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

**Agency Name: Commission on Protection of Competition (Bulgaria)**
**Date: 4 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.

   **Answer:** Refusal to deal is violation of the Law on Protection of Competition (LPC). According to the LPC the term refusal to deal is broader than the definition used for the purposes of this questionnaire as it encompasses not only refusal to deal with rivals, but

refusal to deal with actual or potential customers in order to impede their economic activity. Nevertheless, the answers below are in accordance with the definition in the questionnaire.

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)?

   **Answer:** The legal basis for the Commission on Protection of Competition (CPC) to address a refusal to deal is Art. 21, p. 5 of the LPC. As regards margin squeeze the legal basis is Art.21, p. 1 of the LPC:

   Art. 21. The conduct of undertakings with monopoly or dominant position, as well as the conduct of two or more undertakings with a collective dominant position that may prevent, restrict or distort competition and impair consumers' interests, shall be prohibited, such as those which:

   1. impose directly or indirectly purchase or sale prices or other unfair trading conditions;
   …
   5. unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity.

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

   **Answer:** The relevant 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?

   **Answer:** A refusal to deal is an administrative 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)?

   **Answer:** During the period 2000-2009 the CPC has conducted 26 in-depth investigations of a refusal to deal with a rival.

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.

   **Answer:** During the past ten years the CPC found unlawful conduct in 17 refusal to deal cases, 3 of which are margin squeeze cases. 13 of these cases concern essential facilities, 1 – IP-licensing, 3 – other input. The anticompetitive effect in these cases is that the refusal threatens to exclude the competitors of the dominant undertaking as they would face serious difficulties in implementing their activities without the respective goods/services, access to essential facility or IP license.

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.

**Answer:** 16 of the CPC decisions finding a violation concerning refusal to deal were appealed before the Supreme Administrative Court. 11 of them were upheld, 3 were repealed and 2 are still pending.

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.

**Answer:** The leading refusal to deal cases are:

By Decision No. **858/2008** the CPC imposed two pecuniary sanctions on "International Fair Plovdiv" AD (IFP) for infringement of Article 18, p.1 of the LPC (repealed)[1] related to imposing unfair trading conditions and price abuse in the form of margin squeeze.

The case was initiated ex-officio on the basis of received information and upon request of the "Association of Companies providing fair and exhibition services – Bulgaria".

The CPC found that IFP had a dominant position on two vertically connected markets of services – the upstream market of "right to construct" and "approval of a design plan", and the downstream market of "building of exhibition premises".

In the course of investigation, the CPC found out that the company had taken advantage of its dominant position in the market of "right to construct" and "approval of a design plan" by raising the price of the service in relation to rival companies and at the same time maintaining the price of the complex "construction" service, offered by IFP to the exhibitors. In this way, IFP deprived the other participants on the market of the opportunity to make profit, thus managing to exclude its competitors from the downstream market.

Additionally, the investigation showed lack of transparency concerning the conditions, in which the IFP can refuse to sign a construction contract, as well as the right of the company to change unilaterally the General Terms of Participation in the Fair and the participation fee rates. This has allowed IFP to impose unfair trading conditions, including prices, without taking into account the interests of the customers.

The CPC ruled on termination of the infringements.

Detailed English summary of the decision can be found at
http://www.cpc.bg/Competence/AbuseOfDominanceDecisions.aspx

By its Decision No. **135/2006** the CPC imposed sanction on Bulgarian Telecommunications Company (BTC) for violation of Art. 18(1) LPC (repealed). The Commission established that the BTC was abusing its dominant position by applying a

[1] The new Law on Protection of Competition came into force on 2 December 2008

price-squeezing strategy in providing unbundled local loop access for broadband ADSL services. The Commission's analysis revealed that, in the absence of feasible alternatives to its well-deployed fixed network, the BTC enjoys a quasi-monopolistic position in the wholesale market. The BTC abusively applied a price-squeezing technique by charging its unbundled local loop access services to alternative operators at wholesale prices higher than the retail prices charged by the BTC to its own subscribers. Thus, new entrants lose economic incentives to compete with the BTC in the provision of retail services to end users.

The abusive price squeezing technique of the BTC covered the entire territory of Bulgaria and raised effective entry barriers to operators willing to enter the telecommunication market for broadband data and fixed voice services by gaining local loop access. Thus, BTC competitors were disabled from building their own networks based on the copper infrastructure of BTC and using them to provide fixed voice and data transmission services similar to those of the former incumbent. The commercial and pricing policy of the BTC puts at risk the development of a competitive environment in the recently liberalized telecommunication sector, and thus truncates the choices available to end users.

