nal Competition Network
Conduct Working Group
Questionnaire

Agency Name: The Competition Authority, Ireland
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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 by a dominant firm is potentially a violation of the Irish Competition Act.

The Competition Authority's Guidance Note on Refusal to Supply does not provide a formal definition of "refusal to supply". In practice, the definition is in line with the one defined in the introductory paragraphs above, except that it is not limited to actual or potential competitors only. A refusal to deal with a non-rival, for instance, by a dominant supplier to a buyer, could also amount to a breach of the Competition Act.

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)?**

Two provisions in Irish competition law relate to refusal to supply:

- Section 4 of the Competition Act prohibits arrangements between firms that have as their object or effect the prevention, restriction or distortion of competition; and

- Section 5, by contrast, prohibits the abuse of a dominant position by a single firm.

Section 4 is concerned with co-ordinated behaviour by firms, and Section 5 unilateral behaviour by firms. For the purpose of this questionnaire, Section 5 of the Competition Act applies.

To provide guidance to those making complaints, so as to improve the quality of the complaints, and to assist businesses and others to comply with competition law, the Competition Authority published a "Guidance Note" on the issue of refusal to supply/deal. This is available at the Competition Authority's website at

http://www.tca.ie/PromotingCompetition/GuidanceNotes/RefusaltoSupply/RefusaltoSupply.aspx

There are currently no separate provisions for specific forms of refusal in Ireland, e.g. IP licensing, essential facilities, or margin squeeze.

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

The relevant provisions relating to unilateral conduct only apply 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?**

Refusals to deal by a dominant firm can in principle amount to either civil or criminal violations. However, for practical reasons refusals to deal are treated as civil violations.

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)?**

   Despite the large number of complaints that the Competition Authority receives that fall under the heading of "refusals to supply/deal", there have been only between five and ten 'in-depth' investigations of refusal to deal by the Irish Competition Authority.

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 Irish Competition Authority is not a decision making body. A finding of an abuse of dominance can only be made by the Courts. The Competition Authority has the same rights as private individuals to bring cases before the Court on civil matters. The question of a refusal to deal has arisen in three matters before: ILCU, Galileo and JNRS.

   ILCU:

   In July 2003, the Competition Authority initiated proceedings against the Irish League of Credit Unions ("ILCU"). During High Court proceedings in 2004, the Competition Authority alleged that ILCU occupied a dominant position in the market for Savings Protection Scheme ("SPS") services (SPS is a stabilization scheme established to protect the savings of members of a credit union in the event of insolvency or other financial default on the part of the credit union) and that ILCU was abusing its dominant position in the SPS market by tying the provision of SPS to the provision of credit union representation. The Competition Authority also suggested, but very much as a subsidiary argument, that this conduct was anti-competitive by reason of abusive refusal to supply SPS by a dominant firm.

   The High Court found in favour of the Competition Authority. However, the High Court judgment was overturned on appeal to the Supreme Court, which concluded, in May 2007, that there were not two separate markets for representation and SPS services and,

therefore, no question of abusive tying could arise. After having dealt with the issue of the market definition, the Supreme Court considered that there was no need to analyse the issue of dominant position, its abuse or any objective justification. The judgment also indicated that there cannot be an abusive refusal to supply, although it did not go into further detail on this point given that it was presented as a subsidiary argument.

The Supreme Court judgment is available at:

http://www.bailii.org/ie/cases/IESC/2007/S22.html

Galileo:

The Competition Authority received a complaint from a travel technology developer, in March 2003, alleging that Timas Ireland, trading as Galileo Ireland, had unjustifiably refused access to its computerised reservation system. Galileo Ireland operates the computerised reservation system used by most travel agents in Ireland. It was alleged that the refusal to allow the complainant access to Galileo Ireland's computerised reservation system was preventing the development of new technology for the travel industry that would enable travel agents to search more effectively and efficiently for information, such as airfares, on behalf of their customers.

