International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Office of Fair Trading (UK)
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.

Yes. The UK recognises refusal to deal/supply as a possible violation of competition law. There is no statutory definition of "refusal to supply/deal"; in fact this is simply a short-hand to denote certain abuses broadly covering 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)?

General – relationship between EC and UK law

First, it should be noted that:

a. **where the OFT[1] applies national competition law (i.e. including the Competition Act 1998 (the "CA98")) to an abuse of dominance prohibited by Article 82 of the EC Treaty, it must also apply Article 82 of the Treaty;[2] and**

b. **when applying the CA98, the OFT must ensure, so far as is possible (having regard to any relevant differences between the provisions concerned), that questions arising under the CA98 in relation to competition in the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.[3] In determining any question, the OFT must ensure that there is no inconsistency between the principles it applies and the principles laid down by the EC Treaty and the European Court of Justice (the "ECJ").[4] In addition, the OFT must have regard to any relevant decision or statement of the European Commission.[5]**

[1] It should be noted that a number of sectoral regulators in the UK also have the power to apply these provisions. The comments in the questionnaire represent the views of the OFT and have been neither endorsed nor disagreed with by these sectoral regulators.
[2] See Article 3 of the Modernisation Regulation: EC Regulation 1/2003 OJ [2003] L 1/1, [2003] 4 CMLR 551.
[3] Section 60(1) of the CA98.
[4] Section 60(2) of the CA98.
[5] Section 60(3) of the CA98.

Legal basis for refusal to supply

Article 82 prohibits,

> ***Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it…in so far as it may affect trade between Member States.*** **[Emphasis added]**

Section 18 of the CA98 (the "Chapter II prohibition") is based on Article 82; it prohibits,

> ***…any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market…if it may affect trade within the United Kingdom.***[6] **[Emphasis added]**

The text of Article 82(b) of the EC Treaty and section 18(2)(b) of the CA98 form the basis of the refusal to supply abuse. Those provisions provide that conduct may constitute an abuse if it consists of,

> ***limiting production, markets or technical development to the prejudice of consumers.***

It should be noted that there are two limbs to the test, namely:

a. **the limitation of production (including the company's own production); and**

b. **prejudice to consumers.**

The Competition Appeal Tribunal (the "CAT") formulated the following three propositions when finding a refusal to supply; although it noted that these were not intended to contain an exhaustive statement of the law:

a. **an abuse may occur where a dominant undertaking, without objective justification, refuses supplies to an established existing customer who abides by regular commercial practice, at least where the refusal to supply is disproportionate and operates to the detriment of consumers;**

b. **such an abuse may occur if the potential result of the refusal to supply is to eliminate a competitor in a downstream market where the dominant undertaking is itself in competition with the undertaking potentially eliminated, at least if the goods or services in question are indispensable for the**

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[6] Section 18(1) of the CA98.

activities of the latter undertaking, and there is a potential adverse effect on consumers;

c. it is not an abuse to refuse access to facilities that have been developed for the exclusive use of the undertaking that has developed them, at least in the absence of strong evidence that the facilities are indispensable to the service provided, and there is no realistic possibility of creating a potential alternative.[7]

Guidelines/informal papers

We note that a DG Competition discussion paper[8] **has stated that five conditions normally have to be fulfilled in order to find a refusal to supply to be abusive:**

a. the behaviour must be properly characterised as termination;

b. the refusing undertaking must be dominant (usually there will be two markets – a market for the input in question (in which the undertaking is dominant) and a connected market in which that input is essential);

c. the input must be indispensible;

d. the refusal must be likely to have a negative effect on competition; and

e. the refusal must not be justified objectively or by efficiencies. [9]

The European Commission's guidance on enforcement priorities in applying Article 82[10] **covers refusal to supply and margin squeeze. It states that it will consider refusal to supply <u>to be an enforcement priority</u> if all the following circumstances are present:**

a. the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;

b. the refusal is likely to lead to the elimination of effective competition on the downstream markets; and

c. the refusal is likely to lead to consumer harm.

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7 *JJ Burgess & Sons v OFT* Case No 1044/2/1/04 [2005] CAT 25, [2005] CompAR 1151.

