INTERNATIONAL COMPETITION NETWORK

Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws

Prepared by

The Unilateral Conduct Working Group

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Executive Summary

This Report was prepared by the ICN Unilateral Conduct Working Group (UCWG) for the 9th Annual Conference of the ICN in April 2010. This year, the Working Group continued its work on the analysis of unilateral conduct by examining a dominant firm's refusal to deal with a rival. The Report is based on responses to a questionnaire[1] submitted by competition agencies and non-governmental advisors (NGAs) from 43 jurisdictions.[2]

Most agencies stated that their competition laws do not specifically define a refusal to deal. The agencies define refusal to deal much like the questionnaire did—as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival, including in particular refusals to license intellectual property rights or to grant access to an essential facility. Several agencies define a refusal to deal more broadly to include refusals to deal with non-rivals or refer to a wider range of practices than those discussed in the Report.

Most agencies noted that a refusal to deal need not consist of an outright refusal. These agencies also recognize a "constructive" refusal to deal, which is generally characterized by the dominant firm's offering to supply its rival on unreasonable terms, such as extremely high prices, degraded service, or reduced technical interoperability. Most agencies also recognize "margin squeeze" as a potential antitrust violation, which occurs when a dominant firm charges a price for an input in an upstream market that, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival in the downstream market to compete.

During the last ten years, a competition law violation based on a refusal to deal or margin squeeze theory was found in approximately 150 cases in the reporting jurisdictions, and no violation was found in at least twice as many investigations. The survey posed several questions on the policy considerations concerning refusals to deal. Several responses articulated the basic principle that firms, whether dominant or not, generally should be able to contract with parties of their choice. A number of responses indicated that allowing companies to refuse to deal can provide incentives to invest and that the adverse impact of an obligation to supply on incentives to innovate warrants careful consideration. The responses also noted potential additional pro-competitive reasons for refusals, such as establishing more efficient distribution channels or reducing costly supply arrangements.

Additional key findings drawn from the responses are summarized below.

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[1] The questionnaire and responses are available at http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/questionnaires-responses/refusal-deal.aspx.

[2] Responses were received from agencies in 43 jurisdictions: Belgium, Bulgaria, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, El Salvador, Estonia, European Union, Finland, France, Germany, Honduras, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jersey, Jordan, Korea, Lithuania, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Russia, Serbia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom, and United States. NGA responses were received from Prof. Drexl (Max Planck Institute, Germany), and Hoffet, Meinhardt, Venturi (Switzerland).

Presumptions and Safe Harbors

The survey revealed that in most jurisdictions a refusal to deal with a rival is generally not presumed illegal. Many agencies explained that they evaluate refusals to deal on a case-by-case basis using a balancing approach. The survey revealed that many jurisdictions do not recognize any safe harbors or presumptions of legality.

Analysis of Refusal to Deal

Competitive Harm

The majority of responses indicated that to raise competition concerns, a firm that refuses to supply must be dominant or possess substantial market power. To prove a violation most jurisdictions must show that the supplier's refusal leads to market foreclosure for one or more firms that compete in a downstream market with that supplier, thus eliminating effective competition. Most responses specified that a refusal to deal is unlawful only if it is not objectively justified.

While many agencies indicated that their law does not require them to prove harm to consumers, some pointed out that consumer harm is indirectly taken into account, as harm to competition ultimately reduces consumer welfare. A few agencies stated that there must be evidence of lasting consumer harm for the refusal to be unlawful. Some agencies indicated that consumer harm may be taken into account to determine the amount of the fine.

Intent

The majority of agencies that responded to the question on this topic indicated that anticompetitive intent is not required but is often considered relevant. Few jurisdictions require a showing of anticompetitive intent. A few responses indicated that intent may be considered in determining the size of a fine.

The Relevance of History of Dealing

No agency indicated that a prior supply relationship between trading partners is necessary to establish that a refusal to deal is anticompetitive. Nevertheless, many responses specified that prior dealing is relevant to their evaluation. Prior dealing may indicate that a supply relationship between trading partners is technically and economically feasible, making it harder to assert efficiency justifications for the refusal or termination. A history of prior dealing may also inform the analysis regarding the impact on the affected firm and more generally on competition.

The majority of agencies indicated that there is no requirement to show that a supplier discriminated against a rival by dealing only with firms that are not current or potential rivals. Some jurisdictions may consider evidence of dealing with third parties to determine strategic motivation, because this evidence may undermine the credibility of efficiency arguments advanced to justify the refusal.

Constructive Refusal to Deal

Agencies were also asked whether their jurisdictions recognize the concept of a "constructive" refusal to deal. Most respondents indicated that they recognize the concept in the terms specified in the questionnaire, although very few of their statutes directly address this concept. Many jurisdictions emphasize that "constructive" refusal cases are heavily fact-dependent, making it difficult to draw general evaluative criteria.

Essential Facilities

The concept of essential facilities is not specifically defined in agencies' competition laws, but has been recognized in some jurisdictions' case law or agency guidelines. Those jurisdictions view the denial of access to an essential facility as a particular type of refusal to deal. In virtually all jurisdictions, the question of essential facilities arises when an undertaking that controls or owns a facility refuses to provide access to other undertakings allegedly to gain a competitive advantage in another market. Agencies consistently identified the principal common elements of an essential facility as: (1) access to the facility must be essential to reach customers; and (2) replication or duplication of the facility must be impossible or not reasonably feasible.

Intellectual Property, Regulated Industries, and State-Created Monopolies

Several agencies explained that they generally treat refusals to license intellectual property in the same way they treat other refusals to deal. Similarly, a majority of agencies explained that they do not treat refusals to deal by participants in a regulated industry under a different standard. Many of those agencies noted, however, that they may take into account the terms of regulation, particularly with respect to access, in analyzing the lawfulness of the refusal. Likewise, several respondents noted that they do not treat former state-created monopolies differently when they refuse to deal, but if they remain subject to regulation they may consider the terms of regulation in the analysis.

Margin Squeeze

Most agencies specified that their jurisdictions recognize margin squeeze practices as a potential antitrust violation. Some agencies stated that they generally do not recognize the concept. Many authorities generally use the same or very similar criteria to those that they apply to outright refusals. Some agencies noted that they apply the "equally efficient competitor test," meaning that there may be a violation if prices are such that they could drive equally efficient competitors from the market. A few agencies noted that a margin squeeze claim differs from a claim of predation in that a margin squeeze does not necessarily entail the dominant firm's accepting losses initially.

Justifications and Defenses

The responses confirm that competition agencies generally consider justifications and defenses for refusals to deal. In most jurisdictions, competition agencies do not *a priori* restrict the type of justifications and defenses that they are willing to consider. The most commonly accepted justification is a refusal based on "legitimate business decisions" or "acceptable commercial grounds;" efficiency considerations as well as the protection against health and safety hazards are also commonly cited justifications. The most frequently cited evidentiary requirement is that the justification has an objective basis. Most agencies explained that it is their burden to show anticompetitive effects, but the company's burden to prove justifications and defenses.

Remedies

The questionnaire asked for a description of the types of remedies that apply in refusal to deal cases brought by competition agencies, as well as in private cases. Approximately half of the responding agencies stated that access to the refused good could be mandated. Half also stated that cease and desist orders were available, roughly a quarter could impose fines, and several have authority to seek criminal sanctions, although only one agency has done so. A few jurisdictions noted their ability to impose structural measures to restore competition, but only one agency reported imposing one. Twenty-four responses stated that the same remedies are available for refusals to deal in regulated industries. A few responses acknowledged that the decision to bring a case is influenced by the administrability of the potential remedies.

I. INTRODUCTION

A. DEFINITION OF REFUSAL TO DEAL

Most jurisdictions define refusals to deal in a manner similar to the questionnaire, i.e., as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival.[3] This typically occurs when a firm refuses to sell an input to a firm with which it competes (or potentially competes) in a downstream market. A refusal to deal defined in this manner is distinct from a *conditional* refusal to deal with rivals, in which 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, with which this Report does not deal (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)). This Report encompasses refusals to license intellectual property rights or grant access to an essential facility.[4]

Several agencies noted that a refusal need not be absolute. These agencies also recognize "constructive" refusals to deal, which is generally characterized by the dominant firm's offering to supply its rival on unreasonable terms, such as extremely high prices, degraded service, or reduced technical interoperability. As the *European Commission* response explains, "unduly delaying or otherwise degrading the supply of the product or the imposition of unreasonable conditions in return for the supply may also amount in reality to a refusal to supply."

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[3] Canada, Chile, Czech Republic, Denmark, El Salvador, Estonia, Hungary, Italy, Japan (under its exclusionary private monopolization provision), Jersey, Jordan, New Zealand, Pakistan, Poland, Russia, Singapore, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. South Africa recognizes "unjustifiable" refusals to deal. Several agencies specifically noted the requirement of dominance or substantial market power, in some instances describing this requirement alternatively as a safe harbor. See agency responses of Canada, Czech Republic, European Commission, Israel, Japan, Mexico, Poland, Russia, Spain, United Kingdom, United States. See also the ICN Recommended Practice on *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws* (2007), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf. Colombia applies a similar definition but notes that the firm needs not to be dominant.

[4] See Section IV.C. See also response of Lithuania (refusal to supply by a dominant undertaking the essential good or charging a prohibitively high price).

Several agencies define a refusal to deal more broadly to include refusals to deal with non-rivals[5] or refer to a wider range of practices than those discussed in the Report.[6] For example, the law in *Ireland* is not limited to refusals to deal with actual or potential competitors, but could include refusal to deal with non-rivals. In *Bulgaria,* "refusals to deal with actual or potential customers in order to impede their economic activity" also may be actionable. The reply of the *European Commission* refers more generally to refusals to supply products or services to existing or new customers, and refusals to provide various types of information, such as interface information and technical information.[7]

A few agencies did not provide a definition of a refusal to deal.[8]

B. POLICY CONSIDERATIONS

The survey posed several questions on the policy considerations jurisdictions take into account in how they approach refusals to deal. There were two common themes to the responses: firms, whether dominant or not, generally should have the right to choose trading partners; and the impact of an obligation to supply on incentives to innovate warrants careful consideration.

