Comisión Nacional de
Defensa de la Competencia

GUIDELINES FOR THE ANALYSIS OF CASES OF EXCLUSIONARY ABUSE OF DOMINANCE

Buenos Aires, Mayo de 2019

Disclaimer: These guidelines have been translated into English to help their reading by non-Spanish speaking people. The only official version of the Argentine Guidelines for the Analysis of Cases of Exclusionary Abuse of Dominance, however, is the Spanish version.

CONTENTS

I. INTRODUCTION

The aim of this document is to provide guidelines regarding practices that constitute infringements of Act No. 27,442 of Defense of Competition (LDC, for its Spanish acronym) and to contribute to predictability in decision-making, notwithstanding its application on a case-by-case basis and the use of complementary criteria that may be developed in the future. In this sense, the guidelines set forth in this document do not constitute an opinion regarding specific cases under investigation.

A typical classification of the conducts that infringe the LDC differentiates unilateral from coordinated conducts. This document refers only to the first type, in particular, to possible abuses of a dominant position by a single firm or legal entity.

Abusive conducts can be further classified in two main categories:[1]

- Exclusionary abuses: Refers to those practices that eliminate or substantially weaken competition from existing competitors or that create or reinforce barriers to entry of new competitors, eliminating or weakening potential competition. These effects of exclusionary abuse of dominance give rise to what is referred to as "anticompetitive market foreclosure",[2] a situation in which the elimination or weakening of current or potential competition makes it likely that the dominant firm will be in a position to profitably increase prices, or affect other relevant competitive variables such as quality, variety, availability of goods and services or innovation, to the detriment of consumers.

- Exploitative abuses: Refers to those practices that exploit customers or suppliers (for example excessively high prices, but there may also be abusive conditions in other variables or dimensions that are valued by consumers).[3]

While both types of abuse constitute violations of the LDC, these guidelines refer only to exclusionary abuses, which are the most frequent in comparative jurisprudence.[4]

Section 1 of Act No. 27,442 establishes that the practices that constitute abuses of dominance in a specific market are forbidden and will be

[1] These categories are not mutually exclusive: a conduct can lead to an exclusionary abuse of a dominant position (leading to exit of competitors from the market and blocking of new players), which in turn allows an exploitative abuse of a dominant position through prices higher than those that would exist without anticompetitive behavior.

[2] See the Communication of the European Commission "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" (2009 / C 45/02).

[3] See "FEGHRA c/SADAIC", Decision 371/2018, Secretary of Commerce.

[4] Regarding exploitative abuses, the analysis must consider that the LDC does not provides for ex-ante price regulation in potentially competitive markets, since it seeks to avoid harm to the incentives to entry from competitors or to innovation and, ultimately, to consumers and the general economic interest.

sanctioned, as long as they may harm the general economic interest. This rule implies that, for a conduct to be considered as an abuse of dominance, the following requirements must be fulfilled:

a) The person or undertaking has to hold a dominant position in a specific market;

b) The alleged conduct must represent an abuse of that dominant position; and

c) The conduct may cause harm to the general economic interest.

These guidelines include a separate chapter for each of the above requirements. Each chapter summarizes the main criteria applicable to the analysis of abuse of dominance cases.

Section 3 of Act No. 27,442 contains a series of examples of practices that, if framed under the stipulations of Section 1 of that Act, can be seen as cases of abuse of dominance. Some of these examples will be more deeply described in Chapter V.

It is worth mentioning that Section 1 of Act No. 27,442 does not only prohibit certain abuses of dominance, but it also prohibits those acts or practices that "limit, restrain or distort competition or access to the market, ... provided that they are harmful to the general economic interest". While this document is primarily focused on cases of abuse of dominance and not on other types of anticompetitive conducts, some of these criteria can also be applied to those other cases.

II. EXISTENCE OF A DOMINANT POSITION

Section 5 of Act No. 27,442 states that an undertaking holds a dominant position in a specific market when it is "the only supplier or buyer or when, without being the only one, it does not face substantial competition". On the other hand, Section 6 establishes several criteria to determine the existence of a dominant position, such as low substitutability between products, regulatory constraints that limit access to other products in the market, and absence of countervailing power from competing firms.

