GENERAL RULES FOR THE RELEVANT MARKET ANALYSIS AND DOMINANT POSITION

Art. 16.- To determine whether an investigated economic agent has a dominant position, according to Art. 29 of the Law, the Superintendence shall consider the following:

a) Its participation in the relevant market in order to take into consideration sales indicators, number of customers, productive capacity or any other factor that the Superintendence considers pertinent;

b) The possibility to fix prices unilaterally or to restrict supply in the relevant market without competitors being able to actually or potentially counteract said power, as well as the potential or real impact of price fixing;

c) The existence of entry barriers, such as:

i. Financial costs;
ii. Costs for developing alternative channels;
iii. Limited access to financing, technology or alternative channels;
iv. The amount, indivisibility and term of recoupment of the required investment, as well as absence or scarce profitability of the alternative use of infrastructure and equipment;
v. The need to possess concessions, licenses, permits or any other type of governmental authorization, as well as rights of use or exploitation protected by the legislation in the area of intellectual and industrial property;
vi. The required investment in advertising for a brand or trademark to acquire a presence in the market to enable it to compete with already established trademarks or brands;
vii. Competition limitations in international markets;
viii. Restrictions established by common practices of the economic agents already existing in the relevant market; and,
ix. Acts of the national or municipal authorities which discriminate in the granting of incentives, subsidies or assistance to certain producers, commercializers, distributors, or service suppliers;

d) The existence of supply or demand alternatives actual or potential of local or foreign goods or services during a determined period of time.

Art. 17.- The criteria oriented for valuating constitutive actions of the abuse of a dominant position , referred to in Art. 30 of the law, amongst others:

a) That the analyzed practice propitiates an increase in access or exit costs of competitors, being potential or actual, local or foreign;
b) That the analyzed practice tends to make difficult or obstacle access to production inputs, internalization of goods or services, or cause an artificial increase in costs structure of their competitors or make their productive or commercialization procedure difficult or reduce their demand;
c) The persistent use of profits obtained by an economic agent in the commercial sale of a good or service in order to finance losses in another good or service; and,
d) The commercially unjustified setting of different prices or sales conditions for different buyers which are under the same conditions.

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

Since in our legislations, it is considered an abuse of dominant position, it only applies to those economic agents who have dominant position in the relevant market.

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?

Salvadorian law considers anticompetitive practices only as an administrative violation by which a fine can be imposed.

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)?

   The SC has conducted three cases related to refusal to deal practices:

   - TRANSAE v. MIDES. It was a case initiated by an agent that collected infectious waste from hospitals, against the only agent that manages a waste processing plant in El Salvador. The defendant refused to renew the contract with the collector because, in those days, he started to provide collecting services also. During the procedure both parties arranged an agreement, and the procedure finished with no fine imposed.

   - EDESAL v. CAESS, AES-CLESA and DELSUR. CAESS, AES-CLESA and DELSUR are the main electricity distributors in three different zones in El Salvador. EDESAL was interested in provide electricity distribution in certain neighborhoods located in those zones (our Electricity Law allows that more than one agent can distribute electricity in a same geographical zone). To provide the service in each of the three neighborhoods, EDESAL needed to interconnect with CAESS, AES-CLESA and DELSUR infrastructure, but the three of them refused to deal. In the final decision the SC considered that the refusal to deal had not justification, so it was considered the creation of obstacles to impede the entry of a competitor and, therefore, imposed fines to the three defendants.

   - ABRUZZO v DELSUR. DELSUR is the main electricity distributor in certain zone in El Salvador. ABRUZZO was interested in provide electricity distribution in a neighborhood located in that zone (our Electricity Law allows that more than one agent can distribute electricity in a same geographical zone). To provide the service in that zone, ABRUZZO needed to interconnect with DELSUR infrastructure, but he refused to deal. In the final decision the SC considered that the refusal to deal had not justification, so it was considered the creation of obstacles to impede the entry of a competitor and, therefore, imposed a fine to the defendant.

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.

   The SC has found unlawful conduct in two cases. The ones related on letters “b” and “c” of the previous answer.

   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 SC has been sued before the Contentious Administrative Chamber of the Supreme Court of Justice for both cases. The judicial procedures have not finished yet.

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

Not applicable.

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.

See question 6 letters b and c. (also: http://www.sc.gob.sv/english/dirs.php?Id=14/)

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.

No, the cases can only be challenged via the administrative procedure.

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?

      The competitive concerns regarding a refusal to deal in Salvadorian legislation is that it may exclude or threaten to exclude a rival (or rivals) from the market, as a result of the abuse of a dominant position. If it's just a threat to exclude, the anti-competitiveness would be determined by the exam of the whole market that could be affected. In the cases conducted by the SC, the SC evaluated that the refusal to deal impeded an agent to enter in the electricity distribution market in certain geographical zones.

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

      No, it is not required that the consumer harm must be demonstrated, the harm to the market would be enough. But, in the cases conducted by the SC, the SC did evaluate the competitor harm in order to calculate the amount of the fine.

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

      Yes. In the cases conducted by the SC, the defendants argued that they refused to deal because the interconnection could provoke certain technical problems. The SC evaluated such justification and found that it was not true, thus, the SC concluded that the intent of the refusal to deal was to impede the entry of new competitors.

   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?

      Those aspects were not applicable to the cases conducted by the SC.

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?

Those aspects were not applicable to the cases conducted by the SC.

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.

No, the term "essential facilities" does not appear in the legislation; therefore it is not recognized as a distinct offense. It is contemplated within the abuse of dominant position.

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.

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

There hasn´t been a case, but it would also be treated as a abuse of dominant position.

a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)? No.

b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal? It could, according to the general rules.

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

The regulated industries have their own rules, so they would broaden the analysis.

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

There has not been a case; therefore, we cannot provide such criteria yet.

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?

No. The law does not recognize such concept.

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?

No. The law does not recognize such concept.

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.

    There is not presumption of illegality, only some considerations (cited in question 1) that if the refusal is made by a dominant firm, must be examined. In the cases conducted by the SC, the lack of justification of the refusal to deal presumed the intent of obstruct the entry of a competitor.

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.

    No. there has not been stated any criteria yet.

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.

    There are not particular justifications determined by the law or the regulation that can be accepted by the agency. It'd all depend in the results of the investigation. In the cases conducted by the SC, a valid justification could be that the interconnection did provoke technical problems in the infrastructure. Even though such justification was invoked, in the procedure was demonstrated its falseness in those specific cases.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

    In the cases conducted by the SC, the SC ordered the defendants to arrange an

interconnection agreement with the competitors that were trying to entry in the zones that they controlled.

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?

    In the cases conducted by the SC, and because the electricity sector is regulated, the interconnection was a remedy that already was available in the Electricity Law.

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.

    At this moment the SC has not used any other remedy in abuse of dominant position cases involving a refusal to deal but the one cited in answer 18.

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?

    Neither the competition law, nor the competition policy has any specific treatment to refusal to deal cases.

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.

    No other comments to be made.