



COMISIÓN NACIONAL
DE DEFENSA DE LA
COMPETENCIA

DRAFT GUIDELINES FOR
THE ANALYSIS OF CASES OF
ABUSE OF DOMINANCE

Preliminary version

September 2018

Index

I. Introduction.....	3
II. Existence of a dominant position.....	3
III. Abuse of dominance.....	5
IV. Harm to the general economic interest.....	7
V. Specific forms of abuse	8
V.1. Abusive pricing.....	8
V.2. Price discrimination	10
V.3. Tying.....	12
V.4. Refusal to supply.....	15
V.5. Predatory pricing.....	17
V.6. Margin squeeze.....	20
V.7. Vertical restraints.....	21
V.7.1. Resale price maintenance	21
V.7.2. Imposition of exclusivity	23
V.7.3. Exclusive customer allocation and exclusive territories	25
V.7.4. Conditional discounts.....	26

I. Introduction

The aim of this document is to provide the general framework that will guide the Enforcement Authority of Act No. 27,442 (also known as “the Act for the Defense of Competition”), on the analysis of possible cases of abuse of dominance in Argentina, which have been either notified or pursued *ex-officio*.

Section 1 of Act No. 27,442 establishes that the practices that are seen as an abuse of dominance in a specific market are forbidden and will be penalized, 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 must be able to cause harm to the general economic interest.

These guidelines have a separate chapter for each of these requirements. Those chapters summarize the criteria that the Enforcement Authority will use to analyze the cases of abuse of dominance brought to its attention.

Section 3 of Act No. 27,442 contains a series of examples of conducts 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 on chapter V of these guidelines.

It is worth mentioning that Section 1 of Act No. 27,442 does not only establishes the prohibition of certain abuses of dominance, but also the prohibition of those behaviors 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 conduct, some of these criteria can also be applied to those other cases. This is particularly valid for the so-called “vertical restraints”, that will be analyzed in Section V.7 of these guidelines. Such restraints can arise as a consequence of the existence of a dominant position in a market, but also as a consequence of agreements between suppliers and customers of goods and services, and thus be considered as restraints to competition which are not necessarily abuses of dominance.

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 of that Act mentions several criteria to establish 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 strength held by an undertaking, which enables it to prevent the maintenance of effective competition in a relevant market and to behave independently, to a considerable extent, from its competitors, its customers and, ultimately, its consumers. This concept 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 this sense, it is considered that an undertaking does not face a strong competitive pressure if it can maintain, in a profitable manner, prices above competitive levels during a significant period of time. It is possible, then, that this undertaking is holding a dominant position in that specific market. Furthermore, that position can also generate unfavorable effects on other non-price variables, such as innovation, variety of goods and services, quality, etc.

In these guidelines, the concept of dominant position will always be referred to cases in which it is unilaterally held by an undertaking. 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. These last cases will not be analyzed here, since these guidelines are strictly limited to situations of unilateral abuse of dominance.

As it was previously mentioned, dominance is defined in relationship to a specific market. Therefore, it is necessary to define such market, taking into account both its geographic and product dimensions. That definition will be performed by the Enforcement Authority using the general criteria established in the already issued Merger Control Guidelines.¹ However, in some particular cases, the analysis of certain behaviors may require some specific notions.

Quantitative standards based on the firms’ market shares will be used as indicators to evaluate the existence or absence of a dominant position.² 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 any case, the position of an undertaking will be evaluated considering, first, its market share. A high market share is, in general, a necessary but not a sufficient condition to establish the existence of market power. Similarly, the difference between the market share of the firm under examination and the market share of its closest competitor can also be seen as a signal of market power. This is due to the fact that, the smaller that difference, the lower the probability that the first firm is capable of exercising a substantial degree of market power.

Market shares can be calculated using different criteria (for example, sales volume, income, installed 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 Merger Control Guidelines will also be used for the calculation of market shares in cases of abuse of dominance.

Besides market shares, there are other elements to consider in order to determine if an undertaking holds a dominant position. Section 6 of Act No. 27,442 specifies some additional criteria, among

¹ The current set of merger control guidelines in Argentina is the one issued by the Secretary of Commerce through Decision 208/2018.

² One of these standards is the one suggested by Arie Melnik, Oz Shy and Rune Stenbacka (“Assessing Market Dominance”; *Journal of Economic Behavior and Organization*, vol 68, pp 63-72, 2008), that establishes a “dominance threshold” based on the market shares of the two leading firms in a market.

which it is worth mentioning low substitutability between products, regulatory constraints that limit access to other products to the market, and absence of countervailing power from competing firms.

The regulatory constraints that limit access to other products to the market can be seen as a particular case within the general concept of “entry barriers”. Among those barriers, it is worth mentioning those regulations that forbid the entry of new competitors, and the ones that impose additional costs to new competitors, in a way that undertakings that are already established in a market do not have to face (or have already faced). Other normative entry barriers are the ones that impose the need of having certain licenses for providing some goods or services, as well as the ones related to the protection of invention patents.

Another type of entry barriers, which may favor that a firm becomes dominant in a certain market, are the ones related to product features that imply facing “sunk costs” to enter the abovementioned market. Among them, it is worth mentioning the costs of planning and designing product launching, installing production or marketing facilities, hiring and training human resources, developing distribution channels, switching between different suppliers, spending in advertising and product branding, etc. All these elements can make two undertakings holding the same market share in different markets to be in a very different situation, since one of them may hold a dominant position while the other one may not.³

Another element to take into account to define the possible dominant position of an undertaking in a market is the countervailing power that buyers may possess. For example, a firm with a high market share as a supplier may not be dominant if there is a customer whose market share (as a buyer) is even higher. It is even possible for an undertaking to hold a dominant position as a buyer of a certain good or service, if there are no other buyers with significant market power and no sellers with such power, either.

III. Abuse of dominance

Holding a dominant position in a certain market is a necessary but not a sufficient condition for an abuse of dominance to occur. This also requires the existence of a certain conduct that can be defined as an abuse of dominance. In order to establish that such conduct constitutes an abuse, the following requirements must be met:

- a) The conduct must reflect the exercise of market power by a dominant undertaking;
- b) It must also generate economic harm to the suppliers, the customers or the competitors of that dominant undertaking; and
- c) Such harm should not be possible if the conduct were carried out by an undertaking which does not hold a dominant position.

³ For example, a supplier with a high market share, competing against small firms with relatively low installed capacities of production, may hold a dominant position in one market under the terms of Act No. 27,442. On the other hand, a supplier with the same share in a different market may not be dominant if, among its competitors, there are importers with sufficient capacity to introduce products in the local market at a relatively low price, without increasing their unit costs. In this last case, the absence of dominance is explained by the impossibility of the largest undertaking to exercise its market power (for example, by the unfeasibility of raising prices without inducing their customers to buy the imported products).

The first of these requirements implies that holding a dominant position is not enough to consider that an undertaking is abusing of that position. For this to happen, the exercise of its market power must be reflected in a specific price scheme, a supply or demand restraint, a decrease on the quality, variety or level of innovation of goods and services, etc.

It is worth mentioning, however, that a firm which is dominant in a certain market is capable of practicing 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). In that case it would be possible that a firm which is dominant “upstream” (i.e., in the input market) abused of its position and caused harm “downstream” (i.e., in the output market), or vice versa.⁴ This situation is also possible between markets that are bounded by other types of non-vertical relationships (for example, two different products that share the same distribution channels). In that case, it could occur that a firm which were dominant in one of those markets abused of its position through a conduct that had an impact on the other market.⁵

The requirement which establishes that an abuse of dominance must harm suppliers, customers or competitors of the dominant undertaking allows to classify those abuses in two main categories:

- Exploitative abuses: Those which force customers or suppliers to pay or charge unfavorable prices, to receive or deliver lower quantities of goods and services, etc.
- Exclusionary abuses: Those aimed at preventing a new firm to enter a market, inducing an existing competitor to abandon such market, or impeding the expansion of that existing competitor.

A very important element to take into account, when analyzing cases of abuse of dominance, has to do with distinguishing between actual abuses and situations of competitive behavior. For example, if an undertaking acquires dominance through a competitive process accomplishing productive efficiency, innovation and/or differentiation tactics, then its conduct should not be considered abusive. Similarly, a price increase by a dominant firm, which is caused by an exogenous increase in costs (e.g., in input prices, in tax rates, etc.), does not constitute an abuse of dominance, either, even if it causes harm to the dominant firm’s customers.

