International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Swiss Competition Authority
Date: 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.**

   Yes, our legislation does recognize a refusal to deal as a possible violation of our antitrust law. (see Answer to question 2) In our legislation, the term "refusal to deal" also cover cases where a dominant undertaking refuses to deal with customers in the upstream/downstream market.
   Our legislation contains different examples of behaviors that are unlawful. The behaviors from the definition in the introductory paragraph are included in these examples.

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)?**

   The relevant provisions regarding refusal to deal in the Federal Act on Cartels and other Restraints of Competition (ACart) are Paragraph (1) and (2) of the Article 7, which deals with enterprises having a dominant position.

   According to Article 7 (1) ACart, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.

   According to Article 7 (2) (a) any refusal to deal (e.g. refusal to supply or to purchase goods) is in particular considered unlawful.

   Apart from this specific provision, our legislation contents other examples of behavior that can account for refusal to deal, as understand in your definition of a "constructive" refusal to deal.

   The following behaviors are in particular considered unlawful:
   - any discrimination between trading partners in relation to prices or other conditions of trade Article 7 (2) (b);
   - any imposition of unfair prices or other unfair conditions of trade Article 7 (2) (c);
   - any limitation of production, supply or technical development Article 7 (2) (e).

3. **Do the relevant provisions apply only to dominant firms or also to other firms?**
   The relevant provisions apply only to dominant firms.
   According to Article 4 Paragraph 2 ACart, dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market.

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?**
   A refusal to deal is an administrative violation that can be fined.
   According to Article 49a ACart, any undertaking that participates in an unlawful agreement pursuant to Article 5 paragraphs 3 and 4 or that behaves unlawfully pursuant to Article 7

shall be charged up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years. The amount is dependent on the duration and severity of the unlawful behavior. Due account shall be taken of the likely profit that resulted from the unlawful behavior.

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)?**
   Our agency has conducted three in-depth investigations regarding Article 7 (2) (a) ACart. Please refer to answer to summaries in answer to question 6 for details.

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.**
   Please refer to summaries below.

   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.
   In the case Watt/Migros-EEF, EEF appealed and the authority of appeal rejected this appeal. Then EEF appealed to the Federal Supreme Court which also rejected the appeal and confirmed the decision of the Swiss Competition Authority.

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

   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 Swiss competition authority can impose directs sanctions for antitrust infringements on terms of Articles 5 paragraphs 3 and 4 (hard core cartels) and Article 7 ACart since April 1st 2004. The Swiss Competition Authority has not imposed any fine to a case of refusal to deal yet as those cases were prior to the amendment of April 1st 2004.

   a) We dealt with a case of a refusal to grant access to an essential facility:
      Migros is a Swiss retailer and is active in the food production industry. The production site of Migros is localized in the district of Fribourg.
      EEF and Watt are two companies active in the production, transmission and distribution of electricity. The distribution network of electricity of EEF is also localized in the district of Fribourg. The network of EEF is connected through transformers to a high tension line, which crosses the West of Switzerland.

Migros broke its electricity supplying contract with EEF and decided to contract with Watt because the electricity offered by Watt was cheaper. The contract with Watt foresees that the electricity produced by Watt will be transported from its production site of electricity to the connecting point with the network of EEF. Then, the electricity will go through the network of EEF to the site of production of Migros. Watt asked EEF to access its network to be able to deliver electricity to Migros. EEF refused to transmit electricity provided by Watt to the site of production of Migros. EEF is, however, ready to discuss the price for electricity with Migros. Besides, EEF considers the behavior of Watt as illegal because it pushes Migros to break its current contract. Finally, Watt did not offer EEF reciprocity, i.e. the use of Watt's network by EEF. Based on those facts, Watt and Migros decided to make a complaint to the competition authority. Watt was active on the same product market: production, transmission and distribution of electricity. But Watt was not active on the same geographic market. EEF was alone on the relevant market (as distribution is regional). Thus the market share was 100%. The Competition Authority established that EEF (in a dominant position) had behaved unlawfully in refusing to transmit electricity provided by Watt to the site of production of Migros.
(Law and Policy on Competition, 2001/2, P. 255)

b) The Competition Authority has already pronounced provisional measure for a case of refusal to deal.
Teleclub AG is holder of a licence for Pay-TV Program. Cablecom is an operator of cable network. Teleclub asked Cablecom for an offer to broadcast the Teleclub signal. Cablecom who held a dominant position on the relevant market used a delay tactic for contract negotiation. According to the provisional measure pronounced by the Competition Authority, Cablecom was obliged to broadcast the digital TV-signal of Teleclub.
(Law and Policy on Competition, 2002/4, P. 567)

c) In the watch industry, the investigation into ETA SA Manufacture Horlogère Suisse (hereinafter: ETA), a subsidiary of the Swatch Group, was concluded with the finding that ETA was abusing its dominant position. ETA has had the intention to discontinue its supply of ébauches (movement blanks) as from January 2006 and thereafter to supply only fully assembled watch movements ("phasing-out"). The investigations revealed that ETA held a dominant position in the market for Swiss made mechanical ébauches up to a unit price of CHF 300.-. The termination of supply has to be regarded as an unlawful refusal to do business and therefore as an abusive practice. For numerous competitors, the implementation of the phasing-out within such a short time meant in practical terms that they had been deprived of the basis for their business activity, as there was no alternative supplier. In an amicable settlement, ETA commited to supply the ébauches until the end of 2008 at the current volume and thereafter for two further years at a reduced volume. This will create a situation in which alternative production plants may be set up. In this case, the objective of the rules was to protect the competitive process by ensuring the deliveries of blanks to third parties.
(Law and Policy on Competition, 2005/1, P. 128)

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.