A dominant position can also be interpreted as a position of economic power held by an undertaking in a market, which enables it to behave, largely, independently from its competitors, its suppliers, and its customers. This idea of independence is related to the degree of competitive pressure exercised upon a certain undertaking. Therefore, holding a dominant position implies that this competitive pressure is not strong enough and, consequently, that the undertaking holds a substantial degree of market power.

In these guidelines, the concept of dominant position always refers to cases in which it is owned by only one firm. However, Section 5 of Act 27,442, also provides for the possibility that in certain cases there may be “more than one person” holding a dominant position in a market. In some jurisdictions, however, the term “joint dominant position” is used to refer to situations in which a group of undertakings holds a position in the market that allows them to coordinate actions, thus exercising significant market power. The latter will not be analyzed here, since these guidelines only concern cases of unilateral abuse of dominance.

Dominance is always defined with regards to a specific market. Therefore, it is necessary to define such market, taking into account both its geographic and product dimensions. For market definition, the general criteria established in the Argentine Merger Control Guidelines apply.[5] However, in some particular cases, the analysis of certain conducts may require some specific notions: for example, the appropriate geographic market may be different depending on whether the analysis refers to an M&A operation, in which case it is fundamentally a prospective analysis, or to a past conduct, such as that examined in investigations for alleged-anticompetitive conducts.[6]

The existence or absence of a dominant position can be evaluated using quantitative standards based on market concentration, and in particular, on firms’ market shares.[7] Such criteria, for example, are suitable to discard the existence of a dominant position in situations where the reported undertakings hold smaller market shares than other competitors that operate in the same market. In cases where the investigated company has a market share of less than 40% of the relevant market, it is unlikely that it would hold a dominant position, even if it were the largest company in the market.[8]

In any case, in general, a high market share for long periods is a necessary although not sufficient condition to establish the existence of a dominant position. Similarly, the smaller the difference between the market share of the firm under investigation and its closest competitor, the lower the probability that the former holds a dominant position in the market under analysis.

---

[5] These guidelines have been approved by Resolution 208/2018 of the Secretary of Commerce and can be found at https://www.argentina.gob.ar/defensadelacompetencia/guiasylineamientos.

[6] See the Communication from the European Commission on the definition of the relevant market for the purposes of Community competition law (97 / C 372/03), dated 9 December 1997, paragraph 12.

[7] One of those criteria has been proposed by the economists Ariel Melnik, Oz Shy and Rune Stenbacka ("Assessing Market Dominance", Journal of Economic Behavior and Organization, vol 68, pp. 63-72, 2008), who defined a "threshold of dominance" based on the market shares of the two largest firms.

[8] However, there may be exceptions. The electricity market is an example in which a company with less than 40% of quota, measured in the energy dispatched annually, can have a dominant position and exert its market power affecting consumers. See, for example, the case referred to the economic concentration between AES and Gener, Decision 73/2001, Secretary of Competition and Consumer Protection.

Market shares can be calculated using different criteria (for example, sales volume, sales revenues, production capacity, etc.), which are, in essence, the same criteria used for the analysis of market shares in merger cases. Therefore, the principles developed in the Argentine Merger Control Guidelines will also be used for the calculation of market shares in cases of abuse of dominance.[9]

Besides market shares, there are other elements to consider in order to determine if an undertaking holds a dominant position. Section 6 of Act 27,442 specifies some additional criteria, among it is worth mentioning[10] the existence of regulatory restrictions that limit access of other products to the market, and the limited capacity of competing firms to countervail the power of the dominant firm.

Regulatory constraints that limit access of other products to the market constitute a particular case within the general concept of "entry barriers". The criteria for evaluating entry barriers can be found in the Argentine Merger Control Guidelines.[11]

III. ABUSE OF DOMINANCE

Holding a dominant position is not illegal in itself. It can be acquired through competition by merits and an innovative company can obtain it by creating new products or production processes that benefit consumers. However, companies with a dominant position have a special responsibility not to abuse that position and, in particular, to prevent their behavior from affecting the competitive process.