Another element to evaluate if a conduct represents an abuse of dominance is the comparison between the effects of such conduct in the context of a dominant position versus the corresponding effects in a context without dominance. In order to perform that comparison, an important aspect to consider is the possibility that such conduct is “replicable” by other (non-dominant) undertakings, and if this would have the same effect than the conduct carried out by the dominant firm (or if it helps to offset that effect). If this does not occur, it can be considered as evidence that the conduct under analysis actually represents an abuse of dominance.⁶

⁴ Such is the case of the so-called “margin squeezes”, which will be analyzed in Section V.6.

⁵ Such is the case of the so-called “tying sales”, which will be analyzed in Section V.3.

⁶ For example, the imposition of exclusivity clauses or conditional discounts may have procompetitive effects when it is carried out by a firm facing substantial competition, since it can allow that firm to compete more effectively against other firms. On the other hand, the same behavior carried out by a dominant firm may cause the exclusion of competitors, if it induces most customers to stop buying from other firms and, therefore, to meet all their demands from goods or services provided by the dominant undertaking.

IV. Harm to the general economic interest

The concept of general economic interest is described in Section 1 of Act No. 27,442 (and also in Section 8 of that act) as an expression of the value protected by the Argentine competition law. From an economic point of view, the general economic interest has been identified with the concepts of “consumers’ surplus” and “total market surplus”.⁷ This last concept includes the consumers’ surplus and also the different undertakings’ profits, and it could eventually include as well the surpluses and profits obtained by other economic agents (including the workers) that operate in the different upstream and downstream related markets.

The identification of the general economic interest with the total market surplus comes from the idea that one of the main features of competition, as a resource allocation mechanism, is that it helps to maximize total market surplus. This is clearly seen when studying the properties of the so-called “perfectly competitive equilibrium” which, under certain assumptions, actually generates the maximum total market surplus.

In a context of free entry and exit of firms, a perfectly competitive equilibrium also allows for a distribution of total surplus that particularly benefits consumers, since it tends to maximize the consumers’ surplus subject to a non-negative profit constraint for the participating firms. This partly explains why, when evaluating the effects of an anticompetitive practice, it is important to analyze the possible harm to consumers, i.e., the possible existence of reductions in consumers’ surplus.

In order to assess if an abuse of dominance can cause harm to the general economic interest, therefore, the Enforcement Authority will try to establish if such behavior could generate a reduction in total market surplus and in consumers’ surplus. In particular, if a certain conduct reduces both total market surplus and consumers’ surplus, then it can be considered that such conduct clearly causes harm to the general economic interest. For instance, in a case of exploitative abuse in which the alleged conduct reduces consumers’ surplus and increases the dominant firm’s profits in a smaller amount (as generally happens when prices increase from a more competitive level to a more monopolistic level), then both surpluses will be reduced, and such conduct will undoubtedly be seen as a case of harm to the general economic interest.

Conversely, in the context of a vertical practice in which the conduct under analysis causes harm to a supplier or a retailer (but with no effects on consumers), the consumers’ surplus is not affected. If, in addition, there are elements that allow the Enforcement Authority to believe that such practice reduces the cost of providing the good or service under analysis (for example, through taking advantage of economies of scale or scope), then it will be considered that, far from reducing total market surplus, the practice under analysis causes an increase in that surplus. Therefore, in such situation, the conduct would not be fulfilling the requirement of being able to cause harm to the general economic interest, and thus it should not be considered to be violating Act No. 27,442.

This method of analysis allows to distinguish between situations of harm to the general economic interest and situations in which harm is related to particular interests of certain economic agents. Those particular interests may be protected by different private law provisions, but are not part of

⁷ See “Breve análisis económico de la ley argentina de defensa de la competencia” [Brief Economic Analysis of the Argentine Competition Act]; Buenos Aires, National Commission for the Defense of Competition, 1997.

the legal value that is protected by competition law in Argentina.⁸

Finally, another aspect to consider when analyzing harm to the general economic interest has to do with quantification. In some circumstances, harm quantification is possible and may be useful for imposing fines, when these are applicable. However, it is important to emphasize that there is no legal need to quantify such harm, since Section 1 of Act No. 27,442 simply requires that the alleged conduct “must be able to cause harm to the general economic interest”. For this to occur, therefore, it is enough to develop a reasonable theory of harm to the general economic interest, while establishing the inexistence of reasonable arguments which explain that conduct as a result of a context where no such harm occurs (for instance, an explanation based on product provision costs, efficiency gains, etc.).

V. Specific forms of abuse

V.1. Abusive pricing

Section 3, Sub-Section a) of Act No. 27,442 mentions, as a possibly anticompetitive practice, the behavior consisting in “setting, directly or indirectly, the buying or selling price of goods and services supplied or demanded in a market”. In some cases, such conduct may be equivalent to what is known in international competition practice as “abusive pricing” and, as long as it is carried out by a dominant undertaking, it may constitute an exploitative abuse of dominance.

In general, the concept of “abusive prices” is typically applied to cases in which such prices are also “excessive prices”, i.e., prices set by a dominant supplier that tries to abusively exploit its customers or, indirectly, its consumers. However, the same idea applies to cases in which a dominant undertaking is the sole buyer, and practices a scheme of “artificially low” prices, through which the exploitation lies basically over the sellers of the goods, services or inputs that the dominant firm is purchasing.⁹

To evaluate if a certain pricing scheme is abusive or not, the Enforcement Authority will take into account the following aspects:

- a) The relationship between the allegedly abusive price and the cost of the good or service provided, as well as the evolution of such price in relationship to the abovementioned cost;
- b) The relationship between the allegedly abusive price and the price of the same good or service in another market which is considered to be more competitive;
- c) The existence of entry barriers to the market where the allegedly abusive price is charged or paid; and
- d) The existence of a specific sectoral regulation in the market under analysis.

⁸ In a case like the one summarized in the previous paragraph, for example, the supplier or retailer affected by the behavior of the dominant firm may sue that firm for damages derived from its vertical practice, but such demand will have a strictly private (commercial) nature, will not depend on the dominant position of the defendant, and will not be considered as an infraction to Act No. 27,442.

⁹ See, for example, “CNDC vs. Industrias Welbers”; National Court of Criminal Economic Law, Room 2, 05/07/1983.

The first aspect to consider is the relationship between the allegedly abusive price and the cost of the goods or services involved. If the difference between the price and the average total cost of the good or service is not significant, this will generally be seen as evidence that the price is neither excessively high nor excessively low, and it therefore cannot be considered abusive.

In cases where the supposed abuse is caused by an increase or decrease in price, it will also be important to evaluate if such conduct can be explained by an increase or decrease in cost. This occurs, in particular, when it is possible to analyze the behavior of different index numbers and their relationship with the evolution of certain prices and costs.¹⁰ Those index numbers can be, for example, the ones used for measuring the wholesale or retail inflation, and the exchange rates between local and foreign currencies.

Another element to consider, when evaluating allegedly abusive prices, is the comparison between the price of the good or service under analysis and the price of the same good or service in another market which is supposed to be more competitive. If the difference between the allegedly abusive price and the price in the other market is not significant, this will generally be seen as evidence that the former price is neither excessively high nor excessively low, and it therefore cannot be considered abusive.

The existence of entry barriers is an additional element to take into account in cases of abusive pricing. If those barriers are relatively low, it will be considered that a scheme of abusive prices is not feasible during a long period of time, because it creates conditions favorable to the access or expansion of other undertakings that could offer lower prices (or higher prices, depending on the case) than the allegedly abusive ones. This will prevent the dominant undertaking from maintaining its abusive level of prices (and, eventually, will force it to lose its dominant position).

On the contrary, if entry barriers, especially legal ones, effectively hinder the access of new competitors or the expansion of existing ones, this can be considered as a favorable factor for the existence of abusive prices. In those cases, customers or suppliers affected by such prices will lack alternatives, in neither the short run nor the long run, to avoid being exploited by a dominant undertaking that is selling or buying its products at those excessively high or excessively low prices.