8 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Public consultation, December 2005, p66

9 We note that this discussion paper has been superseded by the EC's Article 82 guidance on enforcement priorities (note 9, below). Nevertheless, it remains persuasive.

10 Communication from the Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive and exclusionary conduct by dominant undertakings [2009] OJ C45/7. Specifically, see paragraphs 75 – 90.

The OFT Competition Law Guideline entitled 'Abuse of a Dominant Position' (OFT 402) describes the concepts of dominance and abuse.

A draft guideline entitled 'Assessment of conduct' (OFT 414a) provides general advice about the application and enforcement by the OFT of Article 82 and the Chapter II Prohibition.[11]

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

Article 82 and the Chapter II prohibition (and therefore any duty to supply under competition law) apply only where one undertaking has a dominant position, or where two or more undertakings are collectively dominant, in the relevant market.

The OFT will carry out a substantial analysis before deciding whether or not an undertaking is dominant in a relevant 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?

Refusal to deal is a civil – not criminal - violation.

In terms of sanctions, an undertaking which is found to have infringed Article 82 or the Chapter II Prohibition may be subject to directions to cease or modify its conduct and/or may be fined up to 10% of its worldwide turnover where it intentionally or negligently infringes the provision. The OFT can impose civil penalties for infringements that have already stopped as well as for ongoing infringements.

The OFT's published Guidance as to the appropriate amount of the Penalty (OFT 423) sets out the five step approach that the OFT follows in deciding the level of a fine. Further details on the consequences of the infringement of Article 82 and/or the Chapter II prohibition are available in the OFT Competition Law Guideline entitled Enforcement (OFT 407).

In respect of the infringement of the Chapter II prohibition only, there is limited immunity from financial penalties for conduct of minor significance.[12] If the annual turnover of the company concerned does not exceed £50 million, the undertaking will benefit from immunity.[13] However, the OFT can decide to withdraw the immunity in

[11] The finalisation of these guidelines was put on hold while the EC completed its work on its Article 82 guidelines.

[12] Section 40 CA98.

[13] The OFT's *Cardiff Bus* decision is the only case to date where the OFT has applied section 40 CA98 and did not impose a fine because the turnover of Cardiff Bus was less than £50m. See: http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/cardiffbus

circumstances where it considers that it would be appropriate to do so. No such immunity is available in respect of an Article 82 infringement.

The OFT may also apply to the Court for a Director Disqualification Order under the Company Directors Disqualification Act 1986 ("CDDA"),[14] if:

a. **a person is a director of a company;[15]**

b. **the company commits a breach of competition law; and**

c. **the person's conduct as a director makes him/her unfit to be concerned in the management of a company.[16]**

[14] As amended by the Enterprise Act 2002.

[15] For these purposes, "director" includes board, shadow and de facto directors.

[16] The OFT has not used its competition disqualification order (CDO) powers to date. It is currently consulting on certain policy changes in relation to the use of CDOs. See: http://www.oft.gov.uk/advice_and_resources/resource_base/consultations/current/competition

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)?

Please note that for the sake of completeness, we have included margin squeeze cases within this category of cases as they are often considered to amount to a constructive refusal to supply.

The OFT has also included the information that it holds from the sectoral regulators which are concurrently responsible for the enforcement of Chapters I & II of the Competition Act 1998 (CA98) and Articles 81 & 82 of the EC Treaty in their respective sectors.

OFT:[17]

Investigations leading to non-infringement decisions

In *Du Pont*, the OFT held that it was not an infringement of the Chapter II prohibition for a monopolist holding exclusive worldwide rights relating to the manufacture and distribution of a product to terminate a supply contract with a downstream firm: http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/du-pont

***Companies House* (margin squeeze): http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/companies-house; and**

***BSkyB* (margin squeeze): http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/bskyb2).**

Investigations leading to infringement decisions

***Genzyme Ltd* (margin squeeze): one finding of infringement relating to bundling was annulled on appeal to CAT; but the OFT's margin squeeze infringement was upheld (see below for details).**

***Harwood Park Crematorium/JJ Burgess Ltd* (12.08.04): a non-infringement decision by OFT was set aside by the CAT, which held that there had been an infringement (see below for details).**

[17] The OFT cases so far are discussed in R Nazzini, A Welfare-Based Competition Policy Under Structuralist Constraints: Abuse of Dominance and OFT Practice, in B Rodger and A MacCulloch (eds), Ten Years of UK Competition Law *Reform* (Dundee: Dundee University Press, 2010, forthcoming).