Section 3 of the LDC enumerates typical practices that may constitute an abuse of dominance. Section IV of this document describes the main types of exclusionary abusive conducts, according to national and international case law and specialized literature.

For a conduct of a dominant firm to be considered illegal, it must have the potential to be detrimental to the general economic interest (Section 1 of the LDC). In general, to determine whether a practice developed by a dominant economic agent constitutes a punishable abuse under the LDC, rather than the specific form of the conduct itself, it is important to assess its likely effect on consumers and on the competitive process. A conduct can be an abuse of dominance if by distorting the competitive process it affects consumers directly (for example by generating high prices or poor quality goods or services) or indirectly (for example by reducing the intensity of current or

[9] These guidelines have been approved by Resolution 208/2018 of the Secretary of Commerce and can be found at https://www.argentina.gob.ar/defensadelacompetencia/guiasylineamientos.

[10] This article mentions the low substitutability of one product by others, which is relevant to delimit the relevant product market in which the concentration and participation of the companies is measured.

[11] Referred to above.

potential competition, reducing innovation). Instead, for example, the refusal to supply by a company with a dominant position to a client that does not have the necessary credit guarantees is not a violation of the LDC.

The LDC requires distinguishing situations in which a conduct, an abuse of dominance, harms the general economic interest from those in which only particular interests of the economic agents involved are affected. In the latter, damages to those particular interests may be the object of disputes within private law, but they do not fit the legal right protected by the LDC.

It is worth mentioning, that a firm that is dominant in a certain market may be able to practice an abuse of dominance in another market. This is possible in a situation where two markets are vertically related (for example, an input market, and the market of an output which is manufactured using that input)[12] or in linked markets that share the same commercialization channels.[13]

It is important to note that the LDC protects the competitive process and not one or more competitors in a specific way. For example, if a firm with a dominant position launches a new product to the market, and this harms its competitors because consumers prefer the new product to those they acquired before, this will not be considered an abuse of dominance. Similarly, a price increase carried out by a dominant firm, originated in an exogenous increase of its costs (for example, the increase of the price of an input, the increase of the tax rates, etc.) will not be seen as an abuse of dominance, even if it causes a loss to the clients of the company in question.

Another element to take into account to asses if a conduct constitutes an abuse of dominance is the possibility that it may be "replicated" by other firms at least as efficient as the dominant firm. If an equally efficient competitor may not be able to replicate it, this may be taken as evidence that the conduct under analysis constitutes an abuse of dominance.

Finally, the requirement that a conduct "may result harm the general economic interest" does not entail the quantification of the damage, but only that the conduct analyzed is capable of generating such damage. Therefore, it is enough to be able to elaborate a reasonable theory of harm to the general economic interest, and, on the contrary, show that there is no reasonable theory explaining the conduct in the absence of harm to the general economic interest (for example, an explanation based on costs of provision of a product, efficiency gains, etc.).

[12] Such is the case of the so-called “margin squeezes”, which will be analyzed in Section V.6.

[13] Such is the case of the conduct usually called "tying sales", which will be analyzed in section IV.3.

III.1. FACTORS TO TAKE INTO ACCOUNT FOR THE EXISTENCE OF EXCLUSIONARY ABUSES OF DOMINANCE

There are several factors that are relevant to consider to assess the likelihood of exclusionary effects, so that there is an anticompetitive market foreclosure, among which are the following:

a) The existence of entry barriers in the markets where those suppliers or customers operate;

b) The position of the competitors of the dominant firm and the possibility that they can replicate or countervail the investigated conducts;

c) The position of the clients or suppliers, including the possible selectivity of the investigated conduct, with respect to specific clients or suppliers that are of special importance for entry or expansion of competitors;

d) The scope of the investigated conduct, taking into account the share of affected sales in the relevant market and the duration of the conduct;

e) Evidence of exclusionary effects, such as competitors that have exited the market or have seen their market share reduced, as well as an increase in the dominant firm's market share or a slowdown of its reduction.

f) Evidence of an exclusionary strategy, such as documents that contain direct evidence of actions or plans to exclude competitors from the market, prevent the entry of competitors or other exclusionary measures.[14]

III.2. EFFICIENCIES

An economic agent could justify a conduct that restricts competition if it leads to enough efficiencies that would make it highly likely that consumers would not be harmed in net terms.