Another element related to entry barriers is the existence of specific regulations in a certain market. If those regulations prevent the entry or expansion of competitors, then its existence can be a favorable factor for a dominant firm to implement a strategy of abusive pricing. Likewise, the effect will be similar if such regulation grants special advantages to the dominant undertaking in its interaction with other potential or existing competitors. If, instead, a regulation favors competition from existing competitors or the entry of new competitors, then such regulation can be considered as an element that decreases the probability of a dominant firm carrying out an abusive pricing scheme.

A particular case of regulation is the one which sets the prices that the dominant undertaking must charge or pay in a certain market. In general, those prices will not be seen as abusive (or as part of a conduct that infringes Act No. 27,442), because they are not set by the dominant undertaking but

¹⁰ See, for instance, “A. Lafalla vs. Juan Minetti”; Decision 309/2000, Secretary of Competition and Consumer Protection.

are determined by a decision of a sectoral regulator.¹¹

Following this line of reasoning, it can also be considered that, if a dominant undertaking is charging or paying prices that violate a direct price regulation, that conduct will not be an infraction under Act No. 27,442, but an infraction to a more specific rule (that must be considered as such, and analyzed by the corresponding regulatory authority).¹²

To be able to frame abusive pricing into the prohibition established by Section 1 of Act No. 27,442, that conduct must also generate a possibility to cause harm to the general economic interest. Considering a scenario of excessive pricing, such possibility appears almost automatically, since an excessive price set by a dominant firm is (by definition) a supra-competitive price that causes a reduction in consumers' surplus and, at the same time, a reduction in total market surplus.

Conversely, in cases where prices are challenged as abusive for being artificially low, there is a possibility that those prices are not causing harm to the general economic interest because they are somehow passed through consumers of the analyzed good or service. Indeed, an undertaking which is dominant as a buyer may be purchasing this good or service at a low price and then reselling it at a price that is also low (thus benefitting consumers). In such case, it can occur that the general economic interest is not affected and, therefore, that the alleged abuse of dominance does not constitute an infraction to the Argentine competition act.

Artificially low pricing, however, can create harm to the general economic interest if a dominant firm buys a good or service at an excessively low price and resells it at a competitive or supra-competitive price. In that case, the harm caused by the dominant undertaking to its suppliers will not be offset by benefits received by its customers, nor by benefits accrued by the final consumers in a "downstream market".

V.2. Price discrimination

Section 3, Sub-Section h) of Act No. 27,442 mentions the behavior that consists in "the imposition of discriminatory conditions for the purchase or disposal of goods or services". Such conduct comprises what is known in international antitrust practice as "price discrimination" and, as long as it is carried out by a dominant undertaking, it may constitute an exploitative abuse of dominance.

Price discrimination is defined as a commercial practice in which different sales terms are applied to equivalent transactions. The most usual example of this practice consists of selling identical units of a good or service at different prices. However, selling at different prices is only included under the discrimination category if such differences are related to the demand of the good or service under analysis, and not to differences in the costs of supplying different customers.

Under certain circumstances, price discrimination may also constitute an exclusionary practice. This can be the case, for instance, when such discrimination is part of a predatory pricing strategy, carried out by an undertaking that acts simultaneously in several markets. In such case, the purpose of price discrimination can be to drive competitors out of a certain market, without affecting the conditions

¹¹ See, for instance, "N. La Porta vs. Telefónica and Telecom"; National Court of Criminal Economic Law, Room A, 04/07/1997.

¹² See, for instance, "G. Corró vs. La Nueva Metrópol"; Decision 53/2018, Secretary of Commerce.

of competition in other markets. If price discrimination is seen as a variation of a predatory pricing scheme, it will be evaluated according to the criteria stated in section V.5 of these guidelines.

Another case in which price discrimination may constitute an exclusionary anticompetitive practice is when a seller establishes a conditional discount scheme, inducing its buyers to purchase exclusively or predominantly from him, instead of buying some products from its competitors. This kind of discounts will be discussed in section V.7.4. of these guidelines.

To establish if differences between prices set for different units of the same product represent a case of discrimination, it is relevant to analyze if the conduct is caused by differences in provision costs. If, for example, a price difference can be explained by the existence of different transportation, distribution or marketing costs, then that difference does not represent, *a priori*, a situation of price discrimination. This non-discriminatory differences happen, for example, when a product is cheaper in locations which are closer to a production facility (and is more expensive in farther locations), when that good or service is cheaper in a more densely populated area (and is more expensive in less populated areas), or when a product is cheaper for wholesale buyers (and is more expensive for retail buyers).

Price differences may not be discriminatory, either, if they occur in different periods of time. A certain product could be more expensive during a period of high demand (when the installed capacity of production of such product is being used more intensively) and cheaper during a period of low demand (when there is some degree of excess capacity). In such case, the implied price difference will not be seen as an act of discrimination.

To consider a particular price discrimination as an exploitative abuse of dominance, the undertaking carrying out such practice must hold a dominant position in the relevant market (or at least be dominant in relationship to the allegedly exploited customers). It could therefore occur that a firm discriminates against a certain group of buyers (who can only buy from it) and, conversely, benefits another group of buyers (who can choose between buying exclusively from that firm and having other suppliers as well).¹³

To establish that a price discrimination strategy infringes Act No. 27,442, it must be able to cause harm to the general economic interest. For this to occur, it is important to evaluate the effects of price discrimination *vis à vis* a situation in which the dominant undertaking does not discriminate prices. In this last scenario, it is possible for the undertaking to choose to charge all its customers a relatively low price, or, conversely, to charge a relatively high price.

To define which alternative is more likely, it is useful to analyze the quantities sold to each group of customers in the situation of price discrimination. If the dominant firm sells a larger quantity to the group of customers that pays the lowest price, then it can be assumed that in a non-discrimination scenario it will keep that low price and it will reduce the highest price. If, conversely, it holds that the dominant firm sells a larger quantity to the group that pays the highest price, then it will be likely that, in a non-discrimination scenario, the firm will keep that high price and it will increase the

¹³ See, for example, “CNDC vs. YPF”; Decision 17/1999, Secretary of Industry, Commerce and Mining; and Argentine Supreme Court of Justice, 02/07/2002.

lowest price.¹⁴

In cases where discrimination implies a higher average price, it can be considered that such discrimination causes harm to the general economic interest. On the contrary, when price discrimination implies a lower average price, it can be considered that it is not causing harm to the general economic interest and, therefore, that it is not infringing Section 1 of Act No. 27,442. This is because, in certain situations, the non-discrimination alternative implies harming buyers that were paying a lower price, without benefitting customers that pay a higher price.¹⁵

V.3. Tying

Section 3, Sub-Section f) of Act No. 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”. Such conduct is equivalent to what is generally known as “tying” and, as long as it is carried out by a dominant undertaking, it may be an exploitative abuse of dominance.

The concept of tying refers to any situation where, in order to purchase one product, customers are required to additionally purchase another product from the same supplier. A possible case of tying is 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. In such case, where purchasing a product is only possible if the customer also buys another different product (which can be freely purchased), the first of those products is called the “tying product” and the second one is called the “tied product”. If none of them can be separately purchased, then both products are at the same time “tying” and “tied” 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 such cases when bundling is optional, the corresponding market strategy is known as “mixed bundling”, and it does not imply the subordination of the purchase of a product to the purchase of another product (i.e., it is a situation of bundling without tying).

For tying to be considered as an abuse of dominance, the supplying firm must have a dominant position, at least in the market of the tying product. If the abuse is deemed to be exploitative, it must imply that the dominant firm finds more profitable to exercise its dominant position through tying than selling its products separately. This happens, for instance, if the dominant undertaking manages to sell the tied product at a higher price than the price that would be set if that product

¹⁴ See, for example, “CNDC vs. El Tehuelche and PCR”, Decision 387/2017, Secretary of Commerce.