OFTEL/OFCOM – telecommunications/electronic communications sector:

	Margin Squeeze	Refusal to supply	Outcome
Oftel	**4**	**2**	**4 x non-infringement – (1 under appeal) 1x admin priority 1x withdrawn**
Ofcom	**5**	**2 (re-investigations after being remitted by CAT)**	**7x non-infringement**
Total	**9**	**4**	
In addition Ofcom currently has two margin squeeze CA98 investigations ongoing.			

OFWAT – water sector:

One investigation (*Albion Water*) leading to a non-infringement decision. This decision was appealed to CAT. The CAT found the defendant had infringed the CA98 (margin squeeze and excessive pricing (see below for details)). The CAT's decision was upheld by the Court of Appeal.

ORR – rail sector:

Investigations leading to file closure or non-infringement decisions

One investigation in which the file was closed:
http://www.rail-reg.gov.uk/upload/pdf/refusal-to-supply-locos.pdf

One investigation leading to a non-infringement decision:
http://www.rail-reg.gov.uk/server/show/ConWebDoc.7342

One investigation is ongoing (*RTTI*): http://www.rail-reg.gov.uk/server/show/nav.2202

Investigations leading to infringement decisions

One investigation leading to an infringement decision (*EWS*): http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf. ORR called the abuse one of discrimination, but it could have been characterised as margin squeeze.

OFGEM – gas and electricity sector:

Investigations leading to non-infringement decisions

One investigation is ongoing into an alleged margin squeeze (*ENW*). The allegations relate to the terms imposed by ENW on independent networks connecting to ENW's pre-existing network.

One investigation leading to a non-infringement decision (*EDF*) concerned an alleged refusal to supply meter data services: http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/gas-electricity.

One investigation leading to a non-infringement decision (NPower) concerned an alleged refusal to share 'Triad benefits' with a renewable generator: http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/npower.

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.

Please refer to summaries below for more detail of infringement decisions.

OFT:

- **One infringement decision (margin squeeze) - *Genzyme Ltd* (27.04.03), one finding of infringement annulled on appeal to CAT, however that relating to margin squeeze was upheld**

- **One non-infringement decision (refusal to supply) *Harwood Park Crematorium/JJ Burgess Ltd* (12.08.04), decision set aside by the CAT. CAT held that there was a refusal to supply.**

OFWAT:

- **One non-infringement decision – *Albion Water*, appealed to CAT, CAT found defendant (Dŵr Cymru) guilty of margin squeeze and excessive pricing.**

ORR:

- **One infringement decision - *EWS*. ORR categorised the abuse as one of discrimination, but it could have been characterised as margin squeeze.**

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

No criminal powers were used – or available - in these cases.

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.

Genzyme Ltd

Genzyme, the producer of a drug called 'Cerezyme' for Gaucher's disease was found to have abused its dominant position in the downstream market for delivering Cerezyme to patients' homes by squeezing the margin of its competitor, Healthcare at Home. The CAT also imposed a judgment relating to remedy as Genzyme had been unable to propose a price which would not amount to a margin squeeze.

http://www.oft.gov.uk/news/press/2005/184-05

http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/genzyme

http://www.catribunal.org.uk/238-862/Final-judgment.html

Harwood Park Crematorium/JJ Burgess & Sons

***JJ Burgess & sons v OFT*, Case No 1044/2/1/04 [2005] CAT 25, [2005] CompAR 1151**

The CAT concluded that W Austin & sons had abused a dominant position by refusing to grant access to Harwood Park Crematorium for the purpose of conducting cremations; in doing so the CAT annulled the decision of the OFT that there had been no abuse.

http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/harwood

http://www.catribunal.org.uk/238-1201/Final-judgment.html

Welsh Water (Albion Water/ Dŵr Cymru)