In this sense, the efficiencies should:

a) Arise directly from the conduct and not be achievable through less restrictive alternatives to competition.

b) Be likely, and its concretion must not depend on factors that are completely outside the firm's control. They should not be vague or speculative and should be verified by reasonable means.

[14] See Communication of the European Commission "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" (2009 / C 45/02), paragraph 20.

- Prove that they will overcome any probable negative effect on competition and on consumer welfare.
- Not eliminate effective competition by suppressing all or most of existing or potential competition sources.[15]

IV. SPECIFIC FORMS OF ABUSE

This section exhibits several conducts that constitute usual forms in which abuse of dominance may appear according to the national and international experience. The enumeration of conducts is not exhaustive but is useful to provide guidance and examples on some of the main practices that can constitute abuses of dominance according to the LDC.

IV.1. REFUSAL TO SUPPLY AND MARGIN SQUEEZE

Section 3, Sub-section a) of Act 27,442 refers to “unreasonably denying to satisfy concrete requests for buying or selling products, carried in the markets’ current conditions” as a possible anticompetitive practice. Such conduct may be considered as the equivalent to what is known in international antitrust law as “refusal to supply”.

As a general principle, all undertakings are free to choose to whom and in what conditions they sell their products. As such, the mere refusal to sell certain products (or denying the grant of a license) to certain customers does not usually constitute an infringement of Act 27,442. However, when the refusal is carried out by a dominant firm, this may imply that a customer wishing to purchase a certain product may not have the option of purchasing it to a different supplier. This may lead to exclusion from the market or a substantial reduction of its ability to compete, which may harm the general economic interest.[16]

The idea “refusal to supply” includes several specific conducts, such as the refusal to supply products to new or existing customers, the refusal to license intellectual property rights, or the refusal to access an essential facility.[17]

To evaluate if a refusal to supply constitutes an exclusionary abuse of dominance, it is relevant to analyze if such conduct has the potential to exclude the affected customer in, at least, one of the markets where it operates (or to cause a substantial reduction of its ability to compete in those markets). If this is the case, the next step consists of assessing whether that

[15] Communication from the European Commission "Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" (2009 / C 45/02), section III.D.

[16] This concept applies both to the cases of interruption of supply and to the refusal to provide a good or service that the dominant firm did not previously provide to other companies.

[17] Communication from the European Commission "Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" (2009 / C 45/02), section IV.D.

situation generates, at the same time, a reduction in the level of competition (that may imply harm to the general economic interest).

For such evaluation, among others, the following factors will be considered:

a) Whether the dominant firm operates in both "upstream" and "downstream" markets, that is, if it is, at the same time, a supplier and a competitor of the customer to whom it is refusing to supply its products;

b) Whether the refusal refers to a good or service that is essential for effective competition in the downstream market. A good or service is considered essential for effective competition in the downstream market when there is no existing or potential substitute for the product or input that competitors need in such market;

c) Whether the refusal is likely to lead to the elimination of effective competition in the downstream market. To establish this, the assessment should analyze how feasible it is for competitors of the dominant firm in the downstream market to supply effectively that product or input, taking into account the effort that those competitors will have to incur in terms of production, investment and technological development. The following factors must be considered in order to evaluate whether the refusal to supply leads to the effective elimination of competition in the downstream market:

   - The participation of the dominant undertaking in the downstream market (dominant in the upstream market);

   - Limits to productive capacity of the investigated firm, vis à vis its competitors in the downstream market;

   - Ability of the dominant firm to capture the demand of the excluded competitors;

   - In general, when the relevant input is provided by a natural or legal monopoly, the refusal to supply will lead to the elimination of the competition in the downstream market.

d) The likelihood of harm to consumers in the downstream market. Harm to consumers may exist, for example, when the refusal to supply in the upstream market leads to a price increase or a quality reduction of the goods and services sold in the downstream market. Consumers may also be harmed when competitors excluded by the dominant company are prevented from launching innovative goods or services and/or when the subsequent innovation is likely to be frustrated.

