



**International Competition Network  
Unilateral Conduct Working Group  
Questionnaire**

**Agency Name: Competition Commission of Pakistan**

**Date: 18 November 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.

**The Competition Ordinance, 2007 (hereinafter the "Ordinance") specifically prohibits 'refusal to deal' by a dominant firm.<sup>1</sup> Though the term 'refusal to deal'**

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<sup>1</sup> A firm is referred to as an undertaking in the Competition Ordinance, 2007 in Pakistan

**and its specific forms have not been defined under the Ordinance but in some recent cases of the Competition Commission (CCP) it has been interpreted as a refusal to provide access to an essential facility and exclusive dealing in the same connotation mentioned in the introductory paragraphs above.**

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 3 (3) (h) of the Ordinance prohibits refusal to deal by a dominant firm in the following words.**

Section 3:- (1) No person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.

(3) the expression 'practices referred to in subsection (2) shall include, but are not limited to—

(h) refusing to deal

**The term refusal to deal referred in the Ordinance is a broad term and can be interpreted to include its specific forms i.e. IP licensing, essential facility, margin squeeze and exclusive dealing. However, for the conditional refusal to deal such as tying<sup>2</sup> and making the conclusion of contract subject to acceptance of supplementary obligations which have no connection with the subject of the contract,<sup>3</sup> separate provisions have been provided in the Ordinance.**

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

**The relevant provisions i.e. section 3 (3) (c), (d) & (h) of the Ordinance apply only on 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?

**Under the Ordinance refusal to deal attracts civil penalty and CCP can impose penalty up to Rs 50 million<sup>4</sup> or 15% of turn over.**

### *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)?

**CCP was established in October 2007. In two years of its existence, three in-depth investigations of refusal to deal in the matters of Karachi Stock Exchange, National Refinery and McDonald's have been conducted by the CCP.**

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<sup>2</sup> Section 3(3) (c) of the Competition Ordinance, 2007

<sup>3</sup> Section 3(3)(d) of the Competition Ordinance, 2007

<sup>4</sup> Approx US\$ 603,000

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.

**CCP is quasi judicial body and comes under the administrative system. Two investigations conducted in the cases of refusal to deal culminated into final orders<sup>5</sup> passed by the CCP with the findings on refusal to access essential facility and exclusive dealing.**

**In the first case of refusal to deal and refusal to access essential facility<sup>6</sup> it was found that commonly listed securities on all the three exchanges<sup>7</sup> in Pakistan constitute approximately 90% of the total trading volume of listed securities in Pakistan. Out of 90% around 87% of the market share is with the KSE<sup>8</sup> while the combined share of ISE<sup>9</sup> & LSE<sup>10</sup> is only 13%. For historical reasons the best price for a particular security is mostly available at the KSE only. Bids and offers of investors entered into trading systems of other stock exchanges cannot be matched with those entered at KSE, even if the security being traded is listed at both exchanges. LSE and ISE offered KSE a proposal for united trading platform which was out rightly refused by the KSE. KSE's refusal to deal clearly has a negative effect on competition as it contributes to price disparity and prohibits price discovery for the consumers not placing their orders through KSE. There was no "objective justification" for refusal on the part of KSE of 'best price' to ISE and LSE, because its preeminence does not arise from any peculiar effort on part of KSE's members. The Bench held that the trading platform of KSE is an essential facility being controlled by KSE which cannot reasonably be duplicated. The option of setting up a substitute for such a facility does not appear possible and viable. KSE has failed to establish or provide any convincing arguments that access to best price can be provided through any other facility or in any other manner as things presently stand. Therefore, KSE's refusal to allow access to its platform through which all the customer/investors in the relevant market would have equal access to the "best price" available in the market**

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<sup>5</sup> KSE Order and SIZA Food Order

<sup>6</sup> In the Matter of Show Cause Notice Dated April 10, 2008 for Violation Of Section 3 Of The Competition Ordinance, 2007, M/s Karachi Stock Exchange (Guarantee) Limited

<sup>7</sup> Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange.

<sup>8</sup> Karachi Stock Exchange

<sup>9</sup> Islamabad Stock Exchange

<sup>10</sup> Lahore Stock Exchange

amounts to exclusionary and anticompetitive conduct and lacks a reasonable business justification.

Full text of the order in English language is available at <http://www.cc.gov.pk/Downloads/Latest%20KSE-Order%2029-5-09.pdf>

In the second case<sup>11</sup> of refusal to deal, a local company manufacturing beverages filed a complaint that McDonald's franchisee SIZA Foods (pvt) Ltd had refused to entertain its offer to sell non-alcoholic beverages, *i.e.*, Malt 79, Cindy, Lemon Malt, Original Lemonade and Big Apple, as McDonald's had exclusive arrangements with Coca-Cola company. During investigation it was found out that McDonalds enjoys dominant position in the market of foreign fast food chains. It also revealed in the investigation that requests for supply of soft-drinks were made by McDonalds only to the Coca-Cola Company. However, having understood the concerns of the Commission, SIZA volunteered to give the undertaking that in conformity with the requirements of its franchise agreement, other beverages will also be placed in a chiller/beverage cooler within its restaurants and at kiosks.

Full text of the order in English language is available at <http://www.cc.gov.pk/Downloads/Final%20Order-Siza%20Foods.pdf>

In these two abovementioned orders passed by the CCP, order in SIZA Food case was a consent order and the undertaking was also submitted by the firm whereas in the KSE case an appeal was filed before the Supreme Court of Pakistan which is *sub-judice*.