OFWAT rejected Albion Water's complaint that Dŵr Cymru was guilty of a margin squeeze. The CAT held that Dŵr Cymru was guilty of margin squeeze in relation to Albion Water. The CAT suggested the following margin squeeze tests may be appropriate: (a) the dominant company's downstream operations could not trade profitably on the basis of the upstream price charged to its competitors; or (b) that a reasonably efficient downstream operator could not earn at least a normal profit when paying the input prices set by the vertically integrated undertaking. The CAT's decision was upheld by the Court of Appeal.

http://www.catribunal.org.uk/238-1526/Judgment-Dominance-and-other-issues.html

http://www.catribunal.org.uk/238-1454/Judgment.html

EWS (English Welsh & Scottish Railway Ltd)

The ORR found that EWS had abused its dominant position in a number of ways, including discriminating between customers. ORR called the abuse one of discrimination, but it could have been characterised as margin squeeze.

http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf

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.

Where refusal to deal/supply or margin squeeze constitutes an infringement of Article 82/Chapter II, a party could seek redress in court.

The OFT is aware of a number of standalone private actions:

- ***Claritas (UK) Ltd v Post Office and Postal Preference Ltd [2001] UKCLR 2***
- ***Land Rover Group Ltd v UPF (UK) Ltd* [2002] All ER (D) 323**
- ***Network Multimedia Television v Jobserve Ltd* [2002] UKCLR 184, upheld on appeal [2001] UKCLR 814, CA. Court granted injunction pending full trial of the action.**
- ***Getmapping plc v Ordnance Survey* [2002] UKCLR 410**

- ***Intel Corpn v VIA Technologies*** **[2002] UKCLR 576, reversed on appeal [2002] EWCA Civ 1905, [2003] ECC 16. Summary judgment sought but on appeal, Court decided that the issues were too complicated for summary judgment.**

- ***Attheraces Limited v The British Horseracing Board*** **[2005] EWCH 1553 (Ch), judgment of 15 July 2005**

- ***AAH Pharmaceuticals Ltd v Pfizer Ltd*** **[2007] EWHC 565 – interim relief sought. OFT conducted its medicines distribution market study instead.**

- ***Software Cellular Network Ltd v T-Mobile (UK) Ltd, judgment of 17 July 2007.*** **Interim relief successfully obtained.**

Follow-on damages claims can also be brought where the OFT has made a decision that the CA98 has been infringed; see, for example, *Healthcare at Home Ltd v Genzyme Ltd*[18] and *ME Burgess v W Austin and Sons Ltd.*[19]

[18] [2004] CAT 4, [2004] CompAR 358
[19] Case 1087/2/3/07

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?

The refusal to deal must be likely to eliminate or substantially weaken a competitor. The CAT in *Burgess* held that a 'potential effect' would be sufficient.[20]

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

In *Burgess*, the CAT held that, on the facts, significant consumer detriment was proven.[21] The OFT considers consumer harm in its casework prioritisation and is unlikely to prioritise a refusal to supply case in the absence of evidence of likely (substantial) consumer harm.

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

The CAT held that, in accordance with the principle that abuse is an objective concept, the subjective intention of the dominant undertaking is not, in principle, relevant to the existence of the abuse.[22] However, the OFT considers evidence of intent as part of the evidential picture in the case to shed light on the motives and incentives of the dominant undertaking or its understanding of the dynamics of the market. On the other hand, the OFT also recognises that evidence of intent should be treated with caution as it is not always easy to distinguish evidence of an anticompetitive strategy from aggressive language about the effect of the dominant undertaking's conduct on competitors.

    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?

The CAT in *Burgess* suggested that, under EC law, different standards may apply to the cut-off of supplies to an existing customer and to the refusal to supply a new customer.[23] However, the CAT required that the refusal to supply an existing customer operate to the detriment of consumers, thus essentially applying the same standards to

[20] *Burgess v OFT*, para 330.
[21] *Burgess v OFT*, paras 320 – 321 and 330.
[22] *Burgess v OFT*, para 297.
[23] *Burgess v OFT*, paras 311 and 323 - 324.

discontinuation of supplies and refusals to supply a new customer.[24] The OFT is unlikely to prioritise a case merely on the basis that the refusal to deal concerns the cut-off of supplies to an existing customers rather than a *de novo* refusal to supply, an important factor being likely (substantial) consumer harm.