A conduct that may generate similar effects to refusal of supply is the "margin squeeze". This practice occurs when, once all the conditions mentioned above hold, a vertically integrated firm, which is dominant in the upstream market, sets a price in such market (wholesale price) and a price in the downstream market (retail price) that prevent an equally efficient competitor from profitably competing in the downstream market.[18]

However, many cases of refusal to supply, have strictly legal or commercial justifications that do not imply an exclusionary practice, even if they are carried out by a dominant firm. Among such justifications can be mentioned situations in which a customer has a low credit rating, or has breached payment obligations to the company supplying an input, or situations in which the supplier faces capacity constraints or inventory problems of said product.

The dominant firm may claim efficiency reasons to justify the refusal to supply, taking into account the guidelines established in Section III.2 of this document. In particular, it may provide evidence showing that the conduct investigated increases investment, innovation, or quality and/or safety of use of the good or service, for the benefit of consumers.

It should be noted that the characteristic of "essential facility" is not a static and immutable condition. In dynamic markets and those in which innovation plays a central role, the emergence of new technologies and developments may generate that certain infrastructure stops meeting the requirements to be considered an essential facility, while new facilities may also arise that should be classified as essentials.

IV.2. TYING AND BUNDLING

Section 3, Sub-Section f) of Act 27,442 prohibits "subordinating the sale of a good to the purchase of another good, or to the use of a service, or subordinating the provision of a service to the use of another service or to the purchase of a good". According to national and international precedents and specialized literature in competition policy, this conduct is known as "tying".

The concept of tying refers to any situation where, in order to purchase one product, customers are required to purchase another product from the same supplier. A possible case of tying occurs when products are sold jointly in fixed proportions (i.e., fixed quantities of different products in a single package), without the alternative of buying those products separately. Another situation of tying occurs when the purchase of a product is subordinated to the purchase of another product, either in fixed or variable proportions. When purchasing a product is only possible if the customer also buys another different product, but the latter can be freely purchased, the latter is called the "tying product" and the former is called the "tied product". If none of them can be purchased separately, then both products are at the same time "tying" and "tied" products.

[18] The same idea applies in the case of a firm with a dominant position that sells complementary products.

When tying refers to a situation in which products are sold jointly, this can be considered as a particular case of “bundling”. Bundling, however, does not necessarily imply tying, because it is possible that a firm sells two products in a package and, at the same time, it offers them separately, in which case the price of the bundle is lower than the sum of the products offered separately. This case is known as “mixed bundling” or “multi-product rebate”.

For tying or bundling to constitute an abuse of dominance, the supplying firm must have a dominant position at least in the market of the tying product or any of the markets of the bundled products.

Tying or bundling could constitute abuse of dominance if they prevent a new firm from entering the related product market, if they induce an existing competitor to leave that market or if they prevent an existing competitor from expanding.

Through these practices, an entity with a dominant position in a market could create or reinforce barriers to the entry of competitors in that market.

An example of tying that could constitute an abuse of dominance is that of a monopolist of a regulated public service (electricity, gas, drinking water, telephony, etc.) that ties the sale of that public service to that of another good or non-regulated service.

For tying or bundling to qualify as abuse of dominance, in addition to the existence of a dominant position in the market of the tying product (or in one of the markets for products sold in a package), it is important to analyze if it meets the following conditions:

a) The tied and the tying products are clearly different and separable;

b) The conduct is likely to generate an anticompetitive market foreclosure.

For establishing if two products are different and separable, it is necessary to evaluate if, in the absence of tying or bundling, those products would be purchased separately by an important number of buyers. Evidence of this occurs when, given the possibility, most customers choose to buy those products separately. An additional piece of evidence is the existence of companies that choose to sell the products separately (or to sell only one of them and not the other).

In order to analyze whether the firm can extend its dominant position to the tied product market, and whether tying or bundling have the abililty to foreclose said market, the factors outlined in section III.1 have to be considered. It is necessary to evaluate if the buyers of the tying and tied products are indeed the same, as well as the proportion of the demand for the tying product affected by tying or bundling and the ability to constitute a significant obstacle to competition in the related product market by other firms.

