International Competition Network
Unilateral Conduct Working Group
Questionnaire

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Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

   Yes, under Swiss Antitrust law a refusal to deal of a dominant undertaking is considered as a possible violation of Article 7 of the Federal Act on Cartels and other Restraints of

*Competition (Cartel Act, **"ACart"**). According to the aforementioned Article 7 ACart, a dominant undertaking's behaviour is unlawful if it abuses its position in the market to hinder other undertakings from starting or continuing to compete, or to disadvantage trading partners. Under Swiss Antitrust law, unlawful practices by dominant undertakings also include constructive refusal to deal behaviour.*

The term refusal to deal is defined similarly to the definition given in the introductory paragraph with regards to rivals. However, a refusal by a dominant company to provide to, or purchase goods or services from business partners in the up- or downstream market, e.g. on the basis of an exclusive distributorship agreement, may also constitute an unlawful refusal to deal under Article 7 ACart. Distribution systems whereby the supplier undertakes to sell contract goods or services to distributors on the basis of specified criteria (authorised distributors) entail a targeted refusal to deal, which may also fall under Article 7 ACart. In other words, under Swiss antitrust law, the term "refusal to deal" is not restricted to horizontal issues.

For the purpose of answering the questions below, we focused on the definition of refusal to deal in the introductory paragraph.

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 provisions governing refusal to deal practices according to the definitions of this questionnaire are set out in Article 7 (1) and 7 (2) (a), (b, (c) and (e) of the Swiss Cartel Act. The relevant provisions read as follows:

<u>ACart:</u>

"Article 7 Unlawful practices by dominant undertakings

(1) 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.

(2) The following behaviour is in particular considered unlawful:

a) any refusal to deal (e.g. refusal to supply or to purchase goods);

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."

Swiss Antitrust Law does not know separate provisions for specific forms of refusal to deal. The same sanctions and remedies as for refusal to deal in general apply to IP licensing, margin squeeze and essential facilities. However, the following areas are excluded from the ambit of the ACart: (1) provisions which establish an official market or price system, (2), provisions which entrust certain undertakings with the performance of

public interest tasks, granting them special rights, and (3) effects on competition resulting exclusively from laws governing intellectual property.

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

   The relevant provisions of the ACart apply to dominant firms only. Generally speaking a dominant position on a particular market for goods or services is defined as a position of economic strength that enables an undertaking to behave, to an appreciable extent, independently from the other participants (competitors, suppliers, customers) in the relevant market (4 (2) ACart). Both single and collective dominance are caught.

   It is noteworthy that a refusal to deal by a non-dominant firm is not automatically lawful under Swiss law. On the contrary, in a decision based on considerations of public morality (ATF 129 III 35), the Swiss Supreme Court held that such a refusal may be unlawful if (i) the party refusing to deal offers the requested goods or services to the public, (ii) the agreement relates to an essential or commonly available good, (iii) the requesting party has no reasonable substitute and (iv) the refusing party has no objective reason for refusing to enter into the agreement. It is unclear how those criteria developed by the Swiss Supreme Court and the provisions of Article 7 ACart interrelate.

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?

   *An allegation of an abusive refusal to deal can be pursued by way of an administrative complaint (instituted either by an individual or a legal entity or by the Swiss Competition Commission "**SCC**") or as a civil complaint brought by a party who suffered harm as a result of the behaviour concerned. Injunctive relief can be granted in both cases.*

   Any abuse by an undertaking of its dominant position in the Swiss market can trigger an administrative fine of 10% of the turnover that the violating undertaking achieved in Switzerland in each of the preceding three financial years.

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)?

   To our best knowledge, the SCC conducted in-depth investigations of a refusal to deal in nine published cases. There may be further unpublished cases.

   - *Publikation von Arzneimitteln ("Documed", RPW/DPC 2008/3, p. 385)*
   - *Teleclub AG/Cablecom GmbH/Swisscable ("Teleclub/Cablecom", RPW/DPC 2007/3, p. 400)*
   - *Axpo/Migros – EBL (RPW/DPC 2007/1, p. 64)*
   - *Flughafen Zürich AG (Unique) – Valet Parking ("Unique – Valet Parking", RPW/DPC 2006/4, p. 625)*

- *ETA SA Manufacture Horlogère Suisse ("ETA SA - Ebauches", RPW/DPC 2005/1, p. 128)*

- *ErfahrungsMedizinisches Register (EMR): Eskamed AG ("Eskamed - EMR", RPW/DPC 2004/2, p. 449)*

- *EEF / Watt Suisse AG, Fédération des Coopératives Migros ("EEF / Watt", (RPW/DPC 2003/4, p. 925)*

- *Intensiv SA, Grancia (RPW/DPC 2001/1, p. 95)*

- *BKW FMB Energie AG (RPW/DPC 2000/1, p. 29)*

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.