Several responses articulated the basic principle that firms, whether dominant or not, generally should be able to contract with parties of their choice.[9] For example, the *German* response stated that "[d]ominant firms are encouraged to compete on the merits and, like non-dominant firms, are generally not prevented from choosing with whom they wish to deal and how to organize their distribution systems."

The responses also noted potential pro-competitive reasons for refusals as affecting their policies. *Canada*, for instance, wrote that the decision to refuse dealing "may relate to pro-competitive reasons such as establishing more efficient distribution channels or reducing costly supply arrangements." The *United Kingdom* response cited synergies from carrying out activities internally and from choosing selected trading partners.

Several responses also addressed potential effects on innovation and incentives to invest.[10] The *New Zealand Commerce Commission* stated that its approach to refusals to deal "seeks to protect incentives to invest and innovate" and that it may consider "the effect of the conduct on static efficiency and incentives to invest and innovate in any decision to take enforcement action against a refusal to deal." The *Turkish Competition Authority* wrote that while a refusal "may harm consumers in the short term in terms of higher prices or reduced product diversity, the

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[5] Bulgaria, Canada, Colombia, Germany, Ireland, Japan, Korea, Romania (the refusal by a dominant firm to deal with its suppliers or beneficiaries), Turkey.

[6] Belgium, European Commission, Finland, France (encompasses all possible forms of refusals to deal), Honduras, Israel, Mexico (defines refusal to deal as the "denial to sell, commercialize or provide products or services available to others"), Netherlands, Sweden.

[7] See Section IV.C.5.

[8] Costa Rica, Indonesia, Serbia, Taiwan.

[9] Bulgaria, Canada, Denmark, European Commission, Germany, Ireland, Italy, Japan, Mexico, Singapore, Turkey, United Kingdom, United States.

[10] Denmark, Estonia, European Commission, Ireland, Italy, Mexico, New Zealand, Pakistan, Romania, Singapore, Turkey, United Kingdom, United States.

long term benefits of the same conduct in the form of increased investments and innovation could be substantial." The *Competition Commission of Singapore* advised that "[c]are must be taken not to undermine the incentives for undertakings to make future investments and innovations, especially where the essential facility is a result of a previous innovation." Similarly, the *Federal Competition Commission of Mexico* emphasized that the effect the relevant conduct has on the competitive process, including the effects on innovation and investment, must be taken into account.

The potential impact on innovation provoked several responders to note a need for careful consideration before imposing an obligation to supply. The responses identified two potential concerns relating to the impact of a duty to supply on innovation: dominant firms, or firms that anticipate that they may become dominant, may choose not to invest, or to invest less; and "free riders" may take advantage of investments by other firms.[11] The *European Commission* stated that such an "obligation to supply – even for a fair remuneration – may undermine undertakings' incentives to invest and innovate, and thereby, possibly harm consumers." The *Irish Competition Authority* explained its view of the importance of incentives to innovate, responding that "[a]n obligation to deal will not be placed upon the dominant firm if it harms innovation and investment." Likewise, the *Italian Competition Authority* recognized that its interventions "should not undermine the incentives for innovation and investment." The *United States* response states that "[c]ompelling a firm to share a source of advantage could lessen the incentive of firms to innovate and invest in economically beneficial resources."

Two responses raised additional policy considerations with respect to remedies. The *United Kingdom* noted, "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' can be difficult, and may lead to inappropriate incentives for investment and dynamic competition unless done with extreme care." The *United States* response cited the relevance of considering the practicality of remedies, "as a remedy might be difficult for judicial administration and thereby, in some cases, influence the outcome of a unilateral conduct case."

II. LEGAL BASIS AND ENFORCEMENT EXPERIENCE

A. GENERAL VERSUS SPECIFIC PROVISIONS

All agencies that responded to the questionnaire recognize refusal to deal as a possible violation of their antitrust laws. Most respondents (31) address refusal to deal cases under a general statutory prohibition of anticompetitive conduct such as 'abuse of dominance' or 'monopolization' provisions.[12] In twelve jurisdictions, a refusal to deal is cited as an example of potentially abusive conduct under the general statutory

[11] Denmark, European Commission, Pakistan, Romania, United Kingdom, United States.

[12] Belgium, Chile, Czech Republic, Colombia, Costa Rica, El Salvador, European Commission, Finland, France, Germany, Honduras, Hungary, Ireland, Italy, Japan, Jersey, Lithuania, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Serbia, Singapore, Slovak Republic, Sweden, Taiwan, Turkey, United Kingdom, United States.

prohibition or is addressed under a specific statutory provision.[13] For example, *Bulgaria's* law prohibits an "unjustified refusal to supply goods or to provide services." Under *Spain's* law, an unjustified refusal to satisfy the demands of purchase for products or provision of services constitutes an abuse of dominant position. Ten respondents also cited provisions relating to particular forms of refusal to deal, including margin squeeze,[14] denial of access to essential facilities[15] and refusal to license intellectual property.[16]

Most competition law provisions that cover refusals to deal apply only to dominant firms. However, competition agencies from *Canada*, *Colombia*, *Germany, Indonesia*, *Japan*, *Korea*, and *Taiwan* have provisions that address refusals to deal by non-dominant firms.[17]

B. CIVIL VERSUS CRIMINAL LAWS

Refusal to deal is only a civil/administrative violation under most competition laws. However, a refusal to deal may be both a civil and criminal offence in the *Czech Republic*, *Denmark*, *Estonia*, *France*, *Indonesia*, *Ireland*, *Israel*, *Japan*, *Korea*, *Romania*, *Serbia*, and *Slovak Republic*.[18] For example, the *Danish Competition*

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[13] Bulgaria, Canada, Estonia, Israel (refusals have also been dealt with under a general abuse of dominance provision), Japan (refusals are prohibited as exclusionary private monopolization or as unfair trade practices), Jordan, Korea, Mexico, Russia, Spain, South Africa, Switzerland.

[14] Bulgaria, Germany, Mexico, Romania. For example, in Germany, the recently introduced Section 20 (4) clause 2 no. 3 ARC explicitly addresses margin squeeze practices, insofar as small and medium-sized companies are affected.

[15] Czech Republic, Estonia, Germany, Korea, Romania, Slovak Republic, South Africa.

[16] Honduras.

[17] For example, Section 75 of the Canadian Competition Act does not require a firm to be dominant, only that the person denied supply cannot obtain supply because of insufficient competition among suppliers of the product. Similarly, section 32 does not require that a firm have significant market power. According to Colombian competition law, article 48 of decree 2153 and article 1 of law 155 of the year 1959 provides that it is possible to sanction a refusal to deal if it is determined that it is a practice that effectively tends to limit free competition, no matter by what kind of company. The Korean Guideline V.1. applies the refusal to deal provisions to firms generally. Similarly, in Taiwan, Article 19 of Fair Trade Act applies to all firms and not just dominant firms. Section 20 (1) of German Act against Restraints of Competition (ARC) under certain circumstances also applies to non-dominant firms.

[18] A refusal to deal constitutes a crime under the Czech Criminal Code, which took effect on January 1, 2010. In France, a refusal to deal committed by companies is an administrative violation; however, individuals who personally play a decisive role in an anticompetitive agreement and/or in an abuse of a dominant position can be subject to criminal sanction. In Indonesia, Article 47 and 48 of the Law Number 5 (1999) may impose criminal sanctions on a refusal to deal. The Israeli Restrictive Trade Practices Law (1988) provides that unreasonable refusal may constitute a criminal offense, and no specific intent is required. In Japan, when a refusal to deal is judged to be exclusionary private monopolization and the JFTC criminally accuses the refusing party, the party can be subject to a criminal punishment; by comparison, a refusal to deal is subject only to administrative remedies when judged to be an unfair trade practice. In Korea, a refusal to deal can be addressed by criminal law when the level of the violation is objectively clear and is serious enough to be recognized as substantially undermining competition in the concerned market. Similarly, according to Article 60 of the Romanian Competition Law, the abuse of dominance may amount to criminal offence and might trigger the imprisonment of the persons involved in the abusive behavior for between six months and four years or ma result in a fine. Article 232 of the Criminal Law of Serbia provides that a responsible person shall

Authority indicates that intent or gross negligence will make a refusal to deal a criminal violation; *Estonia's* Penal Code provides that repeat offenses will be punished criminally. In *Jordan*, a refusal to deal is only a criminal violation. Only *Israel* indicated that it had brought a refusal to deal case using criminal antitrust authority.

C. AGENCY ENFORCEMENT

According to the responses, over the last ten years, there have been approximately 150 cases in which a refusal to deal or margin squeeze violation was established and at least twice as many investigations in which it was alleged, but no violation was found.[19]

Only two agencies reported that they had not conducted an in-depth investigation regarding refusals to deal.[20] Seventeen agencies answered that they had conducted in-depth investigations, but either have never brought a case or found a violation in only one or two instances during the past ten years.[21] Only 6 agencies reported finding violations in ten or more cases.[22]

D. PRIVATE ENFORCEMENT

Thirty-eight of the respondents stated that their jurisdiction allows private parties to challenge a refusal to deal in court. *Costa Rica* highlighted the need for private parties to exhaust administrative remedies before instituting a court action. Similarly, in *Indonesia* private parties may challenge a decision in court only once the agency has heard the case. Private parties cannot challenge a refusal to deal in court in three jurisdictions.[23] In *El Salvador*, *Mexico* and *Pakistan* cases may be heard only before their competition authorities.[24]

In most jurisdictions private challenges are rare; in some, no cases have been brought. Ten respondents stated that they are not aware of any court cases.[25] Only 13 of the respondents cited cases initiated by a private party.[26]

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be charged with imprisonment of up to three years. The Criminal Act of Slovak Republic applies to any conduct contrary to the Act on Protection of Competition, as well as to all forms of refusal to deal.

[19] Not all agencies provided the number of investigations. See responses from Chile, Estonia, European Commission, Finland, Russia, United States.

[20] Indonesia, Serbia.

[21] Canada (0 violations), Colombia (1 violation), Costa Rica (2 violations), Denmark (1 violation), El Salvador (2 violations), Ireland (0 violations), Japan (2 violations), Jersey (1 violation), Korea (2 violations), Netherlands (2 violations), Pakistan (2 violations), Romania (2 violations), Russia, Sweden (1 violation), Taiwan (1 violation), United Kingdom (2 violations), United States (1 violation).