The Competition Authority investigated this complaint primarily as a possible abuse of a dominant position, in breach of Section 5 of the Competition Act, 2002, and Article 82 of the Treaty establishing the European Union. The Competition Authority agreed to conclude its investigation without recourse to legal proceedings having received legally binding commitments from Galileo Ireland to deal with future requests for access to its computerised reservation system in an open, transparent, proportionate and non-discriminatory manner. Galileo Ireland asserted that its behaviour was not in breach of the Competition Act and denied that the facts alleged in the complaint were true. Nevertheless, in the interest of resolving the investigation, Galileo Ireland offered to give undertakings to the Competition Authority.

JNRS:

In May 2006 the Competition Authority initiated an investigation following a complaint which was submitted on behalf of Metro, the free Dublin newspaper, with regard to the refusal of the Joint National Readership Survey (JNRS) to admit it to its readership survey. JNRS conducts a readership survey to measure the readership of newspapers and magazines that offer an advertising platform in Ireland. The JNRS survey is used by publications to sell advertising space to advertisers and advertising agencies acting on behalf of clients. All major daily newspapers, Sunday newspapers, evening newspapers and over 50 regional newspapers are included in the JNRS survey.

Metro's complaint was that the JNRS refusal makes it impossible for Metro to compete for advertising revenues in Ireland due to the fact that independently verifiable statistics on readership are essential before advertising agencies can justify spending significant amounts of money to place advertising in a publication on behalf of their clients.

As part of its investigation the Competition Authority obtained information from JNRS, publishers of newspapers and magazines, advertising agencies, media buying agencies as well as others. Subsequently, the Competition Authority advised JNRS of the following preliminary findings:

- Free newspapers such as Metro would not be able to compete effectively for national brand advertising against major daily newspapers unless they are able to provide independent verifiable readership statistics such as provided by the JNRS survey;

- The ability to attract national brand advertising was important to the financial viability of Metro and other newspapers;

- There was no reasonable alternative to the JNRS survey in Ireland.

The Competition Authority was of the preliminary view that the refusal to include Metro and other free newspapers in the JNRS survey would distort competition in the market for the supply of national brand advertising in print media and thereby would be a breach of Section 4 and Section 5 of the Competition Act 2002. On foot of the Competition Authority investigation, the JNRS amended its admission criteria to provide for participation in its survey by free newspapers such as Metro without admitting any liability and in January 2008 the Competition Authority closed the investigation.

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 14 of the Competition Act 2002 gives a right of private action in the Courts to any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under Section 4 or 5. To the Competition Authority's knowledge, there have been two refusal to deal cases brought to the courts by private parties in Ireland.

Meridian – Eircell Case

Meridian Communications Ltd, owner of the mobile services provider Cellular 3 Ltd, took a case under the statutory right of private action against the Eircom group subsidiary Eircell Ltd. Concerning wholesale access to the mobile phones market in 2000. Meridian's argument was that Eircell, by terminating its volume discount agreement with Meridian, was abusing its dominant position by refusing to supply Meridian at the corporate rate.

In 2001 the High Court ruled that, despite having a 60 percent share of the market, Eircell did not have a dominant position because, inter alia, Eircell's market share was declining rapidly (Eircell's only competitor, Esat Digifone, had won around 40 percent of the market in just two years), and the significance of the high barriers to market entry was "vastly reduced" by the low barriers to expansion. The Court also ruled that Eircell's mobile network was not an essential facility which had to be made available to other market operators.

Heatons – O'Neills Case

In April 2009 Heatons, a retailer of Gaelic sport replica kits, initiated competition proceedings against O'Neills, a manufacturer of replica kits. Heatons are seeking a declaration that the actions of O'Neills in refusing to supply and/or constructively refusing to supply and or/or applying dissimilar conditions to equivalent transactions in respect of the sale of GAA replica kits to Heatons are contrary to section 5 of the Act 2002 and/or Article 82.The matter is still before the courts.

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?

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

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

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?

