International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Competition Commission and Competition Tribunal of South Africa
Date: 11 December 2009

Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

Yes, refusal to deal is recognised as a possible violation of South African antitrust law. Some aspects of the definition above, including whether margin squeeze can fall under our explicit prohibitions on refusals to deal (sections 8(b) and 8(d)(ii) of our Competition Act, no. 89 of

1998), rather than the general prohibition on exclusionary conduct (section 8(c), discussed below), have not been clarified by our competition law authorities yet.

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

Section 8 of the Competition Act, no. 89 of 1998, says that :

> It is prohibited for a dominant firm to -
> (a) charge an excessive price to the detriment of consumers;
> (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
> (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
> (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –
> (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

'Exclusionary act' is defined in the Competition Act as: *an act that impedes or prevents a firm entering into, or expanding within, a market*. (See section 1(x)).

'Essential facility' is defined in the Competition Act as: *an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers*. (See section 1(viii)).

Margin squeeze has previously (in *Senwes*, discussed below), been examined under section 8(c) above, the general class of exclusionary acts. Nonetheless, the Competition Commission of South Africa (the investigative and prosecutorial body under South African legislation) has investigated margin squeezes under both sections 8(b) and section 8(d)(ii) above. Section 8(a) is also relevant for margin squeeze cases, in that an input priced excessively might give rise to a margin squeeze.

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

The provisions apply only to dominant firms.

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

A refusal to deal is a civil violation.

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

We have only been able to identify the cases where there has been a referral by the Competition Commission (the investigative and prosecutorial authority, hereafter referred to as the Commission) to the Competition Tribunal (our adjudicative body, hereafter referred to as the Tribunal) (see our response below to question 6).

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

   For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief. Please state whether any of these cases were brought using criminal antitrust authority. Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

The Commission has not brought any refusal to supply actions that relate to intellectual property rights. In the table below we deal with refusal to supply scarce goods (prohibited under section 8(d)(ii) of the Competition Act), Refusal to supply an essential facility (prohibited under section 8(b)), and margin squeeze (dealt with in *Senwes* under 8(c)). Most of the decisions of the Tribunal and the Competition Appeal Court (a specialist competition appellate body, referred to hereafter as the *CAC*) emanate from private actions, discussed below under question 7.

	Refusal to supply (8(d)(ii))	**Refusal to supply an essential facility 8(b)**	**Margin squeeze**
Investigated			
Referred to Tribunal, and contravention found by Tribunal and CAC			1 (Senwes)
Referred to Tribunal, and no contravention found			
Referred to Tribunal, and decision pending	2 (Sasol / Kynoch / Omnia; Telkom, 2009)	2 (Telkom, 2004; Telkom, 2009)	1 (Telkom, 2009)
Referred to Tribunal, and subsequently withdrawn	1 (MTN / Cell C)	1 (MTN / Cell C)	

Links to all of the publicly available decisions on refusals to deal, including decisions relating to private litigation (and conducted under interim relief provisions of the Competition Act), are available as follows:

Refusal to deal

Competition Tribunal decision in: The Bulb Man (SA) (Pty) Ltd and Hadeco (Pty) Ltd, case number 81/IR/Apr06, available at: http://www.comptrib.co.za/list_judgement.asp?jid=579 , hereafter referred to as *Bulb Man.*

Competition Tribunal decision in: York Timbers Ltd and SA Forestry Company Ltd, case number 15/IR/Feb01, available at: http://www.comptrib.co.za/list_judgement.asp?jid=19 , hereafter referred to as *York Timbers.*

Competition Appeal Court decision in: York Timbers Ltd and SA Forestry Company Ltd, case number 09/CAC/May01, available at: http://www.comptrib.co.za/list_judgement.asp?jid=516

Refusal to supply an essential facility

Competition Tribunal decision in: National Association of Pharmaceutical Wholesalers & Others and Glaxo Wellcome & Others, case number 45/CR/Jul01, available at: http://www.comptrib.co.za/list_judgement.asp?jid=106 , hereafter referred to as *Glaxo.*

Competition Appeal Court decision in: National Association of Pharmaceutical Wholesalers & Others and Glaxo Wellcome & Others, case number 15/CAC/Feb02, available at: http://www.comptrib.co.za/list_judgement.asp?jid=521

Margin squeeze

Competition Tribunal decision in: Competition Commission and Senwes Limited, case number 110/CR/Dec06, available at: http://www.comptrib.co.za/list_judgement.asp?jid=724 hereafter referred to as *Senwes.*

Competition Appeal Court decision in: Competition Commission and Senwes Limited, case number 87/CAC/Feb09, available at: http://www.comptrib.co.za/list_judgement.asp?jid=1099

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

Private parties are allowed to challenge a refusal to deal in the Competition Tribunal, which is the adjudicative body in our set of competition authorities. While the Tribunal is not a 'court', the Tribunal does have similar rules to civil courts. Private parties are not allowed to approach the civil courts for relief on any competition law related issues. No private suits have ever been successful in respect of refusals to deal and refusal to supply an essential facility.

