International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: The Competition Commission of Singapore
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Refusal to Deal

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

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

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

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

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

General Legal Framework

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

Yes, a refusal to deal is recognized as a possible violation of the Competition Act ("the Act"). In the CCS Guidelines on the Section 47 Prohibition against abuse of dominance, a refusal to supply may constitute an abuse, for example, where a dominant undertaking stops supplying

an existing buyer, or withholds supplies from a new buyer, with the result of (likely) substantial harm to competition. A refusal to supply could result from a refusal to allow access to an essential facility. In limited circumstances, a dominant undertaking's refusal to supply a licence for use of its intellectual property may also constitute a possible violation, for example, if the refusal to supply concerns intellectual property rights relating to an essential facility with the effect of likely substantial harm to competition.

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 47(1) of the Act states that any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

The CCS Guidelines on the Section 47 Prohibition (paragraphs 11.18, 11.26 to 11.31) and the CCS Guidelines on the Treatment of Intellectual Property Rights (paragraph 4.6 to 4.8) set out some of the factors and circumstances which CCS may consider in determining whether the activities of an undertaking may infringe the Act. The Guidelines indicate the manner in which the CCS will interpret and give effect to the provisions of the Act when making its assessment.

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

The provisions listed in CCS' response to question 2 apply only to dominant firms. Vertical agreements are excluded from the Section 34 Prohibition against anti-competitive agreements, and the exclusion includes provisions relating to the assignment or use of intellectual property rights, unless these provisions constitute the primary object of the agreement.

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?

All types of anti-competitive conduct, including refusal to supply, are administrative violations which attract civil penalties under the Competition Act.

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)?

CCS has yet to fully complete a full investigation of a refusal to supply case since the Competition Act came into force on 1 January 2006 although there have been cases at preliminary review.

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.

Under an administrative system, CCS has not found any infringements based on a refusal to supply since the Competition Act came into force on 1 January 2006.

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.**

Section 86 of the Act sets out that any person who suffers loss or damage directly as a result of any anti-competitive conduct, and where CCS has already found that the conduct was an infringement of the Act, shall have a right of action for relief in civil proceedings in a court. As CCS has to date not found an infringement based on a refusal to supply since the Competition Act came into force on 1 January 2006, there have been no instances of such private actions.

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?**

CCS considers that undertakings generally have the freedom to decide whom they will supply. Therefore a refusal to supply, even by a dominant undertaking, would not normally be an abuse. However, in certain circumstances, a refusal to supply by a dominant undertaking may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified.

CCS will evaluate the facts and circumstances of each alleged abuse situation on a case-by-case basis, in order to determine whether the firm in question's refusal to supply a rival (or rivals) has an anticompetitive effect on the market. In its evaluation, CCS's primary focus will be on the actual or potential effect, regardless of whether the practice is threatened or actual, and whether the firm excludes one or more rivals from 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?**

It is necessary to demonstrate that the effect of a practice has led to actual substantial harm or will lead to likely substantial harm to competition, and that there is no objective justification for the practice. It is not necessary to specifically demonstrate consumer harm. For example, CCS may consider harm to the competitive process to be sufficient. It should however be emphasized that harm to competitors is not sufficient.

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

CCS will evaluate the facts and circumstances of each alleged abuse situation on a case-by-case basis. In its evaluation, CCS's primary focus will be on the actual and potential effect of the practice in question. Internal documents of the firm in question may play a role in indicating intent, and may contribute to CCS's analysis of effects.

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?

A prior course of dealing between the parties is not a requirement for finding liability. CCS will evaluate the facts and circumstances of each alleged abuse situation on a case-by-case basis. However, CCS recognizes that in the course of business a firm may refuse to work with a rival with whom it has never supplied for reasons unrelated to a desire to abuse a dominant position. For example, the dominant firm may refuse to supply a firm it has not previously worked with due to inadequate proof of the firm's credit worthiness or reputation. On the other hand, where a dominant firm has withdrawn its supply from a firm, these arguments may seem less compelling unless there is evidence that the customer had in some way failed to meet its commitments. In either case, if arguing that a refusal to supply was objectively justified, the dominant firm will still have to show that it has behaved in a proportionate manner in defending its legitimate commercial interest, and has not taken more restrictive measures than are necessary.

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?

CCS will evaluate the facts and circumstances of each alleged abuse situation on a case-by-case basis.

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.

Firms will generally have the freedom to decide with whom they will deal; forcing firms to supply customers against their will could have repercussions on the incentive for investment and innovation in the economy. Therefore a refusal to supply, even by a dominant firm, will not normally constitute an abuse. However, CCS recognizes that a refusal to provide access to "essential facilities" could be an abuse of a dominant position. Reflecting the desirability that individual businesses retain the right to select their own trading partners, CCS will typically apply the essential facilities standard to any case where it was alleged that a refusal to supply had foreclosed competition.

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.

CCS considers a facility to be essential only where it can be demonstrated that access to it is indispensable in order to compete in a related market, and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy) (CCS Guidelines on the Section 47 Prohibition paragraph 11.28).

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

For competition law purposes, CCS will regard intellectual property rights as being essentially comparable to any other form of property. The right to exclude is the basis of property rights, and CCS recognizes that ownership of intellectual property ("IP") does not normally impose on the IP owner an obligation to license the use of that IP to others, even where the IP ownership confers market power on the IP owner. Therefore a refusal to supply a license, even by a dominant firm, is not normally an abuse.