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 not allowed to challenge a refusal to deal in court. CCP is the only forum where proceedings on violation of competition law can be initiated. CCP can take action in three modes either through complaint by private parties, reference by Federal Government or by *suo moto* action.**

#### *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?

**Foreclosure is the main concern in a refusal to deal case. By foreclosure it is meant that actual or potential competitors are completely excluded or threatened to be excluded. Threat to foreclosure is determined from the circumstances that evidentially prove that the rivals are disadvantaged and they may not compete effectively in the market. In the absence of actual or**

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<sup>11</sup> In the Matter of Murree Brewery Company Limited Vs. SIZA Foods (Private) Limited (File No. 03 /Sec-3/CCP/08)

**threatened exclusion, other harms resulting in market distortion are assessed which hinder the competition still existing in the market.**

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

**Demonstration of actual harm caused to consumers is not a pre-requisite for a refusal to deal case. Likelihood of abuse is sufficient evidence to declare a refusal to deal as unlawful.**

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

**Intent is not relevant. The relevant provisions under the Ordinance do not require demonstration of intent.**

- 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?

**There is no major difference in the evaluation of a refusal to deal if there is a history of dealing between the parties. The same principles of ‘per se’ or ‘rule of reason’ and business justification are applied depending on the facts of the case and the circumstances peculiar to the competition. However, prior history would certainly buttress the case of the complainant.**

- 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?

**In case of refusal to deal with firms that are not rivals, same criteria are applied to evaluation process. If a firm sells its product to everyone except its main rival, it becomes relevant if the main rival does not find any other supplier in the market and its exclusion results in substantial foreclosure of competition in the market.**

- 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.

**There is no separate provision provided under the Ordinance regarding refusal to access to “essential facilities”. In a recent case involving essential facility the issue was addressed under the provision dealing with the prohibition of “refusing to deal”.**

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.

**The Ordinance does not provide the definition of ‘essential facility’. Recent order passed by the CCP laid down three conditions to assess a refusal to deal involving an “essential facility” which are as follows:**

- (i) **The dominant player controls access to an essential facility;**

- (ii) **The facility cannot be reasonably duplicated by a competitor;**
- (iii) **The dominant player denies access to a competitor; and**
- (iv) **It was feasible for the dominant party to grant access.**

**Example of refusing access to “essential facility” and the factors that led to the finding have been explained above under question 6 in the case of KSE.**

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?

**The CCP has not investigated or given findings on any case involving refusal as to intellectual property so far. Therefore, it is bit early to comment on its analysis process.**

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

**While analyzing refusal to deal in a regulated industry, certain factors such as regulatory conduct or statutory obligations are kept in mind.**

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

**Most of former state owned monopolies are in network/regulated sectors. Sector specific regulators ensure access to essential facilities to new entrants. However, if CCP takes cognizance of a former state monopoly there will be no change in the analysis.**

#### *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?

**The Ordinance provides a prohibition on refusal to deal under a broad term of ‘refusing to deal’. This generic term can be interpreted to include ‘constructive’ refusal to deal. The CCP has not yet addressed the issue of constructive refusal to deal in any of its cases and how the CCP would interpret is remain to be seen.**

#### *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?

**The Ordinance provides a prohibition on refusal to deal under a broad term of “refusing to deal”. This generic term can be interpreted to include “margin squeeze”. The CCP has not yet addressed the issue of margin squeeze in any of its cases involving refusal to deal. It is bit early to give any comment on the methodology of evaluation of the margin squeeze.**

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?

### ***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.

**If the conduct of the dominating undertaking is unreasonably exclusionary, it is presumed to be illegal unless the defendant shows any objective business justification to rebut the presumption.**

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

**No there is no presumption of legality or safe harbor for a refusal to deal by a dominant firm.**

### ***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.

**The CCP considers objective business justification as the possible defence for any refusal to deal. In the evaluation CCP weighs pro-competitive effects against the anti-competitive effects and due consideration is given as to whether the business justification is legitimate and that it directly or indirectly enhances welfare of consumers. Burden of proof of objective business justification is on the defendant.**

### ***Remedies***

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

**In the case of SIZA Food (see question 6) undertaking was submitted by the firm and agreed to provide shelf space for the beverages of the complainant.**

**In the case of KSE (see question 6) for refusal to deal six months were given to KSE to devise a unified trading system to ensure availability of and access to the best price of commonly listed securities on all three exchanges. Upon failure to comply with this direction KSE will be liable to pay a penalty of Rs.50 million at the end of the six month period and thereafter an additional penalty of Rs.250,000/- per day if the noncompliance continues.**

**The unified trading system will allow KSE to charge a certain amount as market fee to access its trading platform. All three stock exchanges will negotiate and devise a common formula for the market fee and determine its amount with their mutual consent.**

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?

**Refusal to deal in the case of KSE (see question 6) is an example of unlawful refusal to deal arisen in a regulated industry. The remedy of Unified Trading System granted by the CCP was based on the provision already existed in the securities laws of Pakistan. However, the provision under the securities law was not mandatory for the defendant to follow and gave room to the defendant to engage in the exclusionary conduct prohibited under the Ordinance.**

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

**The CCP is bestowed with wide powers to grant relief in the case of abuse of dominance. Apart from imposing penalty the CCP can pass any order it deems appropriate and necessary to restore competition in the relevant market.**

### *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?

**Important policy consideration is that competition in the market should be effective by giving all market players equal opportunities and no one should be allowed to take unfair advantage of its market power and that consumer welfare should be enhanced in the form of greater output at lower price. However, another policy consideration is that forced sharing should not curb the innovation because when firms investing to create new valuable assets get lower returns from what they expected they lose incentive to invest.**

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.