In terms of process: First, the private party must lodge a complaint with the Competition Commission, which has one year to investigate the complaint. This deadline can be extended by agreement with the complainant. If the Commission does not refer the complaint to the Tribunal, or if the complainant does not agree to an extension after the one year investigation period has passed, the complainant can bring the matter to the Tribunal. Note that the Commission is not a decision making body in this process; the Commission investigates and, where applicable, prosecutes complaints. A private party can also apply for interim relief in the Tribunal during the course of the Commission's investigation period. There have been at

least three private actions on refusal to deal: *Bulb Man*, *York Timbers*, and *Glaxo*. Two of these were litigated (and lost by the complainant) under the interim relief procedure (*Bulb Man* and *York Timbers*). *Glaxo* was litigated in the ordinary course by referring the complaint to the Tribunal after the Commission's investigation period expired.

Both the *Bulb Man* and *York Timbers* failed at the Tribunal stage because in both cases the complainant that was refused supply was not a *competitor* of the respondent in question. Section 8(d)(ii) explicitly requires that the dominant firm in question refuses to supply a *competitor*. It is not clear whether the Tribunal has extended this requirement to section 8(c); invariably, section 8(c) is pleaded alongside section 8(d)(ii). Nonetheless, the Tribunal and CAC place a greater onus on complainants to prove an 8(c) contravention, in that the onus is on complainants to show that the anti-competitive effects of the exclusionary conduct complained of outweigh its pro-competitive effects, while an 8(d) contravention places the onus on respondents to show that pro-competitive effects outweigh anti-competitive effects; complainants need only prove the latter. At the Competition Appeal Court ("CAC") stage, the court ruled in *York Timbers* that indeed there was no refusal to deal, since in fact the complainant could buy saw logs (the essential facility or scarce good in question) on the open market; the 'refusal' was in respect of volumes supplied under contract at lower prices to open ('spot') market prices.

Some of the issues that arose in *Glaxo* are discussed below in response to question 21.

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

    a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

The key competitive concern arising from a refusal to deal is that a dominant firm in engaging in this conduct preserves, creates, or threatens to create a dominant position (with substantial market power) in any market. While neither actual nor threatened exclusion is explicitly required, there is a requirement that rivals must be substantively foreclosed from the market in question; this is discussed below in 8(b). Substantial foreclosure is measured for example by examining changes in market share of the dominant firm's rivals in the relevant market in which effects are alleged. Examples of the kinds of evidence examined on substantial foreclosure are provided from the Tribunal's decision in *Senwes* in (14) below.

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

The Competition Tribunal in *Commission vs. SAA* held that the test for anti-competitive effects under the Competition Act are (1) If there is substantial foreclosure of the market to rivals; (2) actual harm to consumers.[1] Harm to consumers therefore need not be proven in order to prove a contravention. Nonetheless in *Senwes, SAA* and all other exclusion cases decided on the Tribunal did examine whether consumers were harmed in addition to assessing whether substantial foreclosure of a market to rivals had occurred.

[1] See Commission vs. SAA, Competition Tribunal case number 18CRMar01, available at: http://www.comptrib.co.za/list_judgement.asp?jid=110

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

Intent has not been examined in South African refusal to deal decisions.

d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

Prior course of dealing has not been examined in South African refusal to deal decisions.

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

This has not been examined in South African refusal to deal decisions.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.
   If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

Yes, our Competition Act recognizes a separate offence for refusal to supply an essential facility. See responses under question 2 (where section 8(b) of the Act is reproduced).

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.
    a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?
    b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

These issues have not been examined under our competition law.

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

This issue has not been examined under our competition law. There are cases pending in the Tribunal that should provide greater clarity on this issue (*Telkom (2004) and Telkom (2009)*, discussed below in response to question 22).

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

This issue has not been examined under our competition law. There are cases pending in the Tribunal that should provide greater clarity on this issue (*Telkom (2004) and Telkom (2009))*, discussed below in response to question 22).