¹⁵ An example of this last situation may occur in the case of a cinema with a dominant position (for example, the only existing cinema in a small city), that charges lower prices to retired people and higher prices to the rest of its customers. If such pricing scheme were forbidden, the cinema would probably choose to charge all its customers with the highest price (especially if the proportion of retired people is relatively low among cinema goers). Therefore, considering this kind of price discrimination as an infraction to Act No. 27,442 would harm customers paying lower prices (i.e., retired people) without benefitting the ones paying a higher price.

were not tied, without having to reduce the price of the tying product.¹⁶

In order to evaluate the anticompetitive effects of tying, it is important to analyze three main features:

- a) If the tied and the tying products are clearly different and separable;
- b) If the purchase of one product is conditioned to the purchase of the other one;
- c) If the selling firm has the ability to use its market power in the tying product market, in order to obtain higher profits in the tied product market.

For the purpose of establishing if two products are different and separable, it is necessary to evaluate if, in the absence of a tying sale, those products will be purchased separately by an important number of buyers.¹⁷ This occurs if, given the possibility, most customers choose to buy those products separately. Additionally, it also occurs if firms with relatively little market power choose to sell those products separately (or if they only sell one of those products and not the other one).

For the purpose of establishing if the purchase of the tying product is effectively subordinated to the purchase of the tied product, it is necessary to determine if it is impossible or economically inconvenient to buy only the first product, that is, without the tied product. This is clearly the case if the seller does not offer the tying product separately from the tied product. However, it could also happen that a firm offers the option to buy the two products separately, but charges a price or sets a condition that leads the immense majority of its customers to purchase both products jointly.

On the other hand, in order to establish if an undertaking has sufficient power in the tying product market, it is generally necessary to show that such undertaking holds a dominant position in that market (using the criteria developed in Section II of these guidelines). Similarly, in order to analyze if that undertaking can extend its dominance towards the tied product market, it is necessary to evaluate if the buyers of that product are indeed the same buyers of the tying product, or if, conversely, this overlapping affects a reduced percentage of total demand. In this last case, it may be considered that tying does not have enough entity to constitute an abuse of dominance, unless the affected group of customers has some particular features that turns them into a relevant market itself.¹⁸

¹⁶ An example of this may be a case in which a dominant pay television operator forces its customers to purchase content that is not demanded by them (tied product), as a condition to supply other programs or TV channels that they do wish to purchase (tying product). If, as a result of this strategy, the operator forces its customers to pay a higher total price than the total price that they would pay if it had to sell the contents separately, such conduct may be seen as a case of exploitative abuse of dominance.

¹⁷ For example, in the market of shoes it is a fact that the immense majority of consumers demands those shoes in pairs (i.e., in packages consisting of one right-foot shoe and one left-foot shoe). In a situation like that, therefore, it is pointless to consider that selling shoes in pairs is a case of tying, because each shoe, on its own, cannot be seen as a separate product (and, conversely, it is much more reasonable to consider the pair of shoes as a single product).

¹⁸ An example of this situation could be the case of a supplier of a good that acts as a monopolist (for example, in the market of a certain kind of vehicles), that subordinates buying that good to hiring an insurance against accidents provoked by such good. Even if that clause had an insignificant effect on the global market for

Another important aspect to consider is the price structure that a dominant firm faces in the tying product market. For example, if prices in that market are regulated, tying its sales to the purchase of another product may be useful for the dominant firm to implicitly sell the tying product at a higher price, thus evading the existing regulation.¹⁹

When buyers are not final consumers but firms that use a product as an input in their own production or marketing processes, the analysis of tying becomes similar to the evaluation of exclusive dealing cases, which will be developed in section V.7.2 of these guidelines. In such cases, tying can be seen as a situation where a supplier asks its customers not to engage with another supplier (who is, presumably, its competitor). However, what makes tying different is that exclusivity is not related to the main product of the supplier, but to a different product to which it has been artificially linked.

As occurs with price discrimination, tying may not just constitute an exploitative abuse of dominance, but also an exclusionary abuse. This could happen if, through tying, an undertaking which is dominant in the market of a tying product manages to exclude competitors that operate in the tied-product market (but not in the tying-product market), because they are unable to offset the tying strategy carried out by such dominant undertaking.

To assess the feasibility of a situation like the one described in the previous paragraph, it is important to consider if the tying sale under analysis is capable of excluding competitors in the tied-product market. For this, two essential points have to be evaluated: on one hand, which percentage of the tied-product demand is effectively tied to the purchase of the tying product, and, on the other hand, if that percentage can create a significant obstacle for other firms to compete in the tied-product market.

Other elements that imply additional risks of exclusion for competitors can also be taken into account. Among those are the duration of the conduct under analysis, and the degree of complementarity between the tied product and the tying product. The first of those elements implies that the longer the tying policy, the higher the likelihood of excluding other firms from the market. The second element implies that, if the tied product is an important complement for consumers of the tying product, then a reduction in its supply (due to the exclusion of competitors in the tied-product market) may reduce entry in the tying-product market.

If examination concludes that a tying strategy effectively constitutes an exploitative or exclusionary abuse of dominance, the next step will be to evaluate the harm that such abuse may cause to the general economic interest. For this purpose, it is important to weigh that harm against the possible efficiency gains from tying. Such gains may occur because of the existence of less expensive options or quality improvements for the supplied products. That is particularly likely when the tied-product market is an “aftermarket” of the tying-product market (e.g., when the tied product is a maintenance service or a replacement part of the tying product).

accident insurance, this may be enough for the undertaking to extend its monopoly power to a segment of such market, which, for this case, could be analyzed as a relevant market itself.

¹⁹ For instance, this could be the case of the monopolist of a regulated public utility (electricity, natural gas, drinkable water, telecommunications, etc.) that ties its regulated product to another unregulated good or service (for example, cable television, funeral services, etc.).

Additionally, other kinds of efficiency gains are the ones generated by savings in production, distribution or marketing costs. This may occur, for example, if the tying and the tied product are strongly complementary in their production or marketing stages (for example, two different beef cuts, two pay television channels, or two products that share the same transportation means or the same distribution channels).

V.4. Refusal to supply

Section 3, Sub-Section i) of Act No. 27,442 mentions, as a possible anticompetitive conduct, the act consisting in “unreasonably denying to satisfy concrete requests for buying or selling products, carried in the markets’ current conditions”. Such conduct may be considered as the equivalent to what is known in international antitrust law as “refusal to supply” and, as long as it is carried out by a dominant undertaking, it may constitute an exclusionary abuse of dominance.

As a general principle, it can be stated that all undertakings have the right to freely choose to whom and in what conditions they market their products. As such, the mere refusal to sell certain products to certain customers does not constitute a *per se* infraction to Act No. 27,442. However, when the refusal is carried out by a dominant undertaking, this may imply that a customer wishing to purchase a certain product may not have the alternative of buying it from another supplier, and this might lead to a situation of harm to the general economic interest.

To evaluate if a refusal to supply constitutes an exclusionary abuse of dominance, the Enforcement Authority will analyze if such conduct has enough entity to exclude the affected customer in, at least, one of the markets where it operates (or, at least, to cause a substantial reduction of its ability to compete in those markets). If this is the case, the next step for examination consists in evaluating if that situation generates, at the same time, a reduction in the level of competition (that may imply the existence of harm to the general economic interest).

For such evaluation, the Enforcement Authority will consider, among others, the following factors:

- a) If the dominant undertaking operates in both the “upstream” and the “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) If the refusal refers to a good or service that is essential for effective competition in the downstream market;
- c) Whether the refusal can likely lead to the elimination of effective competition in the downstream market; and
- d) Whether this can likely lead to a situation of harm to the final consumers of the products that are sold in the downstream market.

A good or service will be 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 (in order to be able to offset the exclusionary effects caused by the refusal to supply). To establish this, the Enforcement Authority should evaluate how feasible it is for competitors of the dominant undertaking to effectively supply that product or input, considering the effort that those competitors will have to incur in terms of production, investment and technological

development. In general, if the relevant input is the result of a natural monopoly, if there are significant network effects, or if there is information that can only be acquired from a single source, it will be considered that the input is not substitutable.

