International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Superintendencia de Industria y Comercio - Colombia
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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 Superintendencia de Industria y Comercio SIC does recognize a refusal to deal as a possible violation of Colombian antitrust law. However we have to say that the term is used both in the same manner as the definition above, as well as in a different manner.

In Colombian antitrust law, a refusal to deal with a rival is not only considered as an abuse of a dominant position, but can also be considered as a unilateral conduct that does not imply that the refusing firm is dominant. This second option can be sanctioned both in application of the general antitrust prohibition, as well as a unilateral anticompetitive conduct.

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)?

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

ANSWER TO QUESTIONS 2 AND 3

According to Colombian antitrust law, there are three ways to sanction a refusal to deal with a rival as anticompetitive.

First of all, in application of article 50.6 of decree 2153 from the year 1992, if a firm has a dominant position in any given market, any way of obstructing or preventing a third party to access this market, or access to a commercialization channel, constitutes an abuse of its dominant position. A refusal to deal with a rival could constitute an obstruction of access into a market.

A second possibility to sanction a refusal to deal is in application of article 48 of decree 2153 that states that the following unilateral conducts are considered anticompetitive: *"3. the refusal to provide a good or service to a firm, or discriminate against it, when it could be understood as retaliation to its price policy."* (Our translation) In this last case, we can see that the refusal to deal is only considered anticompetitive if it can be related to a direct retaliation to the price policy of the discriminated firm. We understand that this specific conduct relates more with the *retail price maintenance.*

The third possibility is in application of the general antitrust prohibition contemplated in article 1 of law 155 of the year 1959. *"All types of agreements that directly or indirectly intend to limit the production, supply, distribution or consumption of raw materials (inputs), products or national or international merchandise or services, and in general, <u>all types of practices, procedures or systems that tend to limit free competition or to establish or maintain unfair prices</u>."* (Our translation)

With this article it is possible to sanction a refusal to deal if it is determined that it is a practice that effectively tends to limit free competition. The authority has to come up with enough evidence to prove that the practice or conduct is restrictive of competition and free trade.

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?

In Colombia competition or antitrust law is administrative and therefore a refusal to deal is an administrative violation. The SIC emits a decision that can be subject to judicial review to

establish its legality. There are no criminal implications for anticompetitive conducts in Colombia.

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)?

There have been no in depth investigations for refusals to deal in the terms that where defined in the introductory paragraphs. The reason for this is that only once a firm denounced against a competitor or rival for refusing to deal with them. In the rest of the investigations (which we will be briefly explain), the refusing firm was not a competitor, but rather a supplier of goods that the denouncing firm would later retail, and these refusals where caused because of a failure to meet a condition imposed by the supplier, which excludes the definition of an unconditional refusal to deal with a rival.

The only investigation for a refusal to deal was preliminary examined by the SIC. The preliminary investigation initiated doe to a denounce from a firm called QUINSA, who participates in the market for aluminum sulfate against a firm called Productos Químicos Panamericanos PQP, who also competes in the market of aluminum sulfate, but in addition produces sulfuric acid, one of the principal inputs in the production of aluminum sulfate. QUINSA said that PQP was refusing to sell the sulfuric acid in order to prevent them from accessing the market for aluminum sulfate.

The SIC closed the investigation for that specific conduct because it was later determined that PQP did not supply the sulfuric acid doe to a breach of contract. QUINSA later found a better supplier of the chemical at cheaper prices and never asked PQP to supply again.

An investigation that took place in application of article 48.3 of decree 2153 mentioned in the answer to questions 2 and 3, was opened against Nestle of Colombia, who deliberately stopped providing its products to Exito supermarkets. The investigation was opened against Nestle for supposedly refusing to sell Exito its products as retaliation to its price policy.

Nestle was not sanctioned and the investigation was closed as the SIC determined that Exito, who had a dominant position in the supermarket industry, was imposing Nestle conditions that where extremely difficult to comply with, that would cause a significant increase in Nestles prices. This way Nestle decided to pull its products out of Exito supermarkets to be able to compete with better prices in other supermarkets. The SIC then opened an investigation against Exito to determine the possible anticompetitive abuse of its dominant position in the market.

As we can see this conduct does not relate exactly to the one defined by the ICN (relates more to refusal price maintenance), first of all because the refusal to deal was not against a rival, competitor or prospective competitor, but rather against a distributor of its own products. Again, we Second of all because there was never an unconditional refusal to deal, because what Nestle wanted, in order to reestablish the supply of products where normal commercialization conditions.

Another investigation that took place in application of this article was against a firm that produced animal foods called GABRICA. This firm had a number of distributors who sold the products in pet shops. One of these distributors –Concentrados del Norte CN- sold

GABRICA´s products at a 7% profit, while other distributors sold at a 20% profit. For this reason GABRICA decided not to deal any more with CN in clear retaliation to its price policy. In this case the SIC did sanction the refusing firm.

As seen in Nestles investigation, it does not relate to the conduct defined in this questionnaire because the refusal to deal is with a distributor of its own products, which seems to be the most relevant application of the Colombian article 48.3 of decree 2153.

With respect to the rest of the questions we must say that doe to the lack of investigations that have taken place in the SIC for the conducts described in the introductory paragraphs, we will not answer them. This is because they deal with actual experience that this agency does not have in investigating the defined conduct.