[22] Bulgaria (17 violations), France (13 violations), Hungary (12 violations), Mexico (10 violations), Poland (12 violations), Spain (15 violations).

[23] El Salvador, Mexico, Pakistan. Colombia and Serbia did not respond to this question.

[24] In Mexico, once the competition authority issues a final administrative decision, the affected parties have the right to file a civil lawsuit in order to compensate financially the damage produced by the conduct.

[25] Denmark, Honduras, Hungary, Jersey, Jordan, Korea, Netherlands, Poland, Singapore, Turkey.

III. PRESUMPTIONS AND SAFE HARBORS

A. PRESUMPTIONS OF ILLEGALITY

The survey revealed that in most jurisdictions a refusal to deal with a rival is generally not presumed illegal. Twenty-nine agencies stated that there are no circumstances under which a refusal to deal is presumed illegal.[27] .

Contrary to a presumption of illegality, many agencies explained that they evaluate refusals to deal on an individual basis under the rule of reason. For example, the *Competition Bureau of Canada* explained that a "refusal to deal or supply is not presumed to be *per se* illegal, rather conduct is reviewed on a case-by-case basis to determine under the rule of reason standard whether the anti-competitive effects of refusal outweigh the pro-competitive benefits."[28] The *European Commission* explained that "the Commission does not consider a refusal to supply by dominant firms to be pro- or anti-competitive *per se.*"

Two agencies (*Mexico*, *Russia*) explained that certain refusals may result in a presumption of illegality, but they may be rebutted with a reasonable justification or efficiency defense.[29] In comparison, *Poland* stated that although its law has no formal presumptions of illegality, a refusal to deal would likely be judged illegal if the dominant firm operates in a downstream market, has the capacity to deal with the rival, and had a prior course of dealing with the rival, because "an anticompetitive effect in such cases is easy to demonstrate."

Israel explained that unreasonable refusals to deal by a firm with a market share greater than 50 percent are illegal.

B. SAFE HARBORS AND PRESUMPTIONS OF LEGALITY

The survey revealed that many jurisdictions do not recognize any safe harbors or presumptions of legality. Twenty-three agencies clearly indicated that there are no

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[26] Canada, Czech Republic, Finland, France, Germany, Ireland, Israel, New Zealand, Slovak Republic, South Africa, Spain, United Kingdom, United States.

[27] See responses to question 15 (on presumptions) of Bulgaria, Canada, Chile, Czech Republic, Denmark, El Salvador, European Commission, France, Germany, Honduras, Hungary, Ireland, Italy, Japan, Jersey, Korea, Lithuania, Netherlands, New Zealand, Romania, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Taiwan, United Kingdom, United States. Although three other agencies indicated that there was a presumption of illegality for refusals to deal, their analysis is based on whether the conduct was "unjustifiable," "unreasonable," or resulted in restrictive effects on competition. See responses of Belgium, Turkey, and Pakistan. Six agencies did not respond. Colombia, Costa Rica, Finland, Indonesia, Jordan, Serbia.

[28] See response of Canada ("there is no absolute obligation on any business to supply, or buy a product from, another business"); see also response of United States (as "a general matter, U.S. antitrust law allows a company to choose those with whom it will do business and for a company unilaterally to refuse to deal with another . . . [b]ut this right is not unqualified"). Mexico stated that any refusal to deal is "subject to the rule of reason criteria as defined by articles 11 (demonstration of infringement), 12 (determination of the relevant market) and 13 (assessment of substantial market power)."

[29] In addition, Estonia stated that it generally presumes that refusals to deal without objective justifications are illegal. For more information on the justifications and defenses to refusals to deal, see Section V of this Report.

circumstances under which there is either a safe harbor or presumption of legality for a refusal to deal.[30]

Two agencies (*Denmark* and *Turkey*) explained that their jurisdictions have safe harbors in cases involving alleged price or margin squeezes. [31] *Denmark* stated that "there would normally be a safe harbor for the dominant company, if the price it charges downstream is equal or higher than the sum of its price charged to customers plus the [average total cost] of its downstream division." Similarly, *Turkey* stated that "positive margins which cover costs can be accepted as a safe harbor for the undertaking" in price squeeze cases.

IV. ANALYISIS OF AN ABUSE OF DOMINANCE/ MONOPOLIZATION BASED ON REFUSAL TO DEAL

A. EVALUATION OF AN ACTUAL REFUSAL TO DEAL

1. Competitive Harm

In response to a question regarding their jurisdiction's criteria for evaluating the legality of refusals to deal,[32] most respondents indicated that a firm must be dominant or have substantial market power for a refusal to be considered problematic. In the several jurisdictions that do not explicitly require dominance, market power remains an important part of the analysis.[33] *Canada* and *South Africa* referred to a requirement that the refusal must somehow create, enhance, or preserve the refusing firm's dominance.[34]

Many agencies stated that a refusal to deal can be unlawful only if it is objectively possible for the refusing firm to supply the requested product or service.[35]

Several respondents indicated that the main concern in assessing a refusal to deal is whether the refusing firm's conduct leads or is likely to lead to the exclusion of one or more firms with which it competes in a downstream market (sometimes referred to as foreclosure).[36] As a general matter, *United States* antitrust law allows a

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[30] See responses to question 16 (on safe harbors) of Belgium, Bulgaria, Chile, El Salvador, Estonia, European Commission, France, Germany, Honduras, Hungary, Ireland, Italy, Jersey, Lithuania, Netherlands, New Zealand, Pakistan, Poland, Romania, Singapore, Slovak Republic, Switzerland, Taiwan. Seven agencies did not respond to this question. Colombia, Costa Rica, Finland, Indonesia, Jordan, Serbia, Sweden.

[31] Korea and South Africa also identify certain jurisdictional safe harbors that are based on de minimis market shares, revenues, or assets in the relevant jurisdiction.

[32] See responses to question 8 on evaluation of an actual refusal to deal.

[33] See responses from Canada, Colombia, Germany, Indonesia, Japan, Korea, Taiwan. Israel requires that a firm meet the definition of a "monopoly" under its legislation, which is defined as market share above 50%.

[34] For example, the United States requires that a firm must have, or threaten to acquire, monopoly power in a relevant market.

[35] Belgium, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, European Commission, Finland, Germany, Ireland, Israel, Italy, Jersey, Jordan, Lithuania, Mexico, Netherlands, Russia, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom.

[36] Chile, Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Israel, Italy, Lithuania, Netherlands, Poland, Russia, Slovak Republic, Spain, South Africa, Sweden, Turkey, United States. France specified that the exclusion does not necessarily need to be of a rival if the effects are serious.

company to choose those with whom it will do business and for a company unilaterally to refuse to deal. However, this right is not unqualified -- a unilateral refusal might be unlawful if it has an exclusionary effect and harms competition in the relevant market. The *European Commission*'s main concern in assessing a refusal to supply is whether the refusal is likely to lead to the elimination of effective competition and to lasting consumer harm.

Some agencies also cited harm to, or the possible exclusion of, firms in markets other than the downstream market, such as firms operating in the upstream market and other firms that the refusal could affect.[37] Other respondents used more general criteria related to effects likely to distort competition or restrain fair competition.[38] Every agency indicated that both actual and likely effects are sufficient for finding an illegal refusal.

Many respondents indicated that their law does not require a determination that a refusal to deal has resulted in harm to consumers.[39] However, some jurisdictions explained that because harm to competition is considered to ultimately lead to a decrease in consumer welfare, harm to consumers is indirectly taken into account.[40] The *United States* agencies indicated that the conduct must harm, or be likely to harm, competition. Several jurisdictions indicated that although demonstrable harm to consumers is not required, it could be a significant factor in determining whether a refusal to deal had an anticompetitive purpose or effect.[41] Two jurisdictions indicated that they consider evidence of consumer harm in determining the appropriate remedy or fine for the anticompetitive conduct.[42]

In contrast, many jurisdictions explicitly require that the refusal to deal result in actual or likely consumer harm.[43] The *European Commission*'s Guidance on Article 82 provides that the Commission will intervene when the dominant firm's conduct is likely to result in consumer harm.[44] The Commission examines whether, for consumers in the long-term, the likely negative consequences of the refusal to supply outweigh the likely negative consequences of imposing an obligation to

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See also NGA responses from Drexl (Max Planck Institute, Germany) and, Hoffet, Meinhardt, Venturi (Switzerland).

[37] Bulgaria, Indonesia, Ireland, Japan, Korea, New Zealand. Mexico stated that a refusal to deal is "presumed illegal if it fulfills the following legal standards enclosed in [the competition law], namely when the act has the object or effect of: (i) displacing agents, (ii) hindering access, and/or (iii) establishing an exclusive advantage in favour of determined economic agents" in the markets."

[38] Colombia, Costa Rica, Germany, Indonesia, Ireland, Israel, Japan, Mexico, Romania, Singapore, Switzerland, Taiwan.

[39] Canada, Chile, Colombia, Costa Rica, El Salvador, Estonia, Germany, Honduras, Indonesia, Israel, Japan, Korea, New Zealand, Pakistan, Poland, Russia, Singapore, South Africa, Taiwan, United Kingdom, United States. For a more general discussion of this issue see NGA response from Drexl (Max Planck Institute, Germany).

[40] Canada, Germany, Mexico, Turkey.

[41] Estonia, Honduras, Korea, New Zealand, South Africa.

[42] El Salvador, New Zealand.

[43] Bulgaria, Czech Republic, Denmark, European Commission, Finland, Ireland, Italy, Lithuania, Netherlands, Romania, Slovak Republic, Turkey.

[44] *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, Brussels, 3 December 2008.

supply. The *Romanian Competition Authority* also uses this test. The *European Commission* also considers that there may be consumer harm when, for example, as a result of the refusal, new innovative products or follow-on innovation is likely to be stifled.