A particular case of the described situation occurs when the dominant undertaking is refusing to supply its customer the access to an “essential facility”. An asset can be considered as an essential facility if it is indispensable for competing in a market, and if its duplication is impossible or extremely costly due to physical, geographic or legal limitations. Some examples of essential facilities can be, in certain cases, ports, railway stations and telecommunication networks. Some intangible assets can also be included into this category, such as licenses to practice certain activities, the right to access a certain group of customers, or the membership to certain organizations or associations. In general, if dominance results from controlling an essential facility, then the refusal to let customers use that facility may constitute an exclusionary abuse of dominance.²⁰

Many cases related to refusals to supply, however, have strictly commercial justifications, and thus are not exclusionary, even though they are implemented by dominant undertakings. Among those justifications, it is possible to mention low credit rating, breach of a payment obligation towards the dominant undertaking, and situations in which that dominant undertaking faces production restrictions or stock failures.²¹

Another element to figure out if a refusal to supply can be considered as an exclusionary abuse of dominance is if it is capable to eliminate or to reduce effective competition in a downstream market. Such possibility chiefly depends on the following factors:

- a) Share of the dominant undertaking in the downstream market;
- b) Limitations in the productive capacity of the dominant firm, *vis à vis* those of its competitors in the downstream market;
- c) Proportion of downstream competitors that are affected by the refusal to supply; and
- d) Ability of the dominant firm to capture the demand of the excluded competitors.

In addition, if the firm that was affected by a refusal to supply is not a (potential or existing) downstream competitor of the dominant firm, then the likelihood of a reduction of competition in the downstream market is smaller. In this case, however, it may occur that the dominant firm has engaged in exclusivity contracts with undertakings that are actually competing with the firm to which supply was refused, and this may lead to a situation that is equivalent to refusing to supply a dominant firm’s competitor.²²

As occurs in other situations of abuse of dominance, in a case of refusal to supply it is not strictly necessary that an undertaking is dominant in all the affected markets (which here are usually an

²⁰ See, for instance, “Almirante Brown vs. Terminal Salta and La Veloz del Norte”; Decision 34/2006, Secretary of Interior Commerce.

²¹ See, for instance, “Olmo vs. Buena Vista-Columbia-TriStar”; Decision 850/1998, Secretary of Industry, Commerce and Mining.

²² See, for instance, “Fanski vs. Catedral Alta Patagonia”, Decision 421/1998, Secretary of Industry, Commerce and Mining.

upstream and a downstream market). What is actually necessary, however, is that the undertaking that is refusing to supply its products to one or more customers is dominant as a supplier of those products (i.e., in the upstream market). If, at the same time, that firm is also dominant in the downstream market, then this may be considered as a factor that facilitates the anticompetitive effects generated by a refusal to supply.

The criteria established above can be applied to cases involving either disruption of supply to “old customers” or refusal to supply new customers (i.e., to cases in which the customer to whom supply is denied was not previously supplied by the dominant undertaking). However, terminating an agreement with an existing customer is more likely to be considered abusive than refusing to supply a new customer, since, generally, the fact that an undertaking was voluntarily supplying its products to a firm is indicative that such supply does not imply a risk of inadequate compensation for the dominant undertaking’s original investment.

Finally, when the Enforcement Authority considers that a refusal to supply effectively constitutes an exclusionary abuse of dominance, the next step will be to evaluate the possible harm to the general economic interest. For this purpose, it is important to assess the harm caused to consumers of the good or service under analysis. If this harm is proved to be inexistent, this may be considered in principle as an argument to discard the conduct as an infraction to Act No. 27,442.

The most common example of damage to consumers, that may imply harm to the general economic interest, occurs when the refusal to supply an input in an upstream market causes a price increase of the products sold in the downstream market. Consumers’ interest may also be harmed when competitors, being excluded by the dominant undertaking, are prevented to launch innovative products to the market, or when subsequent innovations are likely to be frustrated.²³

In any case, whenever a refusal to supply causes harm to consumers in the downstream market, it will be necessary to evaluate if such harm is larger than the harm that would be caused if the dominant undertaking were imposed an obligation to supply customers. In particular, it can occur that a refusal to supply be necessary for a dominant undertaking to keep investing in the long run, to ensure its innovation level, or to meet higher requirements of quality or security in the supply of certain goods or services.

V.5. Predatory pricing

Section 3, Sub-Section k) of Act No. 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”. Such conduct may be an instance of what is internationally known in antitrust analysis as “predatory pricing” and, as long as it is carried out by a dominant undertaking, it may constitute an exclusionary abuse of dominance.

Predatory pricing is a pricing strategy whereby a firm sells a good or service at a price which is lower than the one expected in a competitive context, with the aim of causing losses to one or several of

²³ More specifically, this can occur if the victim of the refusal is not limited to reselling goods or services purchased from the dominant firm, but also supplies new and/or improved goods or services, for which there exists an actual or potential demand from consumers, which is not adequately satisfied by the dominant firm.

its competitors, and consequently inducing them to withdraw from the market.

To consider a pricing strategy as predatory, the following requirements are necessary:

- a) Low prices should not be related to cost advantages associated with efficiency;
- b) As a consequence of such low prices, the alleged “predator” can increase its market share and obtain greater market power; and
- c) Once that increased market power is obtained, the predator can effectively exercise it and impede the entrance of new competitors.

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 those prices can appropriately cover all direct incremental costs generated by the provision of a good or service, then it will be considered that those prices are profitable for the alleged predator and, thus, that they can be seen as competitive and non-predatory.

Depending on the activity of the firm, the direct incremental cost generated by the provision of a good or service can be estimated using the concept of unit variable cost, or another economic or accounting concept that be appropriate for the specific circumstances. In all cases, the analysis will attempt to estimate the opportunity cost of the abovementioned good or service, that is, the value of that good or service when it is devoted to alternative uses.

Whenever the estimation of the direct incremental cost of a good or service turns out to be difficult, it can be useful to compare the supposedly predatory price with the prices charged by the alleged predator in different relevant markets. If the charged price is higher in another market where the alleged predator faces equivalent or higher competition, then it is possible that the lower price has been set for predatory purposes. However, that is not the case if the higher price is set in a market where the alleged predator faces a lower level of competition. In such scenario, the most likely explanation for the price difference is the exercise of market power by the alleged predator in the market where it charges higher prices (and not an attempt to exclude competitors in the market where it charges lower prices).

Another important element to determine if a pricing strategy has predatory purposes is 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 following aspects:

- a) The market shares of the alleged predator and the alleged “preys”;
- b) The existence of natural or legal entry barriers, which impede or deter the access of new firms to a market;
- c) The relative size of the alleged predator and the alleged preys, particularly in relationship to the products that are marketed by the alleged predator in the markets in which it operates;
- d) The seniority of the alleged predator and the alleged preys in the relevant market;
- e) Other key differences between the alleged predator and the alleged preys, particularly in

relationship to credit access; and

f) The existence of alternative explanations for low-price strategies.

Regarding market shares of the alleged predator and the alleged preys, it will be considered that a predatory pricing strategy will most likely occur when it is executed by the firm with the highest market share in the relevant market, and when the preys are firms with relatively low market shares.

Regarding the existence of natural or legal entry barriers, this condition favors the possible implementation of a predatory pricing strategy, since it allows the predator to increase its price after it effectively excludes competitors from the market (without fearing the entry of new competitors or the re-entry of the previously excluded firms).

Concerning the relative size of the undertakings, it will be considered that a predatory pricing strategy is most likely to occur if the alleged predator operates in multiple markets and, conversely, the alleged preys only operate in the relevant market where the predatory pricing strategy is being implemented. This is due to the ability of the predator to compensate its losses (due to predatory pricing) through profits in other markets, while preys do not have an equivalent source of funding for their own losses.

Regarding the seniority of the alleged predator and the alleged preys, it will be considered that a predatory pricing strategy is most likely to be executed by an undertaking that is already established in the relevant market, while preys are relatively “new firms” in that market. In that case, it is very unlikely that the alleged predator decides to set lower prices to position its products or to make them be known by its customers, while it is easier for that predator to exclude competitors that are not yet well established in the market.

Other key differences between the alleged predator and the alleged preys, particularly in relationship to sources of funding, refer to situations when the predator is able to obtain funds at substantially lower costs than the preys. If those differences are proved to exist, then it will be more likely for a low-price strategy to have predatory purposes, since a predator can fund its losses more easily, while a prey may find more convenient to abandon a market quickly than to wait for a predatory episode to end.