In addition, other elements that imply additional risks of exclusion for competitors must also be taken into account. Among those are the duration of the conduct under analysis and the degree of complementarity between tied and tying products. If the tied product were a relevant complement to the consumers of the tying product, a reduction in the supply (due to the exclusion of competitors in the market of the tied product caused by the conduct) would make entry to the market of the tying product more difficult.

There are cases in which the tying or bundling could generate efficiency increases that can be raised by the company under investigation and taken into account when evaluating the impact on competition and general economic interest, provided that the conditions indicated in section III.2 are met. These gains could be originated in the existence of less expensive options for customers or improvements in the quality of the goods or services provided. This is possible in cases in which the tied product is the maintenance, warranty or spare parts necessary to operate another good or service, which in this case would be the tying product. Another type of efficiency gain could appear if a tied generates savings in the costs of production, distribution or commercialization of the products (for example, if both products are strongly complementary in production or commercialization, such as two hydrocarbons derived from oil distillation or two pay television channels).

IV.3. PREDATORY PRICING

Section 3, Sub-Section k) of Act 27,442 mentions selling goods and services “at prices lower than their costs, without reasons based on commercial uses and customs, with the aim of excluding competitors in a market” as a potentially anticompetitive practie. According to national and international precedents and specialized literature in competition policy, this conduct is known as “predatory pricing”.

Predatory pricing is a pricing strategy whereby a firm sells a good or service at a price lower than the one expected in a competitive context, with the aim of causing losses to one or several of its competitors, and consequently inducing them to exit the market.

It is important to consider carefully which conditions should be met for this practice to constitute an abuse of dominance, in order not to discourage price competition. Many times complaints about predatory prices can be complaints from competitors for low price policies that benefit consumers.

To consider a pricing strategy as predatory, the following three basic conditions have to be met:

a) Low prices should not be related to cost advantages associated with efficiency;

b) As a consequence of such low prices, the alleged predator is able to increase its market share and obtain greater market power;[19] and

c) Once that increased market power is obtained, the predator can effectively exercise it (for example, by increasing prices).

In order to distinguish between predatory prices and lower prices that result from cost reductions from improved efficiency, it may be necessary to compare those prices with the cost of producing or providing a certain good or service. If it can be shown that the price is lower than the direct incremental cost generated by the provision of the good or service, then it can be considered that said price may qualify as predatory.[20] If the price exceeds the average cost, then it does not qualify as predatory.

Another important element to determine if a pricing strategy has predatory purposes is to assess whether the scheme actually has the potential to exclude competitors or if, conversely, it is a strategy designed to allow a firm to compete more effectively in a certain market. In order to distinguish between both situations, it is important to analyze the scope and duration of the low prices policy. In particular, if a low price policy is limited to a very limited product (for example, a single item within the portfolio of a multi-product company, a single type of customer defined by having certain characteristics, etc.) or has a very short time duration, then it will be unlikely that the policy in question may be predatory.[21]

IV.4. VERTICAL RESTRAINTS

Vertical restraints are clauses explicitly established in a commercial relationship between a seller and a buyer of a good or service that is an intermediate step in a production chain. Such restrictions also imply some kind of commitment by one of the parties to limit or restrict their actions.

In general, vertical restraints are less damaging than horizontal restraints and result in significant efficiency improvements. For a vertical restriction to constitute a unilateral abuse in violation of the LDC, it must arise from a decision attributable to a company with a dominant position in one or more of the related markets.

The main vertical restraints that can be seen as abuses of dominance are resale price maintenance of goods or services, exclusivity impositions to suppliers or customers, territorial or customer allocation schemes, and

[19] For a practice of predatory pricing to be set up, it is not necessary that the affected firms have left the market.

[20] Depending on the type of activity in question, the direct incremental cost generated by the provision of a good or service can be estimated using the concept of unit variable cost.

[21] See, for instance, "Cámara Argentina de Papelerías y Librerías c/Supermercados Makro", Decision 810/1997, Secretary of Industry, Commerce and Mining.

conditional discount schemes. Each of these cases will be analyzed in detail in the following sub-sections.