By its Decision No. **16/2006** the CPC imposed a pecuniary sanction on Ecopack Bulgaria AD for infringing Art. 18 of the LPC (repealed). The company was found to be using unfair practices for attracting of customers. Furthermore, Ecopack was found guilty of exercising economic coercion on companies, which are subject to waste recycling obligations under the Waste Management Act (WMA), to conclude recycling contracts exactly with Ecopack. To this end, the infringer was relying on its exclusive rights to use the Green Point mark. The Commission imposed another sanction on the company as it refused to grant Green Point sub-licenses. The Commission also ordered termination of the infringement.

The Commission's analysis revealed that Ecopack Bulgaria AD, based on its exclusive rights on the Green Point mark, was coercing the companies caught by WMA obligations to become Ecopack members, purporting that such membership was the only way for them to lawfully use the Green Point mark on the packaging of their goods. Ecopack Bulgaria AD had made use of the mark conditional on membership in its collective organisation rather than on the actual use of package recycling services. As a result the producers and importers of packaged goods had limited freedom to choose a service provider, which in turn prejudiced the interests of competitors and the competitive structure of the relevant market. The investigation also found that Ecopack Bulgaria AD refused to grant a Green Point sub-license to another countrywide collective recycling system. Based on the so established facts, the CPC imposed a sanction for abuse of dominant position and ordered the company to put an end to its anti-competitive market behaviour.

By its Decision No. **820/2007** the Commission imposed a pecuniary sanction on the company Avtobusni prevozi AD, city of Pleven, for infringing Art. 18 LPC.

Avtobusni prevozi AD, which is a carrier, operates Pleven Bus Station. This bus station, which is the only one in Pleven, is owned by Pleven Municipality and is included in the capital of Avtobusni prevozi AD. All passenger carriers, when performing public-service transport of passengers contracted to them by their respective municipalities, have to stop at Pleven Bus Station where it is the starting, interim or terminal point of their routes. Thus the bus station is an essential facility insofar as without having access to it, the undertakings in the downstream market for bus transport of passengers by approved

transport schemes can not provide service to their clients. Being given the right to operate Pleven Bus Station, Avtobusni prevozi AD enjoys freedom to conduct its business policy autonomously from its customers and is virtually able to impose on bus companies whatever conditions it wishes for the usage of the essential facility. The Commission held that Avtobusni prevozi AD had a dominant position at the relevant market, which was defined as the market for the right to use the facilities of Pleven Bus Station and provide related passenger services at the bus station.

The Commission proved that Avtobusni prevozi AD was using its dominant position to squeeze customers into contracts for bus-station services to its liking and exploit the market situation exclusively to its own benefit. The Commission qualified this behaviour as abuse of dominant position in the meaning of LPC Art. 18(1), which prohibits direct or indirect coercive imposition of prices or other unfair terms of trade. In order to impose these terms, Avtobusni prevozi AD refused access to the bus station to several carriers.

It was also found that in determining the fees for ticketing services in the contracts for 2007, Avtobusni prevozi AD applied a non-market criterion that the fee was only based on whether or not the bus lines belong to a specific transport scheme. The CPC took the view that applying different ticketing fees on the basis of this criterion was unfair. By such a practice Avtobusni prevozi AD have imposed market rules, which discriminate part of its customers and render them in a more disadvantaged position at the related market for public transport of passengers. The Commission qualified this behaviour of Avtobusni prevozi AD as an infringement of LPC Art. 18(3).

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.

   **Answer:** Private parties have the right to challenge a refusal to deal in court in accordance with Art. 104 LPC:

   Art. 104. (1) For damages caused as a result from committed infringements of this Law the person at fault shall owe an indemnity.
   (2) Entitled to an indemnity shall be all natural persons and legal entities who have suffered damages even where the infringement has not been directed against them.
   (3) The claims for indemnity shall be lodged under the procedure set forth in the Civil Procedure Code.
   (4) The decision of the Supreme Administrative Court which has entered into force, and which upholds a decision of the Commission finding a committed infringement of this Law, shall be binding upon the civil court as regards the fact whether the decision of the Commission is valid and compliant with the law. A decision of the Commission, which has not been appealed against or the appeal application against it has been withdrawn, shall have binding force upon the civil court as well. In these cases the right to claim indemnity shall lapse by limitation within 5 years as of the coming of the decision of the Supreme Administrative Court or of the Commission into force.