Concerning the existence of alternative explanations for low prices, these are basically related to elements that are part of the firms’ marketing strategies, by which it may be reasonable to price certain goods or services at low values without aiming or intending to exclude existing or potential competitors. This could have to do with seasonality issues, advertising strategies, product positioning, etc.²⁴

If, once all the factors previously described have been analyzed, it is clear that a pricing strategy has a predatory nature, then it can be considered that such strategy is likely to harm the general economic interest. This is due to the fact that, when a predator is selling below the price which is expected in a competitive context, this market price is also below the social marginal cost of providing the good or service under analysis. This last situation is therefore inducing an artificially high consumption rate for that good or service, which in turn reduces the total surplus generated in

²⁴ See, for instance, “Cámara Argentina de Papelerías y Librerías vs. Supermercados Makro”, Decision 810/1997, Secretary of Industry, Commerce and Mining.

the market under analysis.

Moreover, if a pricing strategy is truly predatory, the predator will eventually be able to raise prices above its competitive level in future periods, and this will induce an artificially low consumption rate for the good or service under analysis. This will also generate a reduction in total market surplus which, as such, can be considered as a situation of harm to the general economic interest as prescribed by Section 1 of Act No. 27,442.

Nonetheless, it should be noted that, for a conduct to be considered predatory, it is not necessary to have reached the stage of market exit by the affected preys. In fact, the firms that are harmed by a predatory pricing strategy may still be in the market but operating in a relatively weaker position, thus reducing their importance as effective competitors of the predator. It could also occur that the predator, once it has preyed those firms, decides to acquire them in order to strengthen its dominant position in the relevant market.

V.6. Margin squeeze

A margin squeeze occurs when a vertically integrated firm, which is dominant in an upstream market, sets the margin between upstream and downstream prices at a level that does not allow an equally efficient competitor to obtain positive profits if it only operates in the downstream market. The dominant firm may achieve this by raising the price of the input sold in the upstream market, by lowering the price of the product sold in the downstream market, or by a simultaneous combination of the previous two actions.

In certain circumstances, a margin squeeze can be interpreted as an alternative version of a refusal to supply, since, instead of refusing to sell an input, the dominant undertaking sets an excessive price in the upstream market, thus motivating possible customers to hold back their demand for that input. In such cases, a margin squeeze can be seen as an infraction to Section 3, Sub-Section i) of Act No. 27,442, which was already mentioned in Section V.4 of these guidelines.

In other circumstances, a margin squeeze can be seen as a variation of a predatory pricing strategy, in which a predator does not sell at a price below its own direct incremental cost, but at a price below the direct incremental cost that he is setting for the firms being preyed (due to a scheme of high input prices). In that case, the conduct can be analyzed within Section 3, Sub-Section k) of Act No. 27,442, which was already mentioned in Section V.5 of these guidelines.

When a margin squeeze case is interpreted as one of the previously mentioned variations, the corresponding analysis will follow the principles developed in Sections V.4 and V.5. Conversely, if a margin squeeze cannot be defined as one of those cases, it could nevertheless be seen as anticompetitive if it induces an artificial cost increase for competitors. In such case, the conduct could be considered within Section 3, Sub-Section d) of Act No. 27,442, which mentions, as a possible anticompetitive practice, the act consisting of “impeding, hindering or hampering to third parties the ability to enter or to continue operating in a certain market, or excluding them from that market”.

In order to analyze if a margin squeeze can generate an artificial cost increase for a competitor, it will be necessary to assess the following elements:

- a) If the input price, set by the dominant undertaking, generates an artificial cost increase for competitors, even if they can find a substitute for that input (since that substitute may be more expensive, or it may have a lower quality, or its supply might be less reliable, etc.); and
- b) If that cost increase induces competitors to modify their commercial strategies in the downstream market, thus granting the dominant undertaking a supra-competitive profit. This profit can stem from an increase in its market share, from an increase in the margin obtained by selling its product in the downstream market, or by any similar circumstances.²⁵

When those circumstances occur, and the conduct of the dominant undertaking can be considered as anticompetitive, it will be necessary to prove as well that it causes harm to the general economic interest. Such harm can result from the exclusion of downstream competitors or from the existence of commercial conditions that affect the downstream market customers (for instance, from prices that are higher than those that would exist without a margin squeeze).

Nonetheless, it is possible to state that, if a margin squeeze that constitutes an exclusory abuse of dominance has been proved to exist, such practice will in principle be harmful for the general economic interest (just as occurs in the cases of predatory pricing described in Section V.5). This happens because of the distortion caused by the dominant undertaking in the upstream market, which leads to lower competition levels in the downstream market and to a decrease in both consumers' surplus and total market surplus in such downstream market.

V.7. Vertical restraints

Vertical restraints are clauses explicitly established in a commercial relationship between a seller and a buyer of a good or service, which imply some kind of commitment by which one of the parties' behavior is restricted in some aspect (i.e., some kind of limitation in the party's discretion towards the disposal of the abovementioned goods or services when they are under the control of that party).

When a vertical restraint is imposed by the dominant undertaking of a certain market, it is possible that such restraint be considered as an abuse of dominance. However, in order to constitute a violation of Act No. 27,442, the restraint must also be harmful to the general economic interest. This is particularly important for the analysis of vertical restraints, since those restraints are often indicative of a situation of "partial economic integration" between a buyer and a seller, and they can therefore be explained by efficiency reasons rather than by the exercise of market power.

The main vertical restraints that can be seen as abuses of dominance are resale price maintenance of goods or services, imposition of exclusivity to suppliers or customers, territorial or customer allocation schemes, and conditional discount schemes. Each of these cases will be analyzed in detail in the following sub-sections.

V.7.1. Resale price maintenance

Section 3, Sub-section a) of Act No. 27,442 mentions, as a possible anticompetitive practice, the

²⁵ See, for instance, "Ventachap and others vs. Siderar", Decision 30/2004, Secretary of Technical Coordination.

conduct consisting in “setting, directly or indirectly, the ... selling price of goods and services supplied ... in a market”. In some contexts, such conduct can be interpreted as a case of what is known in international antitrust practice as “resale price maintenance”.

The concept of resale price maintenance refers to a situation where a supplier imposes the price at which a retailer must resell its product. To a certain extent, this restraint transforms a distribution agreement into an agency agreement, since the gross profit of the retailer ends up being determined as an implicit commission (calculated as the difference between the resale price and the wholesale price paid by the retailer).

In order to establish if a case of resale price maintenance can constitute an abuse of dominance, the Enforcement Authority will consider the following fundamental factors for the analysis:

- a) Evaluate if the firm that sets the resale price has a dominant position in the upstream market;
- b) Establish if that resale price can be considered as a minimum or maximum price, and if such price maintenance strategy works effectively as a restraint for the retailer (i.e., if the retailer will be punished if he decides to resell the product at a different price);
- c) Evaluate if, in a scenario of downstream market power, resale price maintenance can contribute to restrict competition or to deter entry of new competitors in that market; and
- d) Assess the existence of possible alternative explanations for resale price maintenance, which have to do with greater efficiency in the distribution or marketing of products.

The first of the abovementioned factors is usually considered key to establish if a scheme of resale price maintenance is an anticompetitive practice. If a firm is not dominant in a market, a resale price maintenance strategy can never be an abuse of dominance. However, it may happen that resale price maintenance is simultaneously applied by several suppliers, which, if combined, might have market power (though none of them holds a unilateral dominant position). In that case, resale price maintenance could be considered as a practice that impedes, hinders or distorts competition, thus violating Section 1 of Act No. 27,442 if it also causes harm to the general economic interest.

Regarding the nature of resale price maintenance (i.e., whether it implies setting a minimum or a maximum price), this factor is crucial to establish if that practice is an abuse of dominance. In principle, when a supplier sets a maximum resale price for a retailer, this prevents final consumers from being harmed by a possible imposition of excessive prices by that retailer. Therefore, in this scenario, resale price maintenance can be interpreted as a mechanism to avoid distortions in the downstream market, since retailers become unable to exploit certain market particularities (geographic location, population income, etc.) and to generate harm to consumers (and also to the supplier, who could be selling lower quantities of its product).²⁶

Conversely, when a supplier sets a minimum resale price, the effect is, in principle, inverse to the one described in the previous paragraph, since the supplier may be inducing a price increase in the downstream market, which can lead to a reduction in consumers’ surplus.²⁷ Nonetheless, such a

²⁶ See, for instance, “FECRA vs. YPF”, Decision 8/1995, Secretary of Commerce and Investments.