Finally, some competition agencies point out that the limited anticompetitive effects of a particular refusal to deal may result in a finding of no violation (or be considered as a defense).[45] This would for instance be the case if the refusal is of a short duration.[46]

2. The Role of Intent

In response to a question regarding the role of a firm's intent,[47] sixteen agencies indicated that while intent is not required to support a violation, evidence of intent might be used to support a finding that the refusal resulted in anticompetitive effects.[48] For example, in the *United States*, intent merely to beat competitors and to increase market share is not relevant.[49] Evidence of the business rationale for conduct is relevant, however, in assessing the competitive effects of the conduct. Evidence of anticompetitive intent may also be used to demonstrate that there were no legitimate reasons to refuse supply.[50] The *United Kingdom*'s *Office of Fair Trading* also noted that evidence of intent may inform analysis of effect, but that care should be taken to distinguish evidence of anticompetitive strategy from language that indicates an aggressive competitive strategy.

Several jurisdictions require evidence of anticompetitive intent motivating the refusal to deal.[51] Some agencies presume anticompetitive intent from objective evidence of actual or likely anticompetitive effects.[52] In addition, in jurisdictions in which an objective effects test is applied to assess the impact of the refusal, the actual competitive effect may be far more relevant than strategic motivation.[53]

Seven agencies indicated that a refusing firm's anticompetitive intent plays a role in determining the size of the fine for the refusal to deal.[54]

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[45] According to the Canadian competition agency, it has to be proved that the refusal to deal negatively affects the competitive situation in the market and not just the business position of the customer.

[46] Canada, European Commission, France, Turkey. The French competition agency refers to a case in which a refusal to deal for a transitory period (one to two years) was accepted in view of the need to further develop a new market with attractive exclusive offers. According to the Canadian competition agency, shortages of supply as a consequence of a fire at a plant, raw material shortages, or limited production capacity or inventories can be accepted as justification for a refusal to deal because of their temporary nature. In these situations, the Canadian Tribunal is likely to consider that the product is still in "ample supply."

[47] See responses to question 8c on the role of intent.

[48] Costa Rica, European Commission, France, Finland, Germany, Israel, Japan, Jersey, Lithuania, Netherlands, Romania, Singapore, Sweden, Turkey, United Kingdom, United States.

[49] See response of the United States.

[50] See responses of Canada, El Salvador, France, Germany, United States.

[51] Costa Rica, Korea, New Zealand, Taiwan.

[52] Canada, Korea, Mexico, New Zealand.

[53] Czech Republic, Italy, Slovak Republic.

[54] Chile, Czech Republic, Estonia, Germany, Italy, Poland, Turkey.

A few jurisdictions may or may not require evidence of intent depending on under which provision of their antitrust legislation the refusal deal is examined. *Canada*'s legislation includes both a specific provision for refusal to deal that does not require an anticompetitive purpose, as well as a more general provision dealing with abuse of dominance that requires evidence of an exclusionary, predatory, or disciplinary purpose. The civil refusal provisions in *Israel* and *Romania* do not require proof of intent, but intent must be proven for under their criminal provisions.

3. The Relevance of a History of Dealing

The questionnaire asked agencies to describe how a supplier's history of dealing with customers may influence the evaluation of a refusal to deal, and. whether a history of dealing with firms other than its actual or potential rivals has any impact on the evaluation of refusals to deal.[55]

a) Prior Supply Relationship

None of the respondents indicated that a prior supply relationship between a firm and its customer is required to establish liability. In many jurisdictions, a refusal may be found anticompetitive both when it concerns the cut-off of supplies to an existing customer and the refusal to deal with a new customer.[56] The *European Commission*'s response stated that it does not require a prior supply relationship between the trading partners to establish that a refusal to deal is anticompetitive. It is sufficient to show that "there is demand from potential purchasers and that a potential market for the input at stake can be identified." However, some agencies noted that prior dealing was not considered in their enforcement.[57]

Many agencies consider a history of dealing between trading partners to be potentially relevant to evaluating refusals.[58] Several responses stated that prior dealing may be relevant as proof that supplying a particular customer is economically and technically feasible for the supplier[59] and that the refusal to continue supplying may be linked to an anticompetitive design.[60] The *European Commission*'s response stated that the supplier found it in its best interest to supply a customer means that the trade relationship brought adequate compensation for the supplier's original investment, an important aspect to consider in evaluating claims that supply was discontinued on

[55] See questions 8 d. and e on the relevance of a history of dealing.

[56] Bulgaria, Canada, Chile, Czech Republic, Estonia, European Commission, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Korea, Mexico, New Zealand, Pakistan, Poland, Romania, Russia, Singapore, Slovak Republic, Taiwan, Turkey, United Kingdom, United States. Several European competition authorities (Finland, Hungary, Italy, Jersey, Lithuania, Netherlands and Sweden) have adopted an approach to evaluating an actual refusal to deal consistent with article 82 (abuse of a dominant position) of the EC Treaty and the European Commission's enforcement policy, which is articulated in *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, Brussels, 3 December 2008.

[57] Colombia, Costa Rica, El Salvador, Jordan, Lithuania, Serbia, South Africa.

[58] Canada, Czech Republic, Estonia, European Commission, Finland, Germany, Hungary, Ireland, Israel, Italy, Japan, Jersey, Korea, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Singapore, Slovak Republic, Sweden, Turkey, United States.

[59] Mexico, New Zealand, Poland, United States.

[60] Poland, United States.

efficiency grounds. Several agencies indicated that the termination of an existing supply arrangement is more likely to be found abusive than the refusal to supply a new customer.[61]

A history of dealing may inform the analysis of impact of the refusal on the affected firm. *Canada's* response indicates that as a practical matter, if the customer's business would be substantially affected by the refusal to deal, then it will often be the case that the supplier and the customer had been dealing for some time. A history of business relationships becomes relevant in assessing the degree of impact on the firm whose supply was cut off. Three agencies indicated that their jurisdictions require a reasonable notice period before the supply can be interrupted.[62]

b) Dealing with Non-rivals

Only two agencies indicated that dealing with third parties is a prerequisite to finding a refusal unlawful.[63] Competition authorities diverge in their views concerning the relevance of dealing with non-rivals by a supplier in evaluating an actual refusal. While some agencies consider history to determine the motives for the refusal or to assess the degree of market foreclosure,[64] others do not regard it as relevant.[65] The *United Kingdom* indicated that while dealing with third parties may be relevant in establishing the strategic motives and aims of the dominant undertaking, it is "unlikely to be decisive in an individual case."

Estonia indicated that favoring non-rivals or smaller rivals that do not present a significant competitive constraint over a major competitor may raise suspicion that the refusal is linked to an anticompetitive purpose. In addition, where a supplier claims that discontinuing an existing supply arrangement or rejecting a new customer is done for reasons of efficiency – when continued supply allegedly affects the firm's incentives to invest and innovate – the supplier's relationship with non-rival firms or firms that do not pose a serious competitive threat may be revealing. The *European Commission* indicated that if the supplier refuses to sell to its main competitor but at the same time is willing to deal with a smaller competitive fringe or sell inputs in other markets in which it is not present, efficiency arguments may be more difficult to support.

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[61] Canada, European Commission, Japan, Korea, Mexico, Romania.

[62] Czech Republic, Germany, France. The French Competition Authority indicates that the French Commercial Code provides that a termination without adequate advance notice can constitute a civil wrong likely to trigger liability; the French Commercial Code is enforced by commercial judges and does not fall within the jurisdiction of the French Competition Authority.

[63] Indonesia, Mexico.

[64] Canada, Chile, Estonia, Finland, Germany, Israel, Japan, Korea, Netherlands, New Zealand, Pakistan, Poland, Romania, Sweden, United Kingdom, United States. The U.K. Office of Fair Trading indicated that while dealing with firms that are not rivals or potential rivals by an undertaking refusing to supply another competitor is generally irrelevant as a matter of law, it may be considered, as a non-decisive factor, in determining strategic motives.

[65] Russia, Slovak Republic, Turkey.

B. EVALUATION OF A CONSTRUCTIVE REFUSAL TO DEAL

1. Brief Definition

ICN members were asked to indicate whether their jurisdictions recognize the concept of a "constructive" refusal to deal characterized for the purposes of the 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).

Most of the 43 respondents indicated that they recognize this concept in the terms identified in the questionnaire,[66] although a few have statutory provisions that specifically cover this conduct. In many jurisdictions, however, the refusal to deal provisions are general enough to include forms of constructive refusal as well as outright refusals. *Israel* and *Switzerland* indicated that their laws address conduct that they consider constructive refusals to deal. In *Israel*, constructive refusals to deal have been addressed using the general presumptions stated in Article 29A(b). These practices, which include, among other things, unfair pricing and unfair reduction of service, have been banned by the legislature when undertaken by a monopoly, and have been used by the courts to address situations including refusals to deal. *Switzerland* also lists certain similar practices as unlawful in Article 7 (2) ACart.[67]

Only a few agencies stated that they do not recognize a "constructive" refusal to deal concept, either because they do not have applicable statutory provisions[68] or because they have no experience with this conduct.[69]

The agencies that recognize a constructive refusal seem to share a substantive approach, and mention that the supply by a dominant firm of a good or a service on unreasonable terms may "also amount in reality to a refusal to supply."[70] Some agencies, for example *Finland*, indicated that a vast majority of the investigations have involved a "constructive" rather than an "outright" or "absolute" refusal. A constructive refusal can take the form of conduct such as delaying the supply of the requested good,[71] restricting the quantity of the supplied good or service,[72] or degrading the supply of the product.[73]

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[66] See responses to question 13 (on constructive refusals) of Belgium, Bulgaria, Canada, Denmark, European Commission, Finland, France, Germany, Hungary, Indonesia, Israel, Italy, Japan, Jersey, Korea, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Russia, Singapore, Slovak Republic, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom. The United States agencies note that U.S. courts have not provided guidance on when a company that offers to deal can be deemed to have constructively refused to deal for the purposes of the antitrust laws. In the *Trinko* case, in rejecting plaintiff's refusal to deal claim, the courts treated an allegation involving poor quality of service as a refusal to deal. The concept of a constructive refusal to deal has not yet been adjudicated by South African courts.

[67] See response from Switzerland and from Swiss NGAs Hoffet, Meinhardt and Venturi (identifying discrimination between trading partners in relation to prices or other conditions of trade, imposition of unfair prices or other unfair conditions of trade, and limitation of production, supply, or technical development).

[68] Costa Rica, Chile, El Salvador, Honduras, Jordan, Lithuania.