### *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?

**Answer:** A refusal to supply goods or provide services shall be qualified as an abuse in case of proving that there is an objective possibility for the good/service to be supplied and that the practice of the dominant undertaking threatens to exclude from the market one of its contractors thus damaging the market on which the latter carries out its activities. It has to be pointed out that there shall be significant influence on the activities of the contractor who would face serious difficulties in implementing its activities if the respective goods/services have not been supplied.

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

**Answer:** Actual or potential consumer harm should be demonstrated.

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

**Answer:** So far the CPC doesn't have a decision finding that the intent for refusal to deal is an infringement.

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?

**Answer:** No

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?

**Answer:** No

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.

**Answer:** Refusal to provide access to "essential facilities" is not a distinct offense, it is recognized as a type of refusal 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.

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

**Answer:** No.

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?

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

    **Answer:** If the refusal to deal is in a regulated industry, the CPC also takes into account sector-specific regulatory provisions and cooperates with the sector regulator (collects information etc.).

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

    **Answer:** When the refusal to deal is made by a former state-created monopoly, the violation can be qualified also as limiting production, trade and technical development to the prejudice of consumers as it aims to prevent or restrict competition in a market, which is recently liberalized. Thus the dominant undertaking hinders the development of the sector and restricts the possibilities for improvement of the quality.

***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?

    **Answer:** Yes, the CPC recognizes the concept of a "constructive" refusal to deal and it doesn't differ from the definition in the questionnaire. If the "constructive" refusal to deal has double anticompetitive aim, it can be qualified at the same time as imposing of unfair conditions and refusal to deal. The CPC analyses whether the price is unreasonably high or the quality is sufficiently degraded. In order to prove that the price is unreasonably high the CPC analyzes the cost of the product, the sale price including the transport costs and the prices for other clients.

***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?

    **Answer:** Yes, the CPC recognizes the concept of margin squeeze. There is margin squeeze if the following criteria are fulfilled: the undertaking is vertically integrated i.e. it

has activity on both upstream and downstream market; the undertaking is dominant in the upstream market so that its competitors are dependant on it; the difference between the retail prices that the dominant undertaking charges on its end consumers on the downstream market and the wholesale prices on the upstream market that the dominant undertaking charges on its competitors is not sufficient to cover the costs for the provision of the end product or service; the dominant undertaking is active on the downstream market to a significant degree. In case of margin squeeze the competitors of the dominant undertaking cannot offer to their end customers retail prices competitive to the retail prices offered by the dominant undertaking.

The CPC has no competence to assess whether prices approved by the sector regulator are unreasonably high, but the CPC is competent to analyze the correlation between regulated and unregulated prices. Besides in margin squeeze cases in a regulated industry the fact that the retail prices are regulated by price ceiling and the wholesale prices are based on the costs and are ex ante regulated by the sector regulator doesn't mean that the dominant company is not responsible as it can initiate the change of these price in accordance with the sector legislation.

***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.

    **Answer:** No.

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.

    **Answer:** No.

***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.

    **Answer:** The CPC analyzes whether there is objective reason for refusal to deal such as technical reasons etc. The undertaking which justifies the refusal to deal with some reason bears the burden of proof that this reason is objective.

***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?

    **Answer:** When there is a violation, the CPC orders termination of the infringement. In refusal to deal cases this means that the dominant undertaking should offer contract under non-discriminatory conditions and at reasonable prices, to grant access to essential facility etc.

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?

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.

    **Answer:** In accordance with the new Law on Protection of Competition, which came into force on 2 December 2008, the CPC has the right to impose behavioural and/or structural measures to restore competition. The CPC shall impose structural remedies only where there is no behavioural remedy which would have equivalent effect, or when such behavioural remedy which has equivalent effect would be more onerous for the respective undertaking than the structural remedy.

***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?

    **Answer:** The prohibition for refusal to deal by a dominant undertaking is not absolute. There should be sufficient degree of freedom as regards conclusion of contracts and economic initiative while not undermining competition and consumers. The obligation to deal shouldn't affect the incentives of the dominant undertaking for innovation and investment.

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.

    **Answer:** In accordance with the new LPC, the CPC will have the possibility to impose behavioural and/or structural measures incl. in refusal to deal cases.