IV.4.1. RESALE PRICE MAINTENANCE

Section 3, Sub-section a) of Act 27,442 mentions, as a possible anticompetitive practice, the conduct consisting in “setting, directly or indirectly, the ... selling price of goods and services supplied ... in a market”. According to national and international precedents and specialized literature in competition policy, this conduct is known as “resale price maintenance” (or “RPM”).

Resale price maintenance refers to commercial agreements between a supplier and a retailer in which the price at which the retailer must resell its product is fixed.

In order to establish if a case of resale price maintenance can constitute an abuse of dominance, it is relevant to analyze whether the fixed resale price can be taken as a maximum or minimum price. In principle, when a supplier sets a maximum resale price for a retailer, it can prevent some retailers from exploiting certain particularities (geographic location, population income, etc.) and generate harm to consumers (and also to the supplier, who could be selling lower quantities of its product).[22] In a particular case of a minimum resale price imposition, the effect is, in principle the reverse, since the supplier may be inducing a price increase in the downstream market, which can lead to a reduction in consumer surplus.[23]

Additionally, RPM can hardly constitute a unilateral abuse of dominance if it is not combined with a penalty for non-compliance to the retailer.[24]

On the other hand, it is worth noting that RPM can be used to facilitate or implement collusive practices and, therefore, restrict competition between retailers or between suppliers. In those cases, even if the resale prices are formally set by one or more suppliers, they could be considered as a necessary practice to materialize a concerted action between competitors in the same market.

Resale price maintenance may not violate Act 27,442 if there is no harm to the general economic interest. In this regard, the most common situation under which that hypothesis is verified occurs when RPM aims at increasing market efficiency. This is essentially true in the following situations:

[22] See, for instance, “FECRA c/YPF”, Decision 8/1995, Secretary of Commerce and Investments.

[23] See, for instance, “CNDC c/TRISA, TSC y otros”, Decision 28/2002, Secretary of Competition and Consumer Protection

[24] This is generally the case of the "suggested prices" policies, whereby suppliers inform the public of the prices to which they understand that their products should be sold, without forcing retailers to comply with said prices.

a) When RPM encourages the supplier or its retailers to perform activities that tend to improve quality or provide a better service related to the products involved; and

b) When RPM encourages competition between retailers selling products of different suppliers, even though competition between retailers of the same supplier becomes restricted (for example, if it increases inter-brand competition even if it reduces intra-brand competition).

IV.5. EXCLUSIVITY

As established by Section 3, Sub-Section g) of Act 27,442, a conduct can be defined as a possible anticompetitive practice if it intends “to condition the purchase or sale of a product to a prohibition of using, purchasing, selling or supplying goods or services that were produced, processed, distributed or marketed by a third party”. This description corresponds to what the national and international precedents and the specialized literature in competition policy call exclusivity conditions or agreements.

Exclusivity is a vertical restraint that can appear in agreements between suppliers and customers of a good or service, and its main feature is the existence of clauses that imply commitments for one of the parties (or both) not to trade with competitors of the other party. As such, the imposition of exclusivity clauses can occur in an upstream market or in a downstream market, since it is possible that a supplier imposes exclusivity to a customer, and it is possible that a customer imposes exclusivity to a supplier, too.

The possible anticompetitive effects of exclusive dealing with a dominant firm may appear, for example, through the overall exclusion of those competitors (if the exclusivity clauses impede their participation in a market); or through increasing rivals (competitors of the dominant firm) costs, who cannot buy from the suppliers or sell to the customers of that firm (and thus have to incur in higher costs to procure their supplies or to market their products). Similar effects can also be generated through conditional discount schemes, as described in the following sub-section.