   The SCC found unlawful conduct in three cases. In several cases the SCC did not find unlawful conduct only because the dominant firms finally agreed to deal with the aggrieved parties. In "ETA SA – Ebauches" e.g., ETA SA decided to phase out the production of movements for watches within three years and not to supply certain producers of watches anymore. The SCC would have considered the refusal to deal unlawful if ETA SA had not agreed to continue the delivery of clockworks.

   Essential facility cases:

   "Unique – Valet Parking": Unique is the owner and operator of Zurich airport and did not renew two of three contracts based on which other firms were providing valet parking services for airport customers for years. The SCC found that Unique cannot refuse to continue dealing without legitimate business reasons and therefore must grant access to its airport facilities.

   In "EEF / Watt" the SCC found that the refusal of a dominant company to grant third party access to an electricity network is unlawful.

   Other types:

   In the case "Intensiv SA/Grancia", a producer of dental instruments refused to deal with a direct mail seller which could not provide an adequate customer service. As these instruments do not require a high customer service standard, the SCC considered the refusal to deal unlawful.

   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.

Switzerland has an administrative system. The SCC issues its own decision which is subject to a review by the Federal Administrative Court (before January 2007 by the Competition Appeal Commission). An appeal against the decision of the Federal Administrative Court may be lodged with the Swiss Federal Supreme Court.

Two of three decisions in which the SCC stated an unlawful refusal to deal were challenged in court ("Unique – Valet Parking" and "EEF / Watt").

"Unique – Valet Parking" was challenged only partially, i.e. in regard to interim measures and sanctions. The decision of the SCC was upheld.

The decision of the SCC concerning "EEF / Watt" was confirmed by the Swiss Federal Court.

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.

Please see above. All cases are available in German at:

> *http://www.weko.admin.ch/dokumentation/00157/index.html?lang=de*

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.

   Yes, private parties may challenge any unlawful restriction of competition in a civil court. A civil judge may rule, inter alia, that a party which unlawfully refuses to deal with a rival has to conclude contracts with the rival on terms in line with the market or industry standard, and/or to pay damages.

   There are three representative civil cases:

   - *TDC Switzerland AG (Sunrise)/Swisscom AG, Swisscom Fixnet AG (RPW/DPC 2007/2, p. 338): Swisscom AG as well as TDC Switzerland are providers of telecommunication services. According to the finding of the Commercial Court Zurich - which was upheld by the Swiss Federal Court - Swisscom AG is under no obligation to provide the same Broadband Connection Services to TDC Switzerland AG as it provides to its end customers, as long as there is no statutory duty. Hence, no obligation to pay damages was imposed on Swisscom AG. Please note that since April 1, 2007, the Federal Telecommunication Act provides a duty for dominant firms to grant access to its facilities and services.*

   - *Fussball-Club Aarau 1902, FC Aarau AG, David Sesa/Swiss Football League (RPW/DPC 2004/4, p. 1203): The Swiss Football League refused to qualify David Sesa as qualified Swiss Football League player. The Commercial Court Aargau found that the Swiss Football League could not deny access to its essential facilities and ruled interim measures to grant the footballer's license.*

   - *Allgemeines Bestattungsinstitut (RPW/DPC 2003/2, 451): The Commercial Court*

Aargau found that an exclusive agreement between a dominant Hospital and an undertaker was a refusal to deal, because the Hospital refused to grant access to its essential facilities to other undertakers. The agreement was found to be null and void and the Hospital was obliged to reimburse its profits.

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 refusal to deal does not necessarily need to be illegal. Dominant firms are free to choose if and with which firms they want to do business. Pursuant to Article 7 ACart, a refusal to deal is only considered illegal if a dominant firm impedes a rival from entering or competing in the market (foreclosure) or disadvantages other market participants (e.g. customers) without legitimate business reasons.