[69] Colombia, Serbia.

[70] See response from the European Commission.

[71] See responses from the European Commission (Commission Decision of 2 June 2004, Case COMP/38.096 — *Clearstream* (Clearing and Settlement) - OJ C 165, 17.7.2009, p. 7) Hungary (MAV

Some agencies listed as forms of conduct that might be analyzed as a constructive refusal to deal restrictions that might also fall into different unilateral conduct categories, such as excessive pricing,[74] margin squeeze,[75] or price discrimination.[76]

2. Criteria

The questionnaire asked agencies to indicate, when determining whether the terms of dealing constitute a constructive refusal to deal, how their jurisdictions evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded to constitute a constructive refusal.

Many agencies underline that "constructive" refusal to deal cases are highly fact-dependent, making it difficult to draw general criteria, and that the critical part of the analysis is determining whether the conduct constitutes a refusal.[77] Some respondents stated that the criteria for analyzing a constructive refusal to deal case should be similar to those for analyzing actual refusals.[78]

Many responses address how to assess whether the terms of supply can be considered unreasonable. One method of "constructive" refusal to deal that agencies identified is charging a high price.

Bulgaria states that, to prove that the price is unreasonably high, the competition agency would analyze the cost of the product, the sale price including transport costs, and the prices for other customers. The *United Kingdom*, however, notes that "unreasonable" is essentially an undefined term and extremely high prices in 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 facts and the Office of Fair Trading broadly follows of the "equally efficient competitor" test.

Another method of "constructive" refusal identified is through non-price terms for the transaction. *Germany* states that, in analyzing a constructive refusal to deal, the Bundeskartellamt would look at the terms offered in similar situations by the dominant firm to other undertakings. *Canada* mentions the criteria for analyzing a constructive refusal deal used in the *Nadeau* case, where the Tribunal stated that the usual terms are to be determined in reference to the terms that would be seen as usual from the perspective of market participants.

Case Vj 22/2005) and Italy (*A303 Aviapartner/Aeroporto diBologna)* and from Mexico (the statutory refusal to deal provision includes the use of delaying tactics and the refusal to reply to requests to deal; see case DE-03-99 y RA-18-2001 – *Refusal to provide access to essential facilities and services for long distance services*).

[72] See response of Japan.

[73] See response of the European Commission and France.

[74] Bulgaria, Czech Republic, Estonia.

[75] Mexico, Singapore, South Africa. See also responses to question 14.

[76] Korea.

[77] Germany, Turkey.

[78] European Commission, Germany, New Zealand, Turkey.

Poland states that, when determining whether the conditions offered by an incumbent amount to a constructive refusal to deal, they would look at the reasonableness of those conditions from the incumbent's perspective, assessing whether it would be able to survive in the market if it were supplied under the proposed terms and whether the conditions are markedly different from the way the incumbent treats itself, its subsidiaries, or other market players.

C. EVALUATION OF AN ESSENTIAL FACILITY

In 29 of the 40 jurisdictions that responded to questions concerning essential facilities,[79] the competition law does not specifically define the concept of essential facility, but it has been recognized in relevant case law or agency guidelines.[80] These agencies see the denial of access to an essential facility as a particular type of refusal to deal.

Seven agencies' competition laws specifically define essential facilities.[81] The responses showed consistency in how jurisdictions define an essential facility. In virtually all cases, the question of essential facilities arises when an undertaking that owns or controls a facility refuses to provide other undertakings access to it, allegedly to gain a competitive advantage in another market. The main, common elements of an essential facility are: (1) access to the facility must be *essential* to reach customers; and (2) *replication* or *duplication* of the facility must be impossible or not reasonably feasible.

1. Access Must Be Essential

Many jurisdictions require an element of *essentiality*, *impossibility* or *indispensability* to show an essential facility, i.e., access to the facility is essential or indispensable to reach customers, or it is impossible to reach customers without access to the facility.[82]

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[79] Responses to the question on essential facilities (Question 9) received from Belgium, Bulgaria, Canada, Chile, Costa Rica, Czech Republic, Denmark, El Salvador, Estonia, European Commission, France, Germany, Honduras, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jersey, Jordan, Korea, Lithuania, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Russia, Singapore, Slovak Republic, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom, United States. In addition, responses were received from Swiss NGAs Hoffet, Meinhardt, Venturi and from German NGA Prof. Drexl (Max Planck Institute, Germany).

[80] This is the case in Bulgaria, Canada, Chile, Costa Rica, Denmark, El Salvador, France, Honduras, Hungary, Ireland, Israel, Italy, Japan, Jersey, Korea, Lithuania, Mexico, Netherlands, New Zealand, Pakistan, Romania, Russia, Singapore, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom and under EC Competition Law. See also United States response (some U.S. courts have decided refusal to deal cases under the rubric of the "essential facilities doctrine." The Supreme Court, however, has never recognized the doctrine.) The Belgian response states that there is no distinct offense based on essential facilities, and that the Competition Authority has not yet dealt with this issue.

[81] Czech Republic, Estonia, Germany, Korea, Romania, Slovak Republic, South Africa.

[82] Canada, Czech Republic, the European Commission, Estonia, France, Germany, Honduras, Hungary, Ireland, Israel, Italy, Japan, Jersey, Korea, Lithuania, Romania, Singapore, Slovak Republic, South Africa, Spain, Switzerland, Taiwan, Turkey, United Kingdom.

According to the *United Kingdom*, under European competition law an essential facility must be a facility or infrastructure without access to which competitors *cannot* provide services to their customers. Interpreting European competition law, the *United Kingdom*, *Spain*, and *Hungary* specify that it is not sufficient that it would be convenient or useful to have access to the facility – access must be essential to compete in the downstream market. *Hungary* also states that it must be shown that a "refusal to grant access to the essential facility would be likely to eliminate all competition in the downstream market."

German law specifies that an abuse can arise from a refusal of access to an essential facility if the refusal results in rivals being unable to compete against the dominant undertaking in an upstream or downstream market. *French* law provides that access to the facility must be necessary to compete in an upstream or downstream market, or in a neighboring market.

2. Replication or Duplication must be Impossible or not Reasonably Feasible

Many jurisdictions also require that duplication or replication of the facility be impossible, not reasonably accomplished, or not feasible.[83] The impossibility of duplication may arise, for example, from legal barriers, such as intellectual property rights,[84] physical or geographic constraints,[85] and economic constraints, such as the market's not being sufficiently large to sustain a second facility.[86]

In addition to other constraints on duplication, *Jersey* and *Singapore* specify that duplication or replication must be either impossible or highly undesirable for reasons of public policy. *Italy* and *Taiwan* add that duplication must not be possible within a short period.

The combination of these two elements means, as stated by *Hungary*, that the concept of an abuse of dominance based on a denial of access to an essential facility is applied with caution.

3. Other Considerations Cited by Agencies

Some agencies cited additional considerations for an abuse of dominance based on a denial of access to an essential facility:

- *Chile*, *Czech Republic*, *France*, *Italy*, *Mexico*, *Pakistan*, *Taiwan* and *Turkey* specify that the facility must be owned, controlled, or operated by a monopolist or dominant undertaking. *Korea* states that the undertaking must own or control the facility exclusively.
- *Canada* requires the undertaking that owns or controls the essential facility to have market power in the downstream market in which the facility is used as an input in the period following the denial of access. *Canada* states

[83] Canada, Chile, the European Commission, Estonia, France, Germany, Honduras, Hungary, Italy, Japan, Jersey, Korea, Lithuania, Mexico, Pakistan, Romania, Singapore, Slovak Republic, South Africa, Spain, Switzerland, Taiwan, Turkey, United Kingdom.

[84] See *European Commission* response.

[85] See Jersey response (noting that this may be particularly true for small, physically isolated jurisdictions).

[86] See Hungary response.

that where there is no vertical integration, simply charging a monopoly price for access to a facility, imposing conditions on its use, or choosing not to offer access to downstream purchasers at any price would not, by itself, raise concerns. Similarly, *Italy* notes that in all of its essential facility cases, "the position in the downstream market of the firm controlling the facility was assessed and the firm controlling the facility was also operating, directly or through controlled firms, in the downstream market, often holding a dominant position."

- The *European Commission* considers that in addition to the refused input's being objectively necessary to compete on the downstream market, to constitute a violation, the refusal should lead to the elimination of effective competition and to lasting consumer harm.

- Many jurisdictions stated that providing third-party access to the essential facility must be feasible in order to find an abuse.[87] For example, *German* law specifies that the dominant undertaking may demonstrate that for operational or other reasons access to the essential facility is impossible or cannot reasonably be expected.

- The *Slovak Republic* points out that the owner or operator of the facility is entitled to compensation or payment to provide access, although access must be non-discriminatory. The *Czech Republic* and *Germany* also cite reasonable or adequate remuneration for the facility operator. *Canada*, *Italy*, and the *European Commission* take a similar approach. In addition, according to the *Slovak Republic*, an undertaking that requests access to the essential facility must ensure adherence to the qualitative and quantitative parameters of the essential facility resulting from the facility's operational requirements.

- *Canada*, the *European Commission*, *France*, *Jersey*, *Japan*, *Korea*, *Lithuania*, *Pakistan*, *Turkey* and the *United Kingdom* recognize that an abuse of dominance may be based on either an actual or constructive denial of access to the essential facility.

4. Circumstances in which an Essential Facility has been found to Exist

The agencies identified the following infrastructures that have been qualified as essential facilities in one or more cases:

- Mobile telecommunications infrastructure (*Mexico* and *Turkey*);
- Fixed-line local loop (*France*, *Slovak Republic*);
- Electricity transmission grid (*Costa Rica*, *Germany*, *Switzerland*, *Turkey*);
- Gas pipelines (*Italy*, *Spain*);
- Ports or port terminals (*Germany*, *European Commission*);
- Bus terminals (*Israel*, *Spain*);

[87] Canada, Chile, Czech Republic, the European Commission, France, Germany, Italy, Jersey, Korea, Mexico, Pakistan, Romania, Singapore, Slovak Republic, South Africa, Spain, Switzerland, Taiwan, Turkey, United Kingdom.