²⁷ See, for instance, “CNDC vs. TRISA, TSC and others”, Decision 28/2002, Secretary of Competition and Consumer Protection.

price increase may not constitute an abuse of dominance if the minimum resale price maintenance scheme lacks a penalty for non-compliance (such as having to pay a higher price in order to keep buying from the supplier, or not being able to continue buying from that supplier). If that penalty does not exist, it could be considered that the scheme is not a true “resale price maintenance” scheme but a “suggested resale price” scheme, which does not imply coercion from the supplier towards the retailer.

A particular case of minimum resale price maintenance can occur when that strategy is induced by one or several retailers, in order to restrict competition amongst them (i.e., to facilitate a collusive behavior) or to deter entry from new competitors in the downstream market. In those cases, even though prices are formally set by a supplier, the situation can be considered as an abuse of dominance by a retailer or as a distortion to competition provoked by a concerted practice between competitors in the downstream market.

In both scenarios, however, resale price maintenance may not violate Act No. 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 resale price maintenance is aimed at generating greater market efficiency. This is essentially true in the following situations:

- a) When resale price maintenance encourages retailers to supply customer services or to perform other activities that tend to improve quality or service in relationship to the concerned products; and
- b) When resale price maintenance encourages competition among retailers selling products of different suppliers, even though competition between retailers of the same supplier becomes restricted.

It should be noted that efficiency explanations, as described in the previous paragraph, can be offset by events leading to harm to the general economic interest, such as a price increase for consumers. In those cases, the existence of that harm will be evaluated through an assessment of the procompetitive benefits and the anticompetitive damages generated by resale price maintenance.

V.7.2. Imposition of exclusivity

As established by Section 3, Sub-Section g) of Act No. 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 practice can be interpreted as the equivalent of what is known in international competition practice as “exclusivity” or “exclusive dealing” and, as long as it is performed by an undertaking with a dominant position, it can result in an abuse of dominance.

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 also possible that a customer imposes exclusivity to a supplier.

Exclusive dealing may also occur as a result of an agreement between parties, without imposition of one party over the other. In that case, this conduct cannot be objected as an abuse of dominance, but it can nevertheless be analyzed as a practice that impedes, hinders or distorts competition (thus violating Section 1 of Act No. 27,442 if it causes harm to the general economic interest). This will also be the case if there is imposition of exclusivity but not unilateral dominance. In that situation, it is possible that exclusivity be simultaneously imposed by multiple firms, which, jointly, can exercise market power either as buyers or sellers.

The possible anticompetitive effects of exclusive dealing, when it is imposed by a dominant firm, are essentially two: a cost increase for competitors of that dominant firm, 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); and the overall exclusion of those competitors (if the exclusivity clauses impede their participation in a market). To evaluate the likelihood of these effects, the following factors will be analyzed:

- a) The market shares affected by the exclusivity clauses imposed by the dominant firm, both upstream and downstream;
- b) The costs incurred by competitors of the dominant firm to find suppliers or customers who are not subject to those exclusivity clauses;
- c) The existence of entry barriers in the markets where those suppliers or customers operate;
- d) The feasibility of competitors to replicate the exclusivity clauses offered by the dominant firm to their own suppliers or customers; and
- e) The likelihood that the competitors of the dominant firm must abandon a market due to their inability to trade with the suppliers or customers that are subject to exclusivity clauses imposed by that dominant firm.

If, based on the analysis of the exclusivity clauses imposed by a dominant undertaking, it is concluded that those clauses can entail an abuse of dominance, then that conduct will be evaluated in order to determine the existence of possible harm to the general economic interest. For that purpose, the Enforcement Authority will take into consideration if the anticompetitive effects derived from exclusive dealing clauses are offset, to some extent, by some procompetitive benefits generated by those clauses.²⁸ Among them, it is worth mentioning the following:

- a) The saving of transaction costs that occur due to a greater economic integration between the dominant firm and its suppliers or customers (which allows to reduce costs related to search, bargaining, and possible breach of contract by those suppliers or customers);
- b) The additional incentive for the dominant firm to perform specific investments that can benefit its exclusive suppliers or customers (without worrying for possible phenomena of “free-riding” that may favor its own competitors);
- c) The additional incentive for the exclusive supplier or retailer to increase quality or to improve

²⁸ See, for instance, “SADIT vs. Massalin Particulares”, Decision 281/2000, Secretary of Competition and Consumer Protection.

customer services in relationship to the products that are sold or bought to the dominant firm (since their commercial success now chiefly depends on their relationship with that dominant firm); and

d) The reduction in the incentives for the dominant firm to collude with its competitors, since the absence of shared suppliers or customers provides less instances for information exchange or for joint sales or joint distribution of the product under analysis.

V.7.3. Exclusive customer allocation and exclusive territories

The imposition of exclusivity clauses, as discussed in the previous sub-section, refers to situations in which a supplier or customer of a dominant undertaking becomes bound to exclusively supply or resell products for that undertaking. However, exclusivity can also appear whenever a dominant undertaking designates a certain retailer to be the sole supplier for a certain segment of its downstream market. This vertical restraint is known as "exclusive customer allocation", and it is often defined following geographic criteria. In such cases, it is also known as "assignment of exclusive territories".²⁹

The assignment of exclusive customers or territories that can arise from a vertical restraint imposed by a supplier of certain goods or services (and also the one that is agreed between that supplier and its resellers) should not be mistaken with the horizontal restraint known as "market division", which Act No. 27,442 mentions in Section 2, Sub-Section c), when it refers to such conduct as "horizontally allocating, dividing, distributing, assigning or imposing zones, portions or segments of markets, customers or sources of provisioning ". In that conduct, the result is a collusive agreement between firms to become effective monopolists in smaller markets, when otherwise they would be competing among themselves in a larger market.

Unlike horizontal market division, exclusive customer allocation occurs when all the affected retailers sell a product manufactured or distributed by the same supplier, which should be competing against other products offered by other suppliers (that could also have their own exclusive retailers).³⁰ Therefore, the assignment of exclusive customers can be defined as an "intra-brand restraint", while the horizontal division of markets is, by definition, an "inter-brand restraint" (which affects products that should compete against each other).

In principle, exclusive customer allocation and exclusive territories can only be considered to constitute an abuse of dominance if they allow a dominant undertaking to exercise its individual market power more effectively. For example, in certain cases, exclusive customer allocation may result in price discrimination between different groups of customers, in markets where such discrimination would not be possible if several retailers were competing to capture those customers. By splitting final customers by categories or territories, and by assigning each of those categories or territories to a certain retailer, the dominant undertaking can get each group of

²⁹ An example of assignment of exclusive territories could be the case of a retailer that becomes the sole reseller of the beverages marketed by a dominant undertaking in a certain city or state, while an example of exclusive customer allocation, based on non-geographic criteria, could be the case of a retailer that has the exclusivity to sell those beverages to bars and restaurants, while there is another retailer who is the only one allowed to sell those products to supermarkets and drug stores.

³⁰ See, for instance, "CNDC vs. Acfor and Igarreta", National Court of Criminal Economic Law, Room 1, 27/12/1983.

customers to pay a different price, without generating incentives for retailers to compete against each other (in order to capture the group which is paying higher prices).

The exploitative effect resulting from customer allocation agreements between different retailers is similar to the one that occurs under minimum resale price maintenance, since it implies the imposition of an intra-brand restraint within a set of retailers. However, the assignment of exclusive customers or territories can also generate efficiency gains, related to reductions in transportation, distribution and marketing costs of the products under analysis. For example, in cases where goods must be transported to commercial outlets in order to be bought by final consumers, the assignment of exclusive territories can help to avoid duplication of transportation costs.³¹ Additionally, this conduct may ensure a more efficient storage of products, and it may also help to take advantage of economies of scale or economies of density (which would otherwise be lost if several retailers were allowed to operate in the same geographic area and to supply the same customers).