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

This issue has not been examined under our competition law. There is a case pending in the Tribunal that should provide greater clarity on this issue (*Telkom (2009))*, discussed below in response to question 22).

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

    You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

Margin squeeze is not explicitly recognised in the Competition Act but has been explicitly recognised in case precedents. In *Senwes* (the margin squeeze case cited above), the Tribunal found that Senwes's rivals were all but excluded from trading grain from a certain point in the year.

Senwes concerned a grain silo monopolist monopolizing grain trading activities by charging low prices for storage to farmers who used their trading services and denying the same low price (a 'cap' on storage fees) to trading rivals. In *Senwes,* the Tribunal evaluated:

> (1) Evidence from traders about how the denial of the cap to them led to a change in their trading patterns in the Senwes area;
> (2) Evidence about the change in percentage holdings in grain under the cap indicating that Senwes's share of grain under cap in the Senwes area had as a percentage increased substantially at the expense of traders;
> (3) Evidence of two tenders that Senwes won which the trader witness alleged could only have been done because of the effects of a margin squeeze on them; and
> (4) Evidence that Senwes was winning more post-cap tenders than it had prior to the removal of the cap.

The Tribunal did not require that *Senwes* be dominant downstream in the trading market in order for the margin squeeze to be found to be a contravention of section 8(c). The CAC upheld the Tribunal's decision.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

Refusal to supply an essential facility (section 8(b)) does not set out an explicit weighing of pro-competitive and anti-competitive effects but nonetheless requires that a complainant or the Commission prove that the dominant firm in question refuses "to give a competitor access to an essential facility when it is *economically feasible* to do so". This suggests that a weighing of pro-competitive and anti-competitive effects arising from the conduct in question might be warranted. Therefore, the refusal to supply an essential facility provision under our Competition Act is not a *per se* prohibition.

As discussed above, a complainant must show under section 8(c) that the conduct in question has anti-competitive effects that outweigh the pro-competitive effects of the conduct. On the other hand, once a complainant has proved anti-competitive effects arising from conduct alleged under section 8(d)(ii) (the prohibition on refusals to deal), the onus is on the respondent to show pro-competitive gains that outweigh the anti-competitive effects of the refusal to deal.

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

Other than the requirement that the respondent be dominant, there are no explicit safe harbours for a refusal to deal.

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

See response to question 15 above.

Remedies

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

Remedies have not been decided in a refusal to deal case. A hearing on remedies is pending in the *Senwes* case.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

This issue has not been examined in our competition law.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.

This issue has not been examined in our competition law.

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

It is important to note our Act explicitly stipulates that the anti-competitive effects must outweigh technological, efficiency or other pro-competitive gains.

In addition, the CAC held in *Glaxo*, cited above, that:

> *To demand that a dominant firm should grant access to its facilities is a substantial intervention on the part of a competition authority. The widening of the application and scope of the essential facilities doctrine can have harmful economic effects such as discouraging investment in infrastructure. An investor might be reluctant to invest for fear of a third party demanding a "free ride" on the fruits of such investment.*
>
> *See Competition Law Richard Whish 4th edition page 617.*
>
> *Certainly, from a reference to decided cases, judicial application does not appear to favour a wide interpretation and application of the doctrine. As stated by Whish "the essential facilities doctrine must be applied with caution".*

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.

The Commission referred several refusal to deal complaints against *Telkom,* a regulated telecommunications firm originally established by the government as a fixed-line monopoly, in 2004, which the Tribunal has not yet heard due to procedural challenges by Telkom. The Commission has recently in 2009 referred a complaint alleging margin squeeze, among other things, against Telkom..

In respect of the Commission's first referral against Telkom in 2004, the Commission alleged contraventions of section 8(b), refusal to supply an essential facility and section 8(c), the

general prohibition on exclusionary acts. Telkom's conduct was also alleged to have contravened section 8(d)(i), inducement of suppliers or customers not to deal with a competitor, section 8(a), the prohibition on excessive pricing, as well as section 9, the prohibition on price discrimination.

In the Commission's 2009 referral against Telkom, margin squeeze was alleged as a constructive refusal to supply an essential facility (8(b)), a constructive refusal to supply scarce goods (8(d)(ii)), and an exclusionary act (8(c)). Telkom*'s* conduct in that case was also alleged to contravene section 8(a), the prohibition on excessive pricing, and section 8(d)(iii), the prohibition of tying and bundling. The excessive pricing allegation was linked to the exclusionary effect of the margin squeeze.

These cases are therefore likely to establish important precedent on refusal to deal in South Africa.