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?

Not as a matter of law. The factors indicated above may be relevant to establishing the strategic motives and aims of the dominant undertaking but are unlikely to be decisive in an individual case.

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.

There is no distinct offence of refusing to provide access to "essential facilities" in the UK. Rather, allegations of refusal to supply in relation to "essential facilities" are assessed under Article 82/the Chapter II prohibition.

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 statutory definition of "essential facilities" in UK legislation; and to date there have not been any CA98 infringement decisions in the UK concerning essential facilities.

However, the decisional practice of the Commission and the judgments of the Community Courts is relevant to the application of the Chapter II prohibition.

The ECJ's judgment in *Bronner*[25] establishes that the key to the law on refusal to supply to a new customer is indispensability: the "facility" must be something that is incapable of being duplicated, or which could only be duplicated with great difficulty, or where duplication may be physically impossible. The impossibility of duplication may be legal, for example where an undertaking owns intellectual property rights, such as copyright. It is not sufficient that it would be convenient or useful to have access: access must be essential.

[24] *Burgess v OFT*, paras 311 and 323.

[25] Case C-7/97 *Oscar Bronner GmbH v Mediaprint Zeitungs – und Zeitschriftenverlag Gmbh* [1998] ECR I-7791, [1999] 4 CMLR 112, para 39. See also: *Tierce Ladbroke v Commission* Case T-5-4/93 [1997] ECR II-923; and Cases C-241/91 P etc *RTE and ITP v Commission* [1995] ECR I-743

There have been a number of Commission decisions on essential facilities. For example, in *Sealink/B&I-Holyhead: Interim Measures*[26] the European Commission said that,

> ***A dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers and which refuses its competitors access to that facility or grants access to competitors only terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article [82], if the other conditions of the Article are met…The owner of an essential facility which uses its power in n one market in order to strengthen its position on another related market, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article 82 where a competitive disadvantage is imposed upon its competitor without objective justification.*** **[Emphasis added]**

Access to facilities has been mandated under Article 82 in a number of occasions, for example:

a. **Ports – *Sealink* and *Port of Rodby*[27]**

b. **Airports – *Frankfurt Airport*[28]**

c. **Rail networks – *GVG/FS*[29]**

Note that in *DuPont - refusal to supply* (OFT Decision CA98/07/2003), the OFT found that treating halographic photopolymer film (HPF) for use in graphic arts applications as an essential facility would be stretching the "essential facilities" principle too broadly. It found that HPF was the product of R&D by DuPont and that to treat a new product such as this, which had unique features, as an essential facility for a downstream market would result in an excessive degree of interference with the freedom of undertakings to choose their own trading partners.

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

The OFT has stated that a firm's conduct is not immune from the Chapter II prohibition purely on the basis that its market power stems from the holding of IP rights. In *Capita Business Services Ltd and Bromcom Computers plc* Capita gave the

[26] [1992] 5 CMLR 255 – see paragraph 41
[27] [1994] CMLR 457.
[28] [1998] 4 CMLR 779
[29] [2004] CMLR 1446

OFT voluntary assurances that it would provide "interface information" to a third party to enable it to have access to data on Capita's server; the case was therefore closed.

As noted above, the decisional practice of the Commission and the judgments of the Community Courts is relevant to the application of the Chapter II prohibition.

The ECJ has made it clear that mere ownership of intellectual property rights cannot be attacked under Article 82; but Article 82 may apply to an improper exercise of the right in question. [30]

It is, however, more difficult to establish an abuse of dominance in cases which involve a refusal to licence intellectual property rights or to supply information needed for interoperability.

A refusal to license intellectual property rights by a dominant undertaking has been held to constitute an abuse in exceptional circumstances, in particular where the licensee intended to produce a new product for which there was a potential consumer demand.[31] In *Microsoft* the CFI interpreted the case law on this point to mean that the following circumstances in particular must be considered to be exceptional:

- **a. the refusal must relate to a product or service indispensable to the exercise of an activity in a neighbouring market;**
- **b. the refusal must be of such a kind as to exclude any effective competition on that market; and**
- **c. the refusal must prevent the appearance of a new product for which there is potential consumer demand.[32]**

Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 unless the refusal is objectively justified.