- Airports (*European Commission*, *Slovak Republic*, *Switzerland*);
- Rail network (*European Commission*);
- Centralized train ticket sales platform (*France*);
- Shareholder registry (*Romania*); and
- Stock exchange trading platform (*Pakistan*).

D. REFUSALS TO DEAL INVOLVING INTELLECTUAL PROPERTY, REGULATED INDUSTRIES, AND STATE CREATED MONOPOLIES

1. Refusals to Deal Involving Intellectual Property

In 16 of the 40 jurisdictions that responded to questions concerning refusals to deal involving intellectual property ("IP"),[88] cases involving refusals to grant access to IP are treated in a manner similar to refusals to deal in general.[89] Twelve agencies cited insufficient precedent to provide a detailed response.[90]

Canada, the *European Commission*, *Germany*, *Italy,* and the *United Kingdom* said they were cautios in applying competition law to refusals of access concerning IP (typically, refusal to license). The *European Commission* stated that a dominant firm's refusal to license IP has been held to constitute an abuse only in "exceptional circumstances." The three criteria the Commission applies to all refusal to deal cases[91] ensure that exceptional circumstances are present. Even if these factors are established, the dominant undertaking may show that the refusal was objectively justified. *Denmark*, *Jersey*, the *Netherlands*, *Sweden*, and the *United Kingdom* responded that they would follow the EC approach.

New Zealand and *Canada* take similar approaches to refusals involving IP. *New Zealand* states that an undertaking does not abuse its dominant position simply by enforcing its statutory intellectual property rights; there would be concerns, however, if the holder of IP rights in one market attempted to leverage them to gain power in another market. *Canada*, too, says that an exercise of an IP right is not an

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[88] Responses to IP questions (Question 10) received from Belgium, Bulgaria, Canada, Chile, Costa Rica, Czech Republic, Denmark, El Salvador, Estonia, European Commission, France, Germany, Honduras, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jersey, Jordan, Korea, Lithuania, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Russia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom, United States. In addition, responses were received from Swiss NGAs Hoffet, Homburger, Venturi and from German NGA Prof. Drexl (Max Planck Institute, Germany).

[89] Bulgaria, Chile, European Commission, France, Israel, Italy, Japan, Jordan, Korea, Lithuania, Romania, Spain, Singapore, Sweden, Switzerland, United States. France stated that it would examine refusals involving IP using the same criteria as refusals concerning an essential facility, but noted that its practice with respect to IP is still developing.

[90] Belgium, Costa Rica, Czech Republic, El Salvador, Estonia, Hungary, Pakistan, Poland, Slovak Republic, South Africa, Switzerland, Turkey.

[91] The refusal (a) relates to a product or service indispensable to the exercise of an activity in the downstream or a related market, (b) is of such a kind as to eliminate effective competition in that market, and (c) results in lasting consumer harm, e.g., by preventing the appearance of a new product for which there is potential consumer demand.

abuse, but concerns can arise if the right is used in an anticompetitive manner, in narrowly defined circumstances when:

(1) The refusal to license IP "has adversely affected competition to a degree that would be considered substantial in a relevant market that is different or significantly larger than the subject matter of the IP or the products or services which result directly from the exercise of the IP." This step is satisfied when: (i) the IP holder is dominant in the relevant market, and (ii) the IP is an essential input or resource for firms participating in the relevant market – without access to it others cannot effectively compete in the relevant market.

(2) Invoking a special remedy against the IP right holder would not adversely alter the incentives to invest in research and development. This step is satisfied if the refusal to license the IP is stifling further innovation.

Russia states that any use of IP, including refusals to license, is exempt from the application of its competition law.

Does the type of intellectual property change the analysis?

For many agencies the type of intellectual property involved (e.g., patents versus trade secrets) does not change the analysis.[92] The *United States* notes that, although the basic antitrust principles applied in cases involving refusals to deal are the same for all forms of property, including IP, the outcome of a refusal to deal case could be affected by the form of the IP involved.

For some jurisdictions, a refusal to provide interface information to make a product interoperable may constitute a refusal to deal, although many also cited a lack of precedent in this area.[93] The *European Commission* stated that "leveraging market power from one market to another by refusing interoperability information may constitute an abuse of a dominant position." *Japan* and *New Zealand* expressed similar views. *Poland* cited a specific case where an anticompetitive vertical agreement, which closely resembled anticompetitive unilateral conduct, was found when a firm that produced software for regional offices of the *National Health Service* made it difficult for competitors to achieve interoperability by providing incomplete information, often with significant delays.

2. Refusals to Deal in Regulated Industries

Of the 39 agencies that responded to the question concerning refusals in a regulated industry,[94] 21 stated that their analysis does not change in a regulated

[92] E.g., Canada, European Commission, Germany, Ireland, Italy, New Zealand, Singapore, United Kingdom),

[93] E.g., Canada, European Commission, France, Germany, Ireland, Israel, Italy, Japan, New Zealand, Poland, Romania, United Kingdom.

[94] Responses to Question 11 received from Belgium, Bulgaria, Canada, Chile, Czech Republic, Denmark, El Salvador, Estonia, the European Commission, France, Germany, Honduras, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jersey, Jordan, Korea, Lithuania, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Russia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, the United Kingdom, United States. In addition, responses to this question were received from Swiss NGAs Hoffet, Homburger, Venturi and from German NGA Prof. Drexl (Max Planck Institute, Germany).

industry.[95] However, many of these agencies also note that an industry regulator may set specific terms of access, which may be taken into account in the competition law analysis. As stated by *Italy*, "the specific regulatory environment of a refusal to deal case is taken into account when assessing a firm's behavior in a regulated industry and its effects on competition."[96] Depending on the circumstances, the specific regulatory environment can either facilitate the finding of an abuse, or provide a defense to otherwise abusive conduct.

- The *European Commission* states that the presence of sector-specific access obligations imposed by a regulator can facilitate the finding of an abuse of dominance if the dominant undertaking fails to comply with or circumvents these obligations. *Chile*, *Estonia,* and *Hungary* follow a similar approach.

- The *Czech Republic* states that if a sector-specific regulation requires a dominant undertaking to behave in a way that otherwise would have constituted an abuse of dominance, there is no offense under the *Czech Competition Act*. *Poland* takes a similar view. Canadian competition cases recognize a "regulated conduct defense" to an alleged criminal violation of the Competition Act, although the availability of the defense in a civil context is unclear.

- The *Slovak Republic* and *Turkey* state that the presence of an industry regulator may affect the competition enforcement agency's prioritization of matters concerning regulated industries. *Turkey* in particular cited an increasing hesitance to intervene in markets subject to sector-specific regulation, especially concerning refusals to supply, when both the upstream and downstream markets are regulated.

- *Spain* states that if the refusal to deal occurs "in a recently liberalized market or enjoys special or exclusive rights, the infringement will be considered as very serious," warranting a higher financial penalty.

- *Singapore* responded that "the provisions in the Competition Act relating to an abuse of a dominant position do not apply to any agreement or conduct which relates to any goods or services regulated by any other written law or code of practice relating to competition, under the purview of a sector specific regulator . . . . In principle, when a firm is obliged by regulation to supply its product at a sanctioned price, it has no ability to refuse to deal with any customer, regardless of whether this firm has market power or not."[97]

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[95] Bulgaria, Canada, Denmark, European Commission, Germany, Honduras, Indonesia, Israel, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Poland, Romania, Russia, Slovak Republic, Taiwan, Turkey, United Kingdom.

[96] Belgium similarly states that "the specific provisions of telecom, electricity or gas regulations will be taken into account in the competition law assessment of market behavior."

[97] For consideration of margin squeeze in regulated industries, see Section IV.E.6. For consideration of remedies in regulated industries, see Section VI.D.

3. Refusals to Deal Involving State-Created Monopolies

Responses of the 39 agencies that responded to the question concerning refusals by a stated-created monopoly[98] largely state that the competition law analysis does not change when applied to a former state-created monopoly. However, if the former state-created monopoly is subject to industry regulation, this may affect the competition law analysis. In particular, specific access obligations may arise for former state-created monopolies operating in regulated industries.

Denmark notes that a state-created monopoly may not be able to justify a refusal to deal by claiming it is necessary to protect innovation and investment. The Danish response states that "for former state monopolies, all or most of the innovation and investments has been made with tax-payers money, therefore an objective explanation referring to the protection of an investment would probably not be accepted."

E. MARGIN SQUEEZE

In response to the question regarding recognition of the concept of margin squeeze, 32 jurisdictions said they recognize this practice as a potential antitrust violation/abuse of dominance.[99] Three agencies stated that they do not recognize the concept.[100]

1. Definition of and Criteria Applied to a Margin Squeeze

Of those 32 agencies that recognize a cause of action for margin squeeze under their competition law, 22 have handled margin squeeze cases and have developed

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[98] Responses to Question 12 received from Belgium, Bulgaria, Canada, Chile, Czech Republic, Denmark, El Salvador, Estonia, European Commission, Finland, France, Germany, Honduras, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Jersey, Jordan, Korea, Lithuania, Mexico, Netherlands, New Zealand, Pakistan, Poland, Romania, Russia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom. In addition, responses to this question were received from Swiss NGAs Hoffet, Meinhardt, Venturi and from German NGA Prof. Drexl (Max Planck Institute, Germany).

[99] This is the case in Belgium, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, European Commission, Finland, France, Germany, Hungary, Israel, Italy, Japan, Jersey, Lithuania, Mexico, Netherlands, New Zealand, Poland, Romania, Russia (margin squeeze is treated as a form of constructive refusal to deal), Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland (see also separate response from Swiss NGAs Hoffet, Meinhardt, Venturi), Taiwan, Turkey, United Kingdom.

In addition, as discussed further below, although the U.S. Supreme Court has held that a margin squeeze claim is not available against an integrated firm that can legally refuse to deal in the upstream product, the Court has not ruled on the question of whether a margin squeeze claim is available when there is an obligation to deal in the upstream product, although it did express skepticism of a standalone margin squeeze doctrine in that context. See also Costa Rica (explaining margin squeeze is not specifically recognized, but could be recognized as a refusal to deal); Pakistan (explaining that margin squeeze could be included within refusal to deal, but that the competition authority has not yet addressed the issue).