According to Article 12 Paragraph 1 ACart, a person impeded by an unlawful restraint of competition from entering or competing in a market may request the removal or cessation of the obstacle, damages and reparations in accordance with the Code of Obligations, the

remittance of illicitly earned profits in accordance with the provisions on conducting business without a mandate. The Paragraph 2 adds that obstacles to competition include in particular refusal to deal and discriminatory measures.

According Article 15 Paragraph 1 ACart, if the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred to the Competition Commission for an opinion.

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?

An undertaking, even holding a dominant position, should be is free to choose its marketing policy, its trading partners, its suppliers network and its distribution system. A duty to contract can only be imposed to a undertaking holding a dominant position that behaves unlawfully.

To be prohibited a refusal to deal must fulfill three conditions. 1) The undertaking must be in a dominant position on the market. 2) The refusal to deal must be abusive. 3) There must be no legitimate business reason justifying the refusal to deal.

The arbitrary break of business relations is unlawful if four conditions are fulfilled:
- No real or potential substitute
- The product, service or infrastructure must be essential
- Elimination of competition
- No objective legitimacy

The aims of an undertaking that refuses to deal with a trader partner can be the conservation or increase of its market share, the expansion on an adjacent market, discrimination of a business partner.

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.**

No, our jurisdiction does not contain a specific provision regarding refuse to grant access to "essential facility".
The cases of refuse to provide access to "essential facilities" are covered by Article 7 (2) letter (a): refusal to deal. (refer to the case Watt/Migros-EEF, summary in answer to question 6)

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.

An essential facility is a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means.

10. **Does the analysis differ if the refusal involves intellectual property? If so, please explain.**
According to Article 3 paragraph 2 ACart, the ACart does not apply to effects on competition that result exclusively from the legislation governing intellectual property. However, import restrictions based on intellectual property rights shall be assessed under the ACart.

If the undertaking that refuses to grant the right to use intellectual property rights holds a dominant position because of these rights, then this behavior may be considerate as an abuse.
In Switzerland there is no case law (competition law) concerning refusal to grant license product or service on a intellectual property right.

The fact that an undertaking holds intellectual property rights does not imply a presumption of a dominant position.

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

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

11. **Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.**
According to Article 3 paragraph 1 ACart, statutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of this Act. Such statutory provisions include in particular:
    a. provisions that establish an official market or price system; and
    b. provisions that grant special rights to specific undertakings to enable them to fulfil public duties.

12. **Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.**
No

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, our legislation does recognize the concept of a "constructive" refusal to deal, as defined in the introductory paragraph.

According Article 7 (2) ACart, the following behavior are in particular considered unlawful:

b. any discrimination between trading partners in relation to prices or other conditions of trade;
c. any imposition of unfair prices or other unfair conditions of trade;
e. any limitation of production, supply or technical development.

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, our legislation recognize a concept of margin squeeze but our authority has only dealt with three cases yet and in one case only the margin squeeze was considered as a breach of our law.

In our legislation "margin-squeeze" cases are scrutinized under Article 7 Paragraph (1) and particularly also under Article 7 Paragraph (2) letter b (any discrimination between trading partners in relation to prices or other conditions of trade is in particular considered unlawful.)

A "margin squeeze" is defined as a situation where a dominant enterprise in the upstream market sells to downstream rivals an essential input at conditions which don't permit the competitors on the downstream market to gain sufficient margin to compete.

Our practice is based on one recent case (ADSL II, not published yet). In this case, a comparison was made between the margins of Swisscom (dominant firm) and its competitors and another comparison was made between the margins of these competitors and undertakings (in the same market) in other countries.
The Competition authority imposed a fine of CHF 220 Mio. to Swisscom for a margin squeeze.
Link to the press release (in German) of the case ADSL II: http://www.news-service.admin.ch/NSBSubscriber/message/de/29939

The difference between this margin squeeze case and a predatory pricing one is that the recoupment was made at the same time as the negative margins.

In this case, there was no duty to deal based on a sector specific regulation.

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.**
N/A

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.**
N/A

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.**
As mentioned in the answer to question 8, to be prohibited a refusal to deal must fulfill three conditions. 1) The undertaking must be in a dominant position on the market. 2) The refusal to deal must be abusive. 3) There must be no legitimate business reason justifying the refusal to deal.

The arbitrary break of business relations is unlawful if four conditions are fulfilled:
- No real or potential substitute
- The product, service or infrastructure must be essential
- Elimination of competition
- No objective legitimacy

The undertaking can argue that there are legitimate business reasons justifying its behavior. For instance, ETA argued that delivering only assembled clockwork movements was a mean to fight forged products.

Remedies

18. **What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?**
In the case concerning the ETA-ébauches, ETA committed in an amicable settlement to supply the ébauches until the end of 2008 at the current volume and thereafter for two further years at a reduced volume. This will create a situation in which alternative production plants may be set up. In this case, the objective of the rules was to protect the competitive process by ensuring the deliveries of blanks to third parties.

The prices in force at the time of the amicable settlement were considered as cost-covering prices, including a margin. In the amicable settlement, ETA committed itself to notify each price increase superior to the inflation to the authority. A group of neutral experts is responsible for the authorization of these price increases.

The customers of ETA committed themselves not to resale the ETA-ébauches (not assembled).

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?**
N/A
We can possibly refer to a sector specific 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.**
N/A

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?**
N/A

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.**