There is a wide range of practices that can be classified as refusal to deal. In principle, apart from the dominant position of the undertaking refusing to deal, all scenarios require the following conditions for a conduct to be considered abusive:

- *The conduct is properly identified as a refusal; this can involve evaluating practices such as, for instance, imposing unfair trading conditions or charging excessive prices for the input (see question 13 below).*

- *No actual or potential substitute currently exists on the market (see RPW/DPC 1999/3, p. 386 "Swisscom, Angebot von Mietleitungen").*

- *The refusal is not objectively justified.*

When it is discriminatory against business partners, a refusal deal may also come within the purview of Article 7(2)(b) (see RPW/DPC 2008/3, p. 533 "Speedy Garage SA/BMW (Suisse) SA"; RPW/DPC 2000/1, p. 34 " BKW FMB Energie AG"; RPW/DPC 1997/2, p. 141 "Post PTT Adressaktualisierung"). In this case, the refusal is abusive if, apart from the dominant position of the discriminating undertaking, the discriminatory treatment is not objectively justified.

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?

A refusal to deal may cause the elimination of actual competitors or prevent the entry of potential competitors or disadvantage customers. It is not required that the dominant firm completely excludes a rival from the market. It is sufficient to consider a refusal to deal unlawful if a dominant firm impedes a single rival from competing or renders it more difficult for the rival to enter the market (see, however, RPW/DPC 2000/1, p. 25 "BKW FMB Energie", where the SCC, in relation to an "essential facilities"-case, held that a refusal to deal is abusive whenever for whatever legal or factual reason the aggrieved party is prevented from entering the downstream market; RPW/DPC 2000/2, p. 160 "Watt /Migros – EEF").

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

It is not required that consumer harm is demonstrated. Basically, the SCC must demonstrate that the refusal to deal either impedes competitors or disadvantages customers.

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

No, intent is not required.

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 distinction between termination of an existing agreement and refusal to enter into a new relationship is frequently found in legal literature. Termination of supply by a dominant undertaking is often deemed to be abusive (simply) if it is not justified objectively, because the relevant customers are likely to have made some investments connected to the supply relationships. However, a prior course of dealing is not required 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?

No, basically a refusal to deal is not evaluated differently if the aggrieved party is a rival, a potential rival, a main rival or a customer. Whether a refusal to deal is considered unlawful or not, mainly depends on the existence of legitimate business reasons for such a conduct. As mentioned above, the termination of an existing agreement is subject to stricter requirements than the initial refusal to enter into an agreemen.

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.

Swiss statutory competition law does not contain explicit provisions regarding the access to "essential facilities". However, the SCC applies on refusal to deal case involving an "essential facility" the same provisions which apply on any other refusal to deal case.

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.

According to Swiss case law, "essential facilities" are defined as facilities and equipments which are in possession of a dominant firm and which are necessary for another company to provide certain services.

In "EEF / Watt" (RPW/DPC 2003/4, p. 925 – French), the Swiss Federal Court found that the refusal of a dominant producer of electricity to grant access to its electricity network is unlawful if (i) there is no legitimate business reason ("raison objective") for such conduct and (ii) the rival does not have any alternative possibility to gain access. There

are some works in legal literature that consider that denying access to an essential facility for the production in a downstream market is only abusive if, in addition to the above conditions, there is no effective competition in the downstream market (see RPW/DPC 2007/3, p. 359 "NOK – Anschlussbegehren SN Energie AG/EWJR"; RPW/DPC 2000/1, p. 160 "Watt / Migros – EEF"; RPW/DPC 2000/1, p. 33 "BKW FMB Energie AG").

For further "essential facility"-cases please see question 6 above.

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

Only effects on competition resulting exclusively from laws governing intellectual property are excluded from the ambit of the ACart (Article 3 (2) ACart). All other restraints of competition resulting also from intellectual property rights are subject to the ACart.

Intellectual property rights are analysed in connection with the issue of dominance. In particular, in assessing market power it may be analysed whether a company has a broad or a strong intellectual property rights portfolio.

To our knowledge, there are no compulsory licenses cases decided by the SCC so far. In legal literature there is no consensus as to what constitutes the normal exercise of intellectual property rights and what are the conditions in which antitrust intervention is justified.

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

Following the principle of exhaustion of intellectual property rights the type of intellectual property has an impact on the analysis. Patent holders can restrict the import of their products which have been put in circulation on a market outside the European Economic Area into Switzerland whereas trademark and copy right holders cannot restrict the imports of goods which have been put in circulation with the express consent of the owner in any country worldwide. In respect of design rights it is not clear whether the principle of international exhaustion applies to them as no precedents exist. Other than that, the type of intellectual property right may impact the assessment of dominance, but not the abuse analysis. However, please note that there is no case law in Switzerland on this issue.

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

We have no knowledge of respective precedents in Switzerland. Theoretically, such behaviour might constitute an unlawful practice of a dominant undertaking depending on the particular circumstances.