[100] El Salvador, Indonesia, Jordan. A further five agencies stated that they had no data available on margin squeezes, or did not address the question. Colombia, Honduras, Ireland, Serbia, South Korea.

specific criteria to deal with them.[101] On a general level, these agencies define margin squeeze in a manner that is substantially similar to the way it is defined in the questionnaire, i.e., when a dominant firm charges a price for an input in an upstream market that, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival in the downstream market to compete. On a more specific level, the authorities that recognize such an offense generally agree that the authority must determine whether the undertaking is dominant in the upstream (wholesale) market.

While most authorities require dominance only in the upstream market,[102] some also require market power in the downstream market or consider a lack of downstream market power a factor that weakens the case. *Canada*, for instance, requires that the "upstream firm. . . has market power in the downstream market" in order to find a violation. A number of other authorities likewise stressed that while downstream dominance is not absolutely required, possession of downstream market power may play an important role in the analysis.[103] Thus the *United Kingdom* noted that while upstream market power alone will suffice where the dominant undertaking possesses monopoly or near monopoly power in the upstream market, margin squeeze allegations generally raise concerns only when an undertaking has market power in both markets.[104] Similarly, *Poland* noted that the accused undertaking need only be dominant in the upstream market, but that the undertaking usually will also need to be strong in the downstream market.

The *European Commission, Germany, Italy, Japan, and Poland* replied that they generally use the same (or very similar) evaluative criteria for margin squeeze scenarios as they apply to actual refusal to deal cases.[105] Some agencies stated that they analyze whether there is a legitimate business justification for the conduct.[106] Six authorities also stressed that the upstream input must be "essential" or objectively necessary for the downstream firm to compete effectively.[107] *Canada* also stated that a finding of an illegal margin squeeze would require a showing of intent by the dominant undertaking to restrict or distort competition.[108]

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[101] Belgium, Bulgaria, Chile, Denmark, European Commission, Finland, France, Germany, Hungary, Italy, Japan, Lithuania, Mexico, New Zealand, Poland, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom.

[102] This is the case with the European Commission, and by implication the jurisdictions that follow EC practice (Finland, Jersey, Netherlands, Sweden and Lithuania), as well as of Bulgaria, Germany, New Zealand, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Taiwan, Turkey, and the United Kingdom. Estonia, Hungary, Italy, Japan, and Switzerland did not address the question.

[103] Bulgaria, Czech Republic, Germany, Poland, Slovakia.

[104] See the United Kingdom's OECD submission at pp. 3-4, attached to its ICN submission.

[105] Regarding the evaluation of an actual refusal to deal, see section IV.A. of this Report.

[106] Czech Republic, Germany, Slovakia, South Africa, Turkey.

[107] Czech Republic, Italy, Slovakia, Taiwan, and Turkey used the word "essential," while Netherlands stated that the input must be "objectively necessary".

[108] Canada's response cites its "Enforcement Guidelines on the Abuse of Dominance Provisions." New Zealand would also require a showing of intent in the case of a temporary margin squeeze.

2. Specific Provisions and Guidelines Concerning Margin Squeeze Practices

Nearly all of the 32 agencies that recognize margin squeeze as a potential antitrust violation have no specific provisions dealing with them, but rather apply general provisions directed against abuse of a dominant position or a refusal to deal.[109]

The laws of two jurisdictions (*Canada* and *Germany*) have specific provisions that address margin squeeze. Section 78 of the Canadian Competition Act forbids "squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market."[110] *Canada* takes care to distinguish between alleged price squeeze situations and simple profit erosions that companies suffer as a result of vigorous competition. As such, "an anti-competitive price squeeze must be shown to have the purpose of deterring or preventing entry into the downstream market, confining downstream firms to small niches of the market, or driving competitors out of the market."[111] The desire to distinguish true anticompetitive margin squeeze practices from vigorous competition, in other words, is one of the reasons why *Canada's* provision requires a showing of intent.

The *German Bundeskartellamt* applies its general provisions against abuse of a dominant position to most margin squeeze situations, but in 2007 the *German* legislature amended its Act Against Restraints of Competition specifically to address margin squeeze practices affecting small and medium sized businesses. This amendment primarily intended to make it easier for small and medium-sized undertakings to advance margin squeeze claims. The relevant provision states that, where an upstream undertaking possesses superior market power in relation to medium and small undertakings with which it competes in the downstream market, the prices the superior undertaking charges its downstream competitors (wholesale price) must not be higher than the prices it itself charges on the downstream market (retail price).

Some agencies have issued guidelines addressing margin squeeze scenarios. Thus the *European Commission* in December 2008 issued guidance on its enforcement priorities, taking the view that there "can be an abusive margin squeeze under Article 82 of the EC Treaty, which prohibits the abuse of a dominant position, if the difference between the retail prices charged by a dominant undertaking and the

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[109] Thirty of the 32 authorities noted that their general provisions relating to abuse of a dominant position or refusal to deal with a rival law either have been or could be applied to margin squeeze situations (Canada and Taiwan not counted). Of these 30, eight stated that they have not yet applied their general provisions to margin squeeze scenarios – Czech Republic, Estonia, Israel, Jersey, Netherlands, Romania, Russia, Singapore. As noted above, the 22 others have done so. Belgium, Bulgaria, Chile, Denmark, European Commission, Finland, France, Germany, Hungary, Italy, Japan, Lithuania, Mexico, New Zealand, Poland, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom.

[110] Competition Act of Canada Section 78(1)(a). Canada notes that Section 78 of the Competition Act recognizes margin squeeze as a specific form of anticompetitive conduct and further emphasizes that margin squeeze is a form of abuse of dominance already prohibited by Section 79 of the Competition Act. Consequently, if the Canadian Competition Bureau were to pursue a margin squeeze case they would formally challenge it under Section 79 of the Competition Act.

[111] Canada's response, citing its "Enforcement Guidelines on the Abuse of Dominance Provisions."

wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs of the dominant operator for providing its own retail services on the downstream market."[112]

3. Cases Brought against Margin Squeeze Practices

As noted, 22 agencies reported having brought an action against a dominant undertaking for engaging in illegal margin squeeze practices. The overwhelming majority of these cases were brought against undertakings in the telecommunications sector.[113] These cases typically involve former state monopolies that have since been privatized, but still possess monopoly or near-monopoly power over the country's telecommunications network. The cases generally assert that these companies have used their market power over the upstream telecommunications network to prevent competition in downstream markets, such as providing internet service. These cases have met varying degrees of success.[114]

Only seven agencies reported bringing cases outside the telecommunications context in the last ten years. These include:

- *Bulgaria* (construction);[115]
- *European Commission* (gas transmission services);[116]
- *France* (electricity supply);
- *Germany* (gasoline / gasoline stations);
- *New Zealand* (credit reporting and debt collection);
- *South Africa* (agriculture industry);[117] and

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[112] Romania and Taiwan have issued industry specific guidelines for the telecommunications industry. *See Romania's* response, detailing its "Romanian Guidelines on the application of the competition rules to access agreements in the telecommunications sector," and noting that "a price squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream unit of the dominant company." Likewise Taiwan's response explains its "Fair Trade Commission Policy on Regulations of the Telecommunications Industry," which includes a section on "vertical margin squeeze."

[113] Eighteen authorities reported bringing such cases. Belgium, Bulgaria, European Commission, Finland, France, Germany, Hungary, Italy, Japan, Lithuania, Mexico, New Zealand, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom.

[114] The European Commission, France, Lithuania, Spain, and Turkey have prosecuted such cases successfully and imposed fines on the undertakings. Belgium, Japan, and Poland also reported finding unlawful conduct. The United Kingdom and Germany, on the other hand, have investigated such cases but ultimately found no grounds for enforcement action. Sweden's Competition Authority has requested the Stockholm District Court to impose a fine against the incumbent telecommunications operator; proceedings have been stayed awaiting a preliminary ruling from the Court of justice of the European Union (case C-52-09).

[115] A case was brought against an undertaking, which had a dominant position in the upstream "right to construct" and "approval of design" markets, and was also active in the downstream market of "building of exhibition premises." The Bulgarian Commission on the Protection of Competition found that the dominant undertaking raised the price to its downstream competitors for obtaining the right to construct and approve their designs, squeezing them out of the downstream construction market.

[116] See Commission Decision of 18 March 2009, Case COMP/B-1/39.402 *RWE Gas Foreclosure* – OJ C 133, 12.6.2009, p. 10, cited in the European Commission's response.

- *United Kingdom* (pharmaceuticals, Pay TV, water supply).[118]

4. Margin Squeeze vs. Predation

In response to the question asking for comments on how a margin squeeze claim differed from a claim of predation, while most agencies sought to distinguish the claims, the *United States* noted that its Supreme Court recently held that, to prove cognizable harm from a margin squeeze where the defendant has no duty to deal with rivals under Section 2 of the Sherman Act, the plaintiff must show that the retail price at which the defendant sold in competition with the plaintiff is predatory.[119]

Aside from the *United States*, six agencies explicitly discussed the difference between a margin squeeze claim and predatory pricing.[120] The *European Commission* noted that predatory pricing occurs when a dominant undertaking incurs losses by selling a product below cost with the intention of later recouping those losses through raising prices after its competitors are driven from the market. A margin squeeze, on the other hand, does not necessarily entail the dominant firm's accepting losses initially, because "the profits extracted from a high level of retail prices may surpass by far the forsaken profits related to the forsaken wholesale sales as a result of the high wholesale prices relative to the retail prices."[121] The *United Kingdom* made a similar point, noting that "it is plausible that a firm can pass a predation test and fail a margin squeeze test if the wholesale price is higher than its true cost."[122] The *United Kingdom* explained that the true upstream cost is considered in a predatory pricing case focused on the downstream market, whereas the price charged to downstream rivals is considered in a margin squeeze case.

5. Cost Benchmarks Applied in a Margin Squeeze Test

Nine agencies commented on the test that they use to determine if a margin squeeze scenario exists.[123] Several noted that they apply the "equally efficient competitor test," meaning that if prices compared to costs are such that they could drive equally efficient competitors from the market, a violation may be present.[124]

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[117] The case concerned a grain silo monopolist that monopolized grain trading by charging low prices for storage to farmers who used their trading services while denying the same low price to trading rivals.