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

This is something that we have not come across to date. However, we note DG COMP's *Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* suggests that where proprietary information is required for interoperability that is *not*

[30] See Case 24/67 *Parke, Davis & Co v Probel* [1968] ECR 55
[31] See, for example: *Magill* [1989] 4 CMLR 757 and *IMS* Case C-418/01 [2004] ECR-I-5039
[32] Case T-201/04 [2007] ECR II-000

protected by IP law, but is "merely" a trade secret, it is not necessary to apply "the same high standards" as those for licences of intellectual rights.[33]

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

Yes – consistent with the European Court of First Instance's judgment in *Microsoft* (see above), a refusal to provide interface information to make a product interoperable could constitute abuse under CA98.

As noted above, in *Capita Business Services Ltd and Bromcom Computers plc* Capita gave the OFT voluntary assurances that it would provide "interface information" to a third party to enable it to have access to data on Capita's server; the case was therefore closed.

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

No.

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

No. There is no distinct competition law treatment for former state-created monopolies in the UK, including in respect of refusal to supply. However, they may be subject to sector specific legislation and regulatory requirements e.g. access conditions in licences/authorisations.

[33] We note that this discussion paper has been superseded by the EC's Article 82 guidance on enforcement priorities. Nevertheless, it remains persuasive.

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?

We do recognise this concept and we broadly agree with the definition within the introductory paragraphs.

We would note that 'unreasonable' is essentially an undefined term and extremely high prices of themselves may not be high enough to constitute a constructive refusal to deal (if for example firms still purchase the input and compete profitably downstream).

The precise evaluation of this question is likely to be highly dependent on the case in hand. The broad concept we follow is one of the 'equally efficient competitor' test.[34]

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 Office of Fair Trading and sectoral regulators within the United Kingdom do recognise this concept and have found breaches of competition law under a margin squeeze. We recently submitted a paper to the OECD Competition Committee concerning this topic which outlines our approach and previous cases. This is attached.

[34] The 'equally efficient competitor' test asks whether the alleged abusive behaviour would foreclose firms that are equally as efficient as the dominant firm.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

Under general competition law there are no circumstances under which refusal to deal (or any specific type) is presumed illegal in the UK.

Sectoral regulators may, however, take a slightly different approach in *ex ante* sectoral regulation (e.g. they could impose access conditions on regulated entities via licences/authorisations).

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.

Strictly speaking, the OFT does not apply formal safe harbours when assessing refusal to supply. However, it is noted that:

a. **Article 82 and Chapter II CA98 – and therefore any duty to supply under competition law - apply only where an undertaking has a dominant position on the relevant market; and**

b. **the CAT has stated that it is not an abuse to refuse access to facilities that have been developed for the exclusive use of the undertaking that has developed them, at least in the absence of strong evidence that the facilities are indispensable to the service provided, and there is no realistic possibility of creating a potential alternative.**[35]

[35] *JJ Burgess & Sons v OFT* Case No 1044/2/1/04 [2005] CAT 25, [2005] CompAR 1151.

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.

A refusal to deal will not infringe UK competition law if it can be justified objectively.

A refusal to supply could, for example, be objectively justified on the basis that:

a. **it is necessary to allow the dominant undertaking to realise an adequate return on the investments required to develop its input business;**

b. **innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about;**

c. **a customer is not credible/a bad debtor;**

d. **there is a shortage of stocks/capacity; or**

e. **production has been disrupted.**

In order to be objectively justified, the conduct in question must be proportionate.

It is for the undertaking concerned, and not for the OFT, to raise any arguments as regards objective justification and to support it with sufficient evidence. It is then for the OFT, where it proposes to make a finding of abuse of dominance, to show that the justification cannot be accepted. This is in line with EC case law.[36]

Examples of UK cases in which objective justification has been raised are set out below:

- ***Floe Telecom Ltd (in administration) v OFCOM*: in its decision under the CA98, OFCOM had found that Vodafone's refusal to supply certain services was objectively justified on the basis that Floe had required those services in order to act illegally. On appeal, the CAT held that if Floe's behaviour was clearly illegal, Vodafone would have been justified in refusing to deal with it. However, it held that the illegality of Floe's behaviour was far from clear, and that OFCOM should have conducted a much more extensive enquiry before concluding that Vodafone's refusal was objectively justified. (When OFCOM subsequently re-examined the matter, it**