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?**

Given the limited judicial experience with refusal to deal cases, the best source of guidance on this matter under Irish Domestic competition law is the Competition Authority's Guidance on Refusal to Deal. Therein it states that where a refusal to supply is based on a decision by a single firm, it is not in breach of the competition law unless (a) the firm concerned can be shown to be "dominant" in the relevant market, (b) the refusal can be categorized as an abuse, and (c) there is no objective justification for the refusal.

Exclusionary effect is one of the competitive concerns regarding a refusal to deal. If the practice excludes or threatens to exclude one individual customer from the market, it does not necessarily constitute an abuse. An abuse may only arise when the refusal to deal is likely to have a negative effect on competition in the downstream market.

The Competition Authority takes an effects-based approach to analysing potential abuses rather than looking at the form of the abuse. This links to the self-imposed requirement to show consumer harm. The Competition Authority does not take action in relation to, for example, disputes between a seller and a buyer that do not ultimately harm consumers.

A history of dealing limits the set of objective justifications that can be relied upon. For instance, a claim that it is not feasible to supply would need to be justified on the basis of clear unplanned drastic changes in circumstances. Nonetheless, a company may have

entered into an arrangement with an undertaking that is not a competitor and find that the agreement did not work out as planned. In these circumstances the history may itself be the reason for the refusal to renew. If, even in these circumstances, a dominant firm would still have an objective justification there is no need to consider the normal issues of market definition, dominance and abuse.

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.

The Competition Act 2002 does not define "essential facilities", but the "essential facilities" doctrine may be applied in various cases. In practice, the Competition Authority adopts the definition of "essential facilities" found in community law, which is that an essential facility is a facility without access to which competitors cannot provide complementary services on a neighboring market. The Competition Authority does not have specific formal guidelines on refusal to deal cases involving an "essential facility".

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?

In the case of IP rights, a refusal to deal is not in itself unlawful. Apart from the conditions discussed in Question 9, the refusal to deal has to be shown to prevent the emergence of a new product for which there is consumer demand. This is the case for all types of intellectual property.

A refusal to provide interface information to make a product interoperable might constitute a refusal to deal. The Competition Authority has not had any in-depth investigations in this area.

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

In principle, the fact that a sector is regulated does not preclude the possibility that a refusal to deal may violate competition law. So far the Competition Authority has not had any in-depth investigations in regulated industries.

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

The analysis should not change in the case of a former state-created monopoly. The Competition Authority has not taken any cases in this respect.

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?

Constructive refusal to deal is recognized by Irish and European competition law. The Competition Authority has not taken any cases relating to constructive refusal to deal.

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?

The Competition Authority has not dealt with any in-depth investigation in this area.

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.

The Competition Authority takes an effects based approach towards refusal to deal. The refusal to deal is not presumed illegal in any case.

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.

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.

If a refusal to deal is objectively justified, the refusal can be allowed. The justifications might include non-payment for goods, unauthorized altering of goods, non-compliance with the firm's criteria for selective distribution, shortage of stocks, disrupted supply, etc. A dominant firm may also be allowed to demonstrate efficiency gains from a refusal to deal. In such a case the onus moves to the dominant undertaking to show that their conduct is justified and proportionate.

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 for refusals to deal could include providing mandated access to the relevant product. For example, in Galileo, Galileo Ireland gave undertakings to deal with future requests for access to its computerized reservation system in an open, transparent, proportionate and non-discriminatory matter. The Competition Authority has not dealt with pricing issues in previous cases.

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?

There have been no cases involving remedies in regulated sectors.

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.

No.

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?

The Competition Authority takes the view that, in general, firms should be able to contract with parties of their choice. The Competition Authority is only concerned with whether or not the RTD has an effect on competition, and ultimately, on consumer welfare. The Competition Authority, will not as a matter of policy, attack refusals that do not clearly harm consumers.

Incentives for innovation and investment are an important element in evaluating a refusal to deal case. An obligation to deal will not be placed upon the dominant firm if it harms 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.

N/A