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

Generally, the ACart is also applicable on regulated industries. Only regulated industries for which competition is not applicable due to statutory provisions such as a provision which establishes an official market or price system or which grants special rights to

specific undertakings to enable them to fulfil public duties are excluded from the ambit of the ACart. However, this exception is applied restrictively.

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, Article 7 (2) (c) ACart states that any imposition of unfair prices or other unfair conditions of trade is considered unlawful behaviour of a dominant undertaking. The definition of constructive refusal to deal under Swiss law is in accordance with the definition stated in the introductory paragraphs. As set forth in the answer to question 1, under Swiss antitrust law, the term "refusal to deal" is not restricted to relations with rivals but also covers the situation where a dominant undertaking in a upstream market refuses to deal with customers.

    Typically, the production costs plus a profit margin are deemed to be a reasonable price. If different rivals or customers are charged with different prices, usually a comparison amongst the different prices is made. If the higher prices cannot be justified, for instance because of higher transportation costs, such higher prices might be qualified as inappropriate. However, all depends on a case-by-case analysis (for justifications: see below question 17& 18).

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, Swiss Antitrust law recognizes the concept of a margin squeeze. The SCC defines a

margin squeeze as the situation where a dominant undertaking sets the retail prices in relation to the wholesale prices so low that it is impossible for a comparably efficient competitor to compete profitably in the downstream / retail market. This definition of the SCC was elaborated in reliance on cases from the United States (Alcoa-case, United States v. Aluminium Company of America), European Union (Napier-Brown/British Sugar; Deutsche Telecom AG (DT)) and rulings from the European Court of First Instance.

According to the aforementioned definition, margin squeeze behaviour is a violation of Article 7 (1) ACart if a comparably efficient competitor cannot compete in the downstream market profitably due to the high prices imposed by the dominant undertaking in an upstream market.

Most recently, the SCC has fined the Swiss telecoms incumbent Swisscom with a fine of CHF 220 mio. for a margin squeeze. The SCC conducted an investigation regarding a margin squeeze through the implementation of an unfair price system by Swisscom as a dominant undertaking in the wholesale market for ADSL services. Swisscom charged its rivals so high prices in the upstream market (wholesale market for ADSL connection to the internet) that the rivals could not effectively compete profitably with Swisscom in the downstream market (retail market for ADSL services).Swisscom disagrees with these findings and has announced to appeal the decision.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal?

    No.

    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)?

    No.

    Are there any circumstances under which there is a presumption of legality?

    N/a.

    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?
    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 a general rule, a dominant company can show that its refusal to deal is objectively justified, i.e. that there are legitimate business reasons for its practice (see SCC decision of 18 September 2006 in the case "Flughafen Zürich AG (Unique) – Valet parking" [RPW/DPC 2006/4, p. 656, n. 197 seq.]). There is no general definition as to what constitutes such "legitimate business reasons" for a refusal to deal. Therefore, every issue must be examined on a case by case basis (see Groner, Verweigerung von Geschäftsbeziehungen unter Schweizer und US Wettbewerbsrecht, in: SZW/RSDA 2001/6, p. 274). In this regard, it should be noted that the termination of an existing agreement is subject to stricter requirements than the initial refusal to enter into an agreement.

"Legitimate business reasons" may be of a technical or commercial nature. For example, in the "Spitallisten" case, a private health insurance provider offered a cheaper insurance policy based on a limitation of the choice of hospitals to which the policy holder had access. This limitation constituted a refusal on the insurance company's part to deal with the hospitals which were not included in the policy list. The SCC held that this refusal was justified from a commercial point of view, as it was a reaction to the fact that more and more insurees were choosing not to take out expensive policies (RPW/DPC 1999/2, p. 239, n. 99).

As an example for technical legitimate business reasons, the Swiss Federal Tribunal held, in a case concerning access to an electricity network that low network capacity could constitute legitimate grounds for a refusal to deal with a third party provider, insofar as an obligation to open the network to said third-party provider could impair the network owner's performance to its own clients (Decision of the Swiss Federal Tribunal of 17 June 2003 RPW/DPC 2003/4, p. 962, para. 6.5.4.).

According to the Vaud Cantonal Tribunal (ruling on interim measures in an "authorised distribution"-case), commercial reputation may also be an objective justification for a refusal to deal (RPW/DPC 2008/3, p. 533 "Speedy Garage SA/BMW (Suisse) SA").

Moreover, a refusal to deal which is deemed abusive by the SCC or the Swiss Federal Tribunal may, by way of exception, be authorised by the Federal Council if there is an overriding public interest (Article 8 ACart).