[36] See *Microsoft v Commission* Case T-201/04 *Microsoft Corpn v Commission* [2007] ECR II-000, [2007] 5 CMLR 846.

still believed that Vodafone's behaviour was objectively justified. OFCOM's second decision in this case was also appealed to the CAT, but it did not reach a conclusion on this issue.);

- ***Complaint from NTM Sales and Marketing Ltd against Portec Rail Products (UK) Ltd*[37]: the ORR accepted a defence of objective justification.**

[37] ORR decision of 19 August 2005, 2006 UKCLR 12

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?

***Genzyme* (see above for a summary of the case):**

In a judgment on the remedy to be imposed, the CAT made a direction ordering Genzyme to end the infringement and supply Cerezyme to any bona fide provider of homecare services at a 'drug only' price at a discount of not less than 20 pence per unit from the prevailing NHS list price (equivalent to 7.2% of the then current NHS price list). In the course of the proceedings in front of the CAT, the CAT stated that the primary responsibility for bringing the abuse to an end in that case rested with Genzyme, rather than the OFT or the CAT.

In *Harwood Park Crematorium/JJ Burgess Ltd*, the CAT noted that Burgess had been granted unrestricted access to Harwood Park on the basis of an agreement reached between the parties.

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?

***Albion Water* (see above for a summary of the case):**

In its judgment on the remedies to be imposed the CAT required Dŵr Cymru to bring both infringements to an end and to refrain from any conduct having the same or equivalent effect and, in respect of the excessive pricing for common carriage of water on Dŵr Cymru's network, to respect a maximum access price specified at 2000/2001 prices as being conduct not having the same or equivalent effects to the infringement.

However, the CAT declined to order a specific margin to be maintained as between Dŵr Cymru's common carriage charge and its retail price, because of the practical difficulties in setting a retail margin remedy, the lack of detail about costs and revenues of Dŵr Cymru, and the need therefore for further fact finding investigation.

The case was contrasted with the *Genzyme* case, in which the CAT did conduct an investigation and set a minimum retail margin. In that case there was considerable available data about margins and the OFT had prepared detailed reports in this respect.

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.

The OFT's prioritisation principles require it to consider a range of issues when considering whether to progress a competition case (such as: the likely effect on consumer welfare, the strategic significance of a matter, the likelihood of a successful outcome, and the OFT's resources). The principles are starting points which are not adhered to slavishly; they are illustrative rather than exhaustive and other factors are considered where relevant. Thus, the OFT may, for example, consider whether or not there is a reasonable chance that an appropriate remedy would be available when considering whether or not to bring a refusal to deal case.

The OFT may, in some cases, choose to look at these types of issues by way of a market study, or a market investigation reference to the Competition Commission where it has reasonble grounds to suspect that any feature, or combination of features, of a market restricts or distorts competition. See for example, the OFT's recent market study on Isle of Wight Ferry Services - http://www.oft.gov.uk/shared_oft/consultations/oft1135.pdf

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal?

In the UK, firms should be allowed to contract with whomsoever they wish.

A duty to supply is not a general duty to assist competitors. A duty to supply involves interference with basic property rights and inevitably affects the incentives of the owner to make valuable investments in the future. Forcing a dominant undertaking to supply may not be conducive to economic welfare if it means that free riders can take advantage of investments that have been made by other firms in the market.

When assessing refusal to supply it is important bear in mind the process of rivalry. Price competition can be the most visible form of rivalry but competition can also involve many other individual company decisions on how to produce in the most efficient manner (or to produce to a higher quality) which allow firms to compete on price and quality. By choosing which firms it will deal with, or indeed choosing to integrate its operations in house, a company may be able to improve its efficiency or the quality of its output, and gain the full benefits of its investments.