In limited circumstances, a dominant firm's refusal to supply a license may constitute an abuse of dominance, for example, if the refusal concerns an IP right that relates to an essential facility, with the effect of (likely) substantial harm to competition. The analysis does not differ in this instance from a refusal to supply in a situation not involving IP, in that CCS may consider if the dominant firm is able to objectively justify its conduct, and whether the dominant undertaking has behaved in a proportionate way in defending its legitimate commercial interest. However, CCS notes that essential facilities are rare in practice and IP rights are generally unlikely to create essential facilities.

In determining whether a refusal to supply a license constitutes an abuse, the impact on the technology and innovation markets will be considered. CCS is aware that care must be taken not to undermine the incentives for firms to make future investments and innovations.

The definition of "essential facilities" for IP is defined in the same way as a situation involving non-IP products and services.

a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

No, the type of intellectual property involved does not change the analysis.

b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

The actual or likely effect of such a practice will be assessed on a case-by-case basis.

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

In Singapore, the provisions in the Competition Act relating to an abuse of a dominant position do not apply to any agreement or conduct which relates to any goods or services regulated by any other written law or code of practice relating to competition, under the purview of a sector specific regulator. Examples of sector specific regulators with competition rules or codes of practices concerning competition include telecoms, postal, electricity, media and airport services which also have ex ante regulatory powers. In principle, when a firm is obliged by regulation to supply its product at a sanctioned price, it has no ability to refuse dealing with any customer, regardless of whether this firm has market power or not.

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

No, the analysis does not change. The Act applies to all undertakings i.e. all natural or legal persons capable of commercial or economic activity. This is regardless of ownership of the entity, whether they are foreign-owned, Singapore-owned or owned by Government or its statutory boards. Undertakings could be individuals operating as sole traders, businesses, companies, firms, partnerships, societies, co-operatives, business chambers, trade associations or even non-profit organisations. However, some former state-created monopolies in Singapore are subject to sectoral regulations, which can be more stringent than competition law in view of the ex ante regulatory powers of the sectoral regulator. The business conduct of these monopoly undertakings are excluded from the Act, as discussed in CCS's answer to Question 11.

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?

Yes, CCS recognizes the concept of a "constructive" refusal to supply. CCS's definition of a "constructive" refusal to supply is similar to the definition in the introductory paragraphs above, whereby the effective price or the terms at which a dominant firm supplies its rivals are intended to prevent its rivals from making the purchase. In particular, CCS accepts that a margin squeeze could constitute an effective refusal to supply.

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?

Yes. A 'margin squeeze' is likely to constitute an abuse of dominant position where it harms (or is likely to harm) competition. It is required that the vertically-integrated firm holds a dominant position in the upstream market, and that there is actual or likely effect on competition in the downstream market. In contrast, predatory pricing requires demonstration of dominance and effects in the same market, but does not require vertical integration with any upstream or downstream entities.

In testing for the effects of a margin squeeze on competition, CCS will generally determine whether an as-efficient downstream competitor would earn (at least) a normal profit when paying the input prices set by the vertically integrated undertaking. The downstream arm of the vertically integrated undertaking is typically taken as the proxy for the as-efficient competitor. The CCS Guidelines on the Section 47 Prohibition have set out the cost standards used for assessing predatory pricing, but not for margin squeezing. Temporary margin squeeze is unlikely to constitute an abuse, because it is unlikely to cause sustained harm on competition.

When the margin squeeze occurs in a regulated industry, or in an industry where a duty to deal is imposed by some other law, then the conduct may be excluded from the Act. In principle, however, where upstream supply is regulated at a sanctioned price, margin squeezing is still possible in conjunction with the downstream pricing of the vertically-integrated firm.

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.

No, there are no stated circumstances under which refusal to supply (or any specific variant of it) is presumed illegal.

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 are no stated circumstances under which refusal to supply (or any specific variant of it) is presumed legal.

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.

In cases of alleged abuse, CCS may accept objective justifications by the dominant firm such as the buyer's poor creditworthiness, or capacity constraints. However, the dominant firm will still have to show that it has behaved in a proportionate manner in defending its legitimate commercial interest, and it should not take more restrictive measures than are necessary to do so. CCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct. It will still be necessary for the dominant undertaking to show that its conduct is proportionate to the benefits claimed. Such conduct will not be allowed if its primary purpose is to harm competition.

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?

Where CCS proposes to make a decision that a refusal to supply (or any specific variant of it) is an infringement under the Act, CCS may give a direction to the parties concerned, or to such persons as it considers appropriate, to bring the infringement to an end. CCS may also impose a financial penalty of up to 10% of the turnover of the business of the firm in Singapore for each year of infringement, up to a maximum of three years.

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?

In Singapore, any agreement or conduct which relates to any goods or services regulated by any other written law or code of practice relating to competition, under the purview of a sector specific regulator are excluded from the Act and will be dealt with by the sectoral regulator. Examples of sector specific regulators with competition rules or codes of practices concerning competition include telecoms, postal, electricity, media and airport services.

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.

See response to question 18.

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?

In determining whether a refusal to supply constitutes an abuse of dominance, the impact on the technology and innovation markets will be considered. Care must be taken not to undermine the incentives for undertakings to make future investments and innovations, especially where the essential facility is a result of a previous innovation.

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.

Nil.