As occurs in resale price maintenance and exclusive dealing cases, the effects of exclusive customer allocation and exclusive territories on the general economic interest will be evaluated by weighing the abovementioned efficiency gains with the possible anticompetitive effects derived from the exercise of market power. In general, if those effects are not very significant (for example, if the reduction in intra-brand competition that results from exclusive customer allocation takes place in a context where there is a strong inter-brand competition), then this vertical restraint will not be capable to cause harm to the general economic interest.

Moreover, even when a dominant firm faces scarce competition from other firms, exclusive customer allocation may not be able to induce an increase in its market power. This can happen when, for some reason, the dominant firm is unable to discriminate prices between different groups of customers or to carry out any other commercial policy that may harm consumers as a result of the assignment of exclusive customers or territories. In such cases, that assignment can be considered as a practice which does not harm the general economic interest, and, therefore, it will not be a violation of Section 1 of Act No. 27,442.

V.7.4. Conditional discounts

As mentioned in Section V.2 of these guidelines, it may happen that a dominant undertaking in a certain market decides to implement a price discrimination scheme, consisting of selling certain units of a product at a lower price, under the condition that the customers perform, or abstain from performing, a certain behavior (and, conversely, selling other units at a higher price, if their buyers do not comply with the established condition). In this circumstance, the dominant undertaking would be implementing a scheme of "conditional discounts", which would be a particular case of the conduct described in Section 3, Sub-Section h) of Act No. 27,442.

Conditional discounts can also be seen, in certain cases, as a variation of exclusive dealing, like the one described in section V.7.2 of these guidelines. In those circumstances, conditional discounts can also be analyzed as a possible infraction to Section 3, Sub-Section g) of Act No. 27,442, which refers

³¹ For instance, if two retailers sell the same amount of a certain product, but each of them operates in a different city, they will travel, on average, a smaller distance than if they had to transport their product in both cities and between those cities.

to situations in which a purchase is subject to the prohibition of “using, purchasing, selling or supplying goods or services that were produced, processed, distributed or marketed by a third party”.

As a general rule, conditional discounts will be seen as capable of producing an exclusionary abuse of dominance in the same cases than the imposition of exclusivity. This is due to the fact that the most common condition that generates a possible abuse is the one related to purchasing a good or service exclusively or predominantly from a dominant undertaking. This situation determines the existence of "exclusivity discounts" and "loyalty discounts".

Exclusivity discounts imply conditioning a price reduction to buying a good or service exclusively from a certain firm (without buying any amount from its competitors). Loyalty discounts, in turn, imply conditioning price reductions to the relative share of that firm within the total purchases of a customer.³² In some cases, this kind of pricing scheme can also be implemented through "volume discounts", that is, through discounts conditioned on the amount purchased by each buyer, and not on the share of that amount within total purchases. These volume discounts, however, rarely have the same effect than exclusivity or loyalty discounts, since, in principle, they are not conditioned on factors related to the possible exclusion of competitors.

In order to assess whether conditional discounts are capable to induce a situation of exclusionary abuse of dominance, the Enforcement Authority will primarily evaluate the feasibility that they may generate a cost increase to competitors of the dominant undertaking, or even their complete exclusion from the market.³³ For this to occur, the following factors will be taken into account:

- a) The share of the market affected by the conditional discount scheme, and the proportion of the dominant firm's sales that have effectively benefited from that scheme;
- b) The amount of the discount, and its ability to increase the cost of the dominant firm's competitors, when these competitors try to sell their products to the dominant firm's customers;³⁴
- c) The feasibility for those competitors to replicate the discount scheme that that the dominant firm

³² For instance, a price reduction can be considered as an exclusivity discount if a firm charges a price of \$100 per unit to customers who also buy from other suppliers, and a price of \$80 to those who solely buy from it. Conversely, the same firm would be implementing loyalty discounts if it charged \$80 to its exclusive customers, \$85 to those customers who buy 90% of their stock from that firm and 10% from other suppliers, \$90 to those who buy 80% of their stock from that firm and 20% from other suppliers, etc.

³³ See, for instance, “Editorial Amfin vs. AGEA”, Decision 336/1998, Secretary of Industry, Commerce and Mining.

³⁴ To illustrate this point, it may be useful to consider a hypothetical example. If a dominant undertaking supplies 90% of a retailer's purchases, while its competitor supplies the remaining 10%, then under certain circumstances an exclusivity discount of 11% on the price of the dominant firm's product will be enough to harm its competitor, since that competitor will not be able to compensate a customer that loses the dominant firm's discount (not even by giving away its products). Suppose, for example, an initial situation where both firms sell their products at \$100 per unit, and the retailer buys 90 units from the dominant undertaking and 10 units from its competitor, thus paying a total amount of \$10,000. In this case, the retailer will prefer to buy 100 units from the dominant undertaking with a 11% discount (thus paying \$8,900), instead of buying to both firms and paying \$9,000 to the dominant undertaking and an additional amount, no matter how small it be, to its competitor.

offers to its customers;³⁵ and

d) The likelihood that competitors of the dominant firm have to abandon the market because they are unable to sell their products to customers who choose to take advantage of the discounts offered by the dominant firm.

When a conditional discount scheme causes the exclusion of the dominant firm's competitors, it works in a similar way than a predatory pricing scheme, analyzed in section V.2 of these guidelines. Therefore, in some cases, it may be necessary to check whether the price at which competitors of a dominant undertaking would have to sell, in order to effectively compete in a market, is below their direct incremental cost, or below the direct incremental cost of the dominant undertaking.³⁶

Like other vertical restraints that have been analyzed in this section, the restraint consisting in imposing conditional discount schemes to certain customers (or agreeing with those customers to implement conditional discount schemes) is also able to generate some procompetitive benefits, which imply that such schemes may not be harmful to the general economic interest. Some of those benefits have already been mentioned in previous sub-sections, such as the ones related to:

a) Encouraging retailers to provide customer services or other activities that tend to improve quality or service in relation to the products that they resell;

b) Encouraging the dominant undertaking to carry out specific investments that can benefit its retailers or customers; or

c) Taking advantage of economies of scale, related to the volume of products purchased by the dominant undertaking's retailers or customers.

It is also worth mentioning the fact that, given that conditional discount schemes imply offering price reductions on the dominant undertaking's sales, those reductions can somehow be passed through consumers (thus inducing an increase in consumers' surplus). However, since the effects of conditional discount schemes can sometimes be assimilated to those of predatory pricing, it may

³⁵ Considering the hypothetical example developed in the previous note, it could be possible for a competitor of the dominant undertaking to offer its customers a similar discount scheme, and thus be able to induce some of them to buy exclusively or preponderantly from it. In such case, in principle, exclusivity or loyalty discounts would not have exclusionary effects, and would probably lead to a situation where 90% of the retailers end up buying exclusively from the dominant undertaking, while the remaining 10% of them become exclusive customers of its competitor. In some markets, however, this situation would be impossible if consumers of the products marketed by the retailers are only willing to buy a limited proportion of the goods provided by the competitor of the dominant undertaking. In such case, there will not be any retailer willing to stop buying predominantly from the dominant firm, and this is precisely the factor that causes the exclusion of that firm's competitors.

³⁶ Notice that, in this context, it is not necessary for a dominant firm to sell at a "net discount price" that is itself lower than its direct incremental cost. Returning to the hypothetical example developed in the previous footnotes, and assuming that such incremental cost is \$50 per unit (both for the dominant firm and for its competitor), a net price of \$89 (resulting from applying a discount of 11% to the original price of \$100) is considerably above that cost. However, if the competitor has to lower its own price to zero in order to effectively compete against the dominant firm, then the pricing scheme of that dominant firm puts the competitor in a situation where it is forced to sell below its direct incremental cost (or, alternatively, to abandon the market).

also be necessary to assess the harm to the general economic interest that could occur if the dominant undertaking actually manages to eliminate its competitors, or to prevent them from growing and competing effectively.

Similarly, since a conditional discount scheme can be seen as a particular case of price discrimination, it may be useful to examine its impact on the general economic interest by comparing its effect *vis à vis* a hypothetical situation without conditional discounts (i.e., without discrimination). Thereon, it will be relevant to estimate whether, absent all conditional discounts, a dominant firm will find more profitable to charge the full price to all its customers, or if, conversely, it will prefer to set lower prices for everybody (but abandoning the imposition of conditional clauses that may have exclusionary effects).