For example, there may be:

a. ***Synergies from carrying out activities internally.*** **A simple example would be that smooth production processes are sometimes best achieved by firms producing both inputs into a final product as well as the final product itself. For these processes to work effectively, it is important that the right amounts are produced at each level and that all parts fit perfectly together. A requirement to supply third parties with such *inputs* could threaten the smooth running of these integrated production processes, and make resource management extremely difficult.**

b. ***Synergies from choosing selected trading partners.*** **In some cases, it may be more efficient for a firm to select specific trading partners, with whom the firm has strong synergies. A policy stance which forced firms to supply all other parties if they supply any other parties, may well lead firms to take activities entirely in-house, even *where* this would be less efficient. A policy stance which differentiated between refusing to supply existing customers and refusing to supply new customers could deter firms from testing out possible relationships in the first place.**

The choice of organisational structure and of trading partners is not as visible an element to competition as prices, but it can still be very important with firms having

strong incentives to find the best partner, and to make themselves a good partner for others. A strong stance against refusal to supply could destroy this beneficial competitive process and this itself could feed through to consumers in higher prices (or lower quality).

The beneficial impact of refusal to supply on price competition

In a situation of imperfect competition both upstream and downstream (but short of monopoly), a firm that supplies only itself downstream, and not its competitors, will have enhanced incentives to price aggressively in the downstream market, since it does not gain revenues from the sales of its competitors.[38]

To give a stylised example; take an industry with one vertically integrated supplier and rivals at both stages of production. Pre-refusal to supply, when the vertically integrated business raises price and thus loses downstream business to its downstream rival, some of the associated revenue is retained through its sales of inputs to the downstream rival. These extra revenues limit its incentive to price aggressively to win sales from its downstream rival. Post-refusal to supply, it no longer retains this revenue and consequently has a greater incentive to price more aggressively downstream.

Differential treatment of refusals to supply

It is possible that distortions could result from a differential treatment of refusals to supply to existing customers and refusals to new customers. This could discourage experimentation with new distribution partners.

The Article 82 enforcement priorities appear not to make any distinction between the two forms of refusal to supply, other than to say that, "if a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds". As noted above, the OFT is unlikely to prioritise a case merely on the basis that the refusal to deal concerns the cut-off of supplies to an existing customers rather than a *de novo* refusal to supply, an important factor being likely (substantial) consumer harm.

Do they apply to all forms of refusal?

Yes.

Are there any particular considerations for specific types of a refusal to deal?

None that we have identified to date.

[38] Whilst this must be balanced by the implicit price rise in the upstream good (from restricted supply), it is not necessarily the case that refusal to supply results in price rises to the ultimate consumers.

What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

One of the benefits of refusal to supply may be increased levels of investment. There are also additional potential benefits from refusal to supply on incentives to invest, both upstream and downstream absent any effect of the refusal to supply on operational efficiency. Such investment can play a key role in dynamic competition.

a. ***Ensuring incentives to invest upstream.*** **If a party is forced to make its facilities open to others, this may inhibit investment in both existing and potentially new facilities given the expected returns to that investment may decline. For example, where such investment represents a large sunk cost for an uncertain demand. Downstream companies who are potential investors know access will be mandated and may choose to wait for others to invest instead of risking their own capital. If the effects are strong enough, no one invests.**

b. ***Ensuring incentives to invest downstream.*** **In many cases, downstream firms need to be promised exclusive supply in order to generate revenues sufficient to justify investment in dedicated facilities for processing the upstream firm's product. A good example might be musicians; they sign exclusive contracts to record labels who then invest in promotion and production of the artist's work. If musicians were prohibited from refusing to supply other record labels, the amount invested in promoting and distributing their work would be much lower.**

In addition, it is worth noting that where competition authorities force supply, which would not occur absent intervention, this will sometimes require the authorities to determine acceptable terms of access. Such 'access pricing' is fraught with difficulties, and may lead to inappropriate incentives for investment and dynamic competition unless done with extreme care[39].

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

[39] There is a large economic literature devoted to access pricing. As an example of some of the problems which can arise: if the access price is set too low, "downstream" entry by inefficient firms may occur, and the firm on whom the prices are imposed may under-invest in its facilities to the long term harm of the industry. If the access price is set too high, other firms may over-invest in facilities to bypass the overpriced input, which is again inefficient. The time and resources devoted by the regulatory bodies such as Ofwat, Ofgem and Ofcom to periodic reviews of access prices indicate the complexity of these issues.