In the administrative procedure the applicable law states a principle of judicial investigation. In other words, the SCC has to undertake the necessary investigations and gather all evidence in order to proof that a refusal to deal behaviour is unlawful or, that a refusal to deal behaviour is justified by legitimate business reasons.

However, in civil proceedings the burden of proof for the existence of legitimate business reasons lies with the dominant company – not with the company alleging an illegitimate refusal to deal (see RPW/DPC 2000/3, p. 490).

Are there any particular justifications or defenses for specific types of refusal?

N/a.

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?

There are several remedies available in a case of "Refusal to deal".

A first distinction has to be drawn whereas who initiates the procedure:

1) Civil litigation/private enforcement: The claimant can be an individual who has been hindered by an illegal restraint of competition. The claimant can claim in this case on the basis of his/her private interests before a civil court. The claimant will claim for a civil remedy (Article 12 (1) ACart): a. elimination or cessation of the hindrance; b. damages or reparation for moral damage according to the Code of Obligations; c. restitution of an unlawfully realized profit pursuant to the provisions on conducting business without a mandate. Article 12 (2) ACart specifically applies in a case of Refusal to deal. Article 13 (2) ACart specifies that the court may order – to enforce a claim to elimination and cessation – in particular that the originator of the hindrance to competition enter into contracts with the person hindered that are in line with market conditions or are customary in the industry in question.

In the Fussball-Club Aarau 1902 case, the Commercial Court Aargau imposed precautionary measures and obliged the Swiss Football League on this basis to grant the football license (according to claimants' request).

2) Administrative proceedings: The Secretariat of the SCC investigates the case and the SCC considers the behaviour to be unlawful. The SCC can decide to sanction the company with a fine which goes up to 10 % of the turnover achieved in Switzerland during the last three business years (Article 49a ACart). The amount of the sanction shall be calculated based on the duration and severity of the illegal conduct. The presumed profit resulting from the illegal conduct shall be duly taken into account.
Even before deciding whether the law has been infringed or not, the SCC can decide to impose precautionary measures upon the defendant if certain conditions are fulfilled (urgency of the situation, proportionality, disadvantage which could not be easily repaired, see judgement of the Swiss Federal Court 2A.142/2003, 5th September 2003). If these prerequisites are fulfilled, the SCC can oblige - for instance - the defendant to deal with a company.

In the case "Unique – Valet Parking" the SCC sent a decision of precautionary measures to the defendant which forced it to deal with Sprenger Autobahn AG and Alternative Parking AG: the defendant had to submit a rental offer to both companies which contains comparable conditions as in their previous contracts (with the required authorisations). After several offers, the parties finally settled on the terms and conditions of the contract. The SCC closed the investigation with the finding that the behaviour of the defendant was an infringement of Article 7 (2) (a) resp. (d) ACart. It decided to impose a fine of CHF 101'000 according to Article 49a (1) ACart. The amount took into account the fact that the defendant was cooperative in the last stage of the investigation. Moreover, the SCC accepted the settlement between the defendant and both companies. In conclusion, the SCC did not set the terms and conditions of the contract but did impose guidelines: they had to be similar or comparable to the previous contracts.

In the case"EEF/Watt", the SCC made the finding that the conduct of EEF was unlawful and that EEF had not stopped its unlawful conduct. It did not impose any measures. It is noteworthy that the SCC did not have the possibility to impose a direct sanction pursuant to Article 49a ACart because this Article did not exist at that time.

In the case "Intensiv SA/Grancia", the SCC imposed an obligation upon the defendant to deal with companies which did not have an external customer, if these service providers fulfilled the "usual delivery criteria" of Intensiv SA. Intensiv SA was allowed to apply delivery restrictions as long as they were justified and consistently 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?

    N/a. (The "EEF/Watt" case is a case regarding regulated market but the SCC did not impose any measures (see question 18).)

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.

    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?

    Very often, refusal to deal cases arise in infrastructure situations. In such cases, the justification of a refusal might be rather difficult. This holds true in particular, if the company running the infrastructure acts in a regulated and/or to be liberalized environment. In the ruling "Allgemeines Bestattungsinstitut" (RPW 2003/2, p. 451), the Commercial Court of Aargau considered the fact that the dominant company was a hospital governed by public law as aggravated circumstance because under public law the principle of non-discrimination must be respected.

    A further consideration is that the termination of an already existing business relationship is subject to stricter requirements than the initial refusal to enter into deal. Particularly in situations where the business partners of dominant undertakings have become dependent in the course of time, the termination of the existing business relationship is deemed to be unlawful behaviour.

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.