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

**Agency Name: Konkurrensverket / Swedish Competition Authority**
**Date: 2009-11-03**

## 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, the Swedish jurisdiction recognizes a refusal to deal as a possible violation of Swedish antitrust law, even if there is no explicit legal provision to that effect.***

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)?

   ***Chapter 2, Article 7 of the Swedish Competition Act, which corresponds to Article 82 EC. This provision should be applied in accordance with relevant EC guidelines, guidance and case law. Further, even if the application of Swedish competition law corresponds to EC law in** substance**, there may be** procedural **differences.***

   ***There are no special provisions for specific forms of refusal.***

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

   ***They 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?

   ***It is a civil/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)?

   ***The SCA does not have exact statistics covering the last ten years. Estimation would yield approximately ten cases.***

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.

   ***One case: Telecom – ADSL – margin squeeze – case pending in court***
   ***Anticompetitive effect: In general, a margin squeeze implies that competition is distorted since as efficient competitors are foreclosed, or at least put a competitive disadvantage. In other words, a margin squeeze has likely negative effects on competition. It is not necessary to prove actual effects to find an abuse of a dominant position. Notwithstanding, in this case the SCA found that the dominant firm had more rapid growth in the market than its competitors and that the main competitor's market entry was delayed.***

   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.

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Please state whether any of these cases were brought using criminal antitrust authority.

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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.

***Case summary of the case mentioned above:***

***In December 2004 the SCA sent a summons application to the Stockholm District Court requesting that the telecommunications company TeliaSonera should pay fines amounting to 144 MSEK (approx. 14 MEUR) for having abused its dominant position. The SCA's investigation showed that from April 2000 to January 2003 the margin between the price charged by TeliaSonera for wholesale ADSL products and its retail price for ADSL services to consumers was insufficient to cover TeliaSonera's incremental downstream costs.***

***TeliaSonera is the incumbent telecommunications operator in Sweden and the company owns the nationwide copper based access network. The relevant downstream market was defined as the national market for broadband access to Internet to residential customers, including ADSL, cable and fibre networks. The relevant wholesale product is a reseller product, which includes both broadband access using ADSL technology and Internet connectivity. The reseller product was not subject to sector regulation, but was instead supplied voluntarily by TeliaSonera. TeliaSonera is required to give access to its fixed access network through local loop unbundling (LLUB). However, the opinion of the SCA is that access through local loop unbundling was not a viable alternative for rivals downstream during the time of the abuse.***

***The SCA used the "as efficient competitor test" and made the margin squeeze test by comparing the margin between retail and wholesale prices with TeliaSonera's own long run incremental costs downstream.***

***The Stockholm District Court decided on 30 January 2009 to stay proceedings and to request a preliminary ruling from the European Court of Justice.***

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 may claim damages in a district court.***
- ***Following a complaint, the SCA may require an undertaking to terminate an infringement of the prohibition laid down in Chapter 2 Article 7 of the Swedish Competition Act. Such an obligation shall take effect immediately, unless other provision is made. If the SCA decides in a particular case not to impose such an obligation, the Market Court may do so at the request of an undertaking that is affected by the infringement. Such a right to legal action, however, does not exist if the decision of the Swedish Competition Authority is based on Article 13 of the Council Regulation (EC) No 1/2003.***

***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?

***See above, question 2.***

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

***As pointed out above, the Swedish application of competition law on refusal to deal is in line with the view of the European Commission. The SCA refers to GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS.***

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

***See above.***

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?

***See above.***

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?

***See above.***

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.

   ***There is no specific notion of essential facility under Swedish competition law. The essential facility doctrine is applied in the same way under the Swedish Competition Act as under Article 82 EC.***

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

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

    ***The SCA's policy is in accordance with relevant EC case law and the European Commission's guidance on Article 82 EC.***

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

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

***Yes, the analysis may be affected if a refusal to deal occurs in a regulated industry. The high legal standard under EC competition law as to when a duty to deal may be imposed, aims at protecting incentives for investments and innovation. A balance must in each case be struck between the interest of competition in a market and the interest of not deterring investments. In a regulated industry, this balancing of incentives may have already been made by the regulator. This is especially the case in the telecommunications market, where the regulatory framework is based on competition law principles.***

***However, the existence of regulatory obligations is not a pre- prerequisite of refusal to deal to violate competition law. Neither does the existence of regulatory obligations prevent the application of competition law.***

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

***No, but if the incumbent is a former legal monopoly it may still hold a very strong market position.***

***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 term "constructive refusal to deal" is usually not used, rather the term "unfair trading conditions" is used for conducts such as those named in the introductory paragraphs in the questionnaire.***

***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 SCA considers margin squeeze to be a form of abuse of a dominant position. The Swedish Competition Authority has so far treated margin squeeze cases as pricing abuses and has not analysed them as refusal to deal cases. Under what circumstances a margin squeeze violates competition law is currently subject of a request for a preliminary ruling from the European Court of Justice (case C-52/09). See above, question 6.***

***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.

***There is no presumption of illegality.***

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.

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***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 the dominant firm is able to show objectively justifiable grounds for its refusal to deal, it would not be considered an abuse of dominance.***

***The SCA refers to relevant EC case law for examples of objectively justifiable grounds.***

***It is for the party invoking the justification to bear the burden of proof.***

***Remedies***

18. What remedies for refusals to deal were applied in the cases discussed in questions 5 and 6? 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 ADSL case mentioned above, the infringement had stopped, hence no remedy was applied.***

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?

***Although the abuse in the ADSL case occurred in a regulated*** *industry****, the relevant*** *products* ***were themselves not subject to any regulation.***

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.

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***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 SCA's policy is in accordance with EC case law and the European Commission's guidance on Article 82 EC.***

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.

    ***Regarding margin squeeze, the conditions that must be fulfilled are under debate. However, as mentioned above (question no. 14), this question is subject to a request for a preliminary ruling from the European Court of Justice (case C-52/09).***