Other elements have to be considered in addition to those indicated in section III.1, to evaluate the likelihood that exclusivity agreements would lead to an anticompetitive market foreclosure that constitutes an abuse of dominance, including:

a) The costs incurred by competitors of the dominant firm to find suppliers or customers who are not subject to those exclusivity clauses;

b) The likelihood that competitors of the dominant firm can be excluded from the market, or that their competitive position is substantially weakened, due to their inability to trade with suppliers or customers that are subject to exclusivity clauses imposed by the dominant firm.

c) Exclusionary effects are more likely to appear when, without the exclusivity clauses or agreements, competitors or potential competitors would practice significant competitive pressure. If competitors cannot compete for all the demand of a particular client because it is inevitable for all or most of the clients to deal with the dominant firm, either because of characteristics of the preferences regarding certain established brands or due to capacity constraints, even a short-term exclusivity may have exclusive effects.[25]

Exclusivity may arise from an imposition of the dominant firm or also from an agreement between parties without imposition of one over the other, since the dominant firm may offer commercial conditions that compensate its counterpart for its limitation to contract with third parties (this happens in the case of the conditional discounts that are analyzed in the following section). In both cases, the effects of exclusivity agreements with the dominant firm on competition and the general economic interest will be considered.

Provided that the conditions indicated in section III.2 are met, the investigated company may present pro-competitive benefits or efficiency improvements that may countervail the anticompetitive effects produced by the exclusivity.[26] Among them, the following should be mentioned:

a) Evidence of transaction costs savings due to a greater economic integration between the defendant firm and its suppliers or customers (which allows costs reductions related to search, bargaining, and possible breach of contract by those suppliers or customers);

b) Evidence that the exclusivity is necessary for the defendant firm to carry out specific investments that benefit its exclusive supplier or customer;

c) Evidence that the exclusivity is necessary for the exclusive supplier or retailer to increase quality or to improve customer services that are sold to or purchased from the dominant firm;

IV.5.1. CONDITIONAL DISCOUNTS

Conditional discounts are granted to reward buyers for performing or refraining from performing a certain conduct. For example, a discount granted when a customer's purchases exceed a certain volume threshold in a certain period of time is a conditional discount. If the discount is applied to all customer purchases, it is called "retroactive", whereas if it is only applied to purchases that exceed the threshold it is called "incremental".

[25] Communication from the European Commission "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" (2009 / C 45/02), section IV.A.a).

[26] See, for instance, "SADIT c/Massalin Particulares", Decision 281/2000, Secretary of Competition and Consumer Protection

Conditional discount policies can also be seen as a variation of the exclusivity obligations previously analyzed, since in general they can be considered as being capable of causing similar effects. Conditional discounts can generate effects equivalent to exclusive agreements without necessarily implying a sacrifice for the dominant firm.[27]

An extreme case of conditional discounts is the case of the exclusivity discounts, which imply conditioning a price reduction to buying a good or service exclusively from the dominant firm. However, for an exclusionary effect to exist, is not necessary for the dominant firm to obtain the exclusivity of purchase from its customers as a counterpart to the discount, since such effects may occur when the dominant firm grants retroactive discounts or through other types of the so-called "loyalty discounts", such as those that imply conditioning the reduction of prices to a certain level of participation of the dominant company in the total purchases of a client.

As in the case of exclusivity agreements, in order to assess the likelihood that conditional discounts lead to anticompetitive market foreclosures that constitute abuse of a dominant position, in addition to the factors indicated in Section III.1, it is important to consider if competitors with an equivalent level of efficiency can compete on equal terms for all the demand of each client. In case this does not happen, for example when a part of the client's demand is rigid (because given the preferences and the characteristics of the products and brands, the client is not likely to stop purchasing that part of its demand from the dominant company), a retroactive discount has a greater probability of generating exclusionary effects. This is because buying from an alternative supplier only a small portion of its demand would mean that the client would lose the discount on all its purchases. This could generate a non-replicable offer for an equally efficient competitor of the dominant firm. The exclusionary effect will be greater the higher the percentage discount and the higher the threshold to obtain it.

When the conditions indicated in section III.2 are met, the investigated firm may present pro-competitive benefits or efficiency improvements that may countervail the anticompetitive effects produced by conditional discounts, such as cost advantages that can be transferred to consumers or some of those mentioned related with exclusivity obligations, such as incentives for retailers. In this sense, incremental discounts are more likely to generate greater incentives than retroactive discounts.[28]

Buenos Aires, National Commission for the Defense of Competition, May 2019

[27] Unlike predatory pricing behavior, which always involves a sacrifice for the person who executes it.

[28] Communication from the European Commission "Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" (2009 / C 45/02), section IV.A.b).