[118] See United Kingdom's OECD submission, attached to the UK's response. In two of these cases an antitrust violation was found (involving pharmaceuticals and water supply) while the case regarding Pay TV led to a non-infringement decision.

[119] See United States' response, discussing *Pacific Bell Telephone Co.* v. *linkLine Comm., Inc.,* 129 S.Ct. 1109 (2009); see also the submission of German NGA Prof. Drexl (Max Planck Institute, Germany), discussing the Supreme Court decision in *linkLine*.

[120] European Commission, Germany, Mexico, Singapore, Turkey, United Kingdom.

[121] European Commission response.

[122] See the United Kingdom's OECD submission, attached to its response. The United Kingdom notes that there may also be differences in the appropriate cost measure for both tests, particularly when there are common and joint costs.

[123] European Commission, Germany, Italy, New Zealand, Poland, Singapore, Sweden, Turkey, United Kingdom.

[124] European Commission, France, Singapore, Sweden, and Turkey noted this specifically.

With respect to measuring costs specifically, the *European Commission* stressed that "the dominant undertaking's pricing practices are determined on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors." It further noted that when it is available or can be constructed, it uses long run average incremental cost as its cost measure. *France*, *Germany*, *Italy*, *Poland*, *Sweden* and the *United Kingdom* also specifically noted using long run incremental costs in analyzing a margin squeeze allegations.

The *United Kingdom* stressed that analyzing the dominant undertaking's costs can be difficult, particularly when the dominant undertaking provides multiple products or services, and the authority has to determine which products or services to include in the analysis and how to allocate any joint costs between different products or services.[125] In addition to looking at long run incremental costs, the *United Kingdom* may also consider Fully Allocated Costs (FAC).[126] *Poland* applies a cost-based test "whenever possible." The analysis is similar to that of a predation case, in that the authority attempts to establish whether the downstream product or service is sold below cost, taking the wholesale price of the upstream input as charged to competitors as the downstream cost for the dominant undertaking in analyzing whether it is offering the relevant product or service below cost. *New Zealand* applies what it calls the "Efficient Component Pricing Rule" (ECPR).

6. Margin Squeeze Cases in a Regulatory Environment

Nine agencies explicitly addressed how margin squeezes would be handled in the context of a regulated industry.[127] *New Zealand* and *Slovakia* stated that they would be handled no differently; others noted that competition rules apply where sector-specific legislation leaves open the possibility of competition.[128] A case described in the *European Commission's* submission, *Wanadoo*, provides an apt illustration of this point.[129]

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[125] See the United Kingdom's OECD submission , attached to its ICN submission.

[126] The United Kingdom thereby noted that FAC were often higher than the long run incremental cost, and thus, if the firm passed the FAC test it would often pass an long run incremental cost standard.

[127] Bulgaria, Canada, the European Commission, Hungary, Mexico, New Zealand, Singapore, Slovakia, Turkey.

[128] European Commission response. *Singapore* noted that, in principle, a vertically integrated firm that provides an upstream input subject to price regulation could also engage in a margin squeeze, but any enforcement would be undertaken by the sector regulator under its own law or code of practice relating to competition, instead of under the Competition Act.

[129] In that case, the dominant undertaking provided two relevant upstream products. One of the products was subject to regulation, which imposed a price ceiling on that product, and accounted for 30% of the total relevant wholesale prices. The other product was unregulated, accounting for the other 70% of wholesale prices. Because the dominant undertaking was free to set prices below the price ceiling for the first product, and could set prices however it liked for the second, the Commission considered that the dominant undertaking possessed the requisite freedom to maneuver, and could be found liable for margin squeeze practices (European Commission's response at 14, describing Commission Decision of 4 July 2007, Case COMP/38.784 *Wanadoo Espana/Telefonica* – OJ C 83, 02.04.2008).

V. JUSTIFICATIONS AND DEFENSES

The responses to the questionnaire confirm that competition agencies generally consider justifications and defenses for refusals to deal.[130]

In most jurisdictions, competition agencies do not *a priori* restrict the type of justifications and defenses that they are willing to consider. Most agencies do not have legal provisions that establish specific justifications and defenses for refusals to deal.[131] Rather, acceptable justifications and defenses are based primarily on policy documents and case law.[132]

A. BUSINESS JUSTIFICATIONS FOR REFUSALS TO DEAL

The most commonly accepted justification for a refusal to deal is a refusal based on "legitimate business decisions,"[133] or "acceptable commercial grounds."[134] Competition agencies agree that suppliers, including those with market power, have a fundamental right to refuse to deal in situations in whjch the refusal is in line with normal business practice. Examples include refusals based on a customer's poor credit record,[135] its reputation as an unreliable trading partner,[136] or the customer's unwillingness to accept or comply with generally accepted terms of supply.[137]

The right of a company to refuse to deal also is recognized when the supplier is unable to supply the goods or services in the desired quantity and/or quality.[138] This

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[130] See responses to question 17.

[131] In a few jurisdictions, legislation lists a number of justifications and defenses that may be accepted in case of a refusal to deal. See responses from Canada, Estonia, Mexico, and Russia.

[132] *E.g.,* the European Commission and Korea. *See* European Commission Guidance paper on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. The Korean competition agency has guidelines that list a set of acceptable justifications.

[133] Spain and Switzerland. According to the Canadian competition agency, a refusal to deal is considered to be based on a legitimate business decisions when continuing to deal would place a substantial administrative burden and other costs on the supplier. The Israeli competition agency considers that a refusal to deal may be justified if the supplier proves that it was "reasonable and economically justified." According to the U.S. agencies' response, valid business justifications provide a defense to a refusal to deal claim.

[134] European Commission and Italy. The Canadian competition agency refers to "usual trade terms," which relates to "terms in respect of payment, units of purchase and reasonable technical and servicing requirements."

[135] European Commission, Serbia, Singapore, Slovak Republic, United Kingdom. According to the German response, a refusal of supply may be justified if the retailer is facing insolvency. However, the supplier cannot invoke this justification if the retailer provides sufficient security.

[136] Canada, European Commission, Italy. The response of Swiss NGAs, Hoffet, Meinhardt and Venturi, refers to a case (*Speedy Garage SA/BMW (Suisse Sa)*) where the Vaud Cantonal Tribunal ruled that "commercial reputation" may also be an objective for a refusal to deal.

[137] Canada, New Zealand, Spain, Turkey. The German response refers, for instance, to situations in which a supplier organizes its distribution system according to objective qualitative and/or quantitative criteria and the retailer does not meet these criteria.

[138] Belgium, European Commission, Korea, Spain. According to the Canadian competition agency, the inability to obtain adequate supplies by a buyer must stem from a supplier's legitimate business decision as opposed to an anticompetitive purpose.

would include situations of shortages of stock, raw materials,[139] or spare capacity.[140] In addition, the *New Zealand* competition agency is willing to accept refusals in cases in which a duty to supply would force the supplier to expand its existing distribution network.[141]

Some agencies may accept a refusal to deal for technical reasons,[142] for example when there is no or limited interconnectivity between the supplier's and customer's products such that a duty to supply might harm the supplier's infrastructure.[143] Interconnectivity issues tend to arise in particular in the telecommunications and utilities sectors.

Efficiency considerations are also commonly cited as acceptable grounds for a refusal to deal.[144] Referenced grounds include reduced transportation and administration costs and other cost considerations. *Canada* notes that the preservation of vertical efficiencies could also qualify as a valid business justification to refuse access to an essential facility.

Similarly, a refusal may enhance efficiencies in research and development, and thus may be recognized as a valid justification for a refusal to deal in some jurisdictions.[145] It also may be a tool to combat free riding.[146] According to the *European Commission*, there may be situations in which a duty to supply may harm the supplier's incentives to invest and innovate in such a way that there is lasting consumer harm.[147] Several jurisdictions identified the desire to protect incentives to invest as a reason to limit the instances in which companies are found to have engaged in an illegal refusal to deal.[148]

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[139] European Commission.

[140] New Zealand, Poland, Serbia Singapore, Slovak Republic, Turkey, United Kingdom.

[141] Similarly, Turkey.

[142] Bulgaria, France, Italy, Korea, Spain.

[143] El Salvador, Korea, Turkey; see also German NGA Prof. Drexl (Max Planck Institute, Germany). The French competition agency refers to the *Unik* case, in which the French competition agency accepted the argument of the telecom operator that technical issues prevented compatibility. The Swiss NGAs, Hoffet, Meinhardt and Venturi, refer to a case concerning access to an electricity network, in which the Swiss Federal Tribunal held 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 third-party providers could impair the network owner's performance of its own clients (Decision of the Swiss Federal Tribunal of 17 June 2003 RPW/DPC 2003/4 p. 962).

[144] Canada, Denmark, European Commission, France, Honduras, Hungary, Japan, Jersey, Mexico.

[145] European Commission, Japan, Turkey, and the United Kingdom. The Danish competition agency notes that if a dominant undertaking has previously supplied the input, this can be relevant to the assessment of a claim that the refusal to supply is justified with an assertion that an obligation to deal would negatively affect innovation.

[146] Turkey.

[147] The German NGA Prof. Drexl (Max Planck Institute, Germany) cautions that the need to recoup investment in innovation as, for instance, recognized in the Guidance paper of the European Commission may give too much room for a justification. IPRs do not imply the right to recoup investment in the creation of the subject matter of protection. Recoupment depends on the success of innovation in the market. Therefore, according to Drexl, investment in innovation, as any other form of investment, does and should involve risk-taking.

[148] United Kingdom. According to the Korean competition agency, a refusal to deal may be justified when a duty to supply would prevent fair compensation for investment by the business providing an

Several competition agencies identified the protection of final consumers from health and safety hazards as a valid justification for a refusal to deal.[149] Such refusals could for instance be justified in relation to medical equipment, or inherently dangerous products where inappropriate use could have detrimental effects.

A small number of competition agencies consider that a refusal to deal may be justified when legislation intervenes in the market process.[150] For instance, *Canada* refers to a refusal to deal that follows from a supply quota set by a public body.[151] *Turkey* refers to a situation in which the rules set by a public sector regulator sanction the business conditions applied by the supplier. *Jersey* has considered, with respect to a publicly owned dominant undertaking, whether a refusal to deal is authorized by national law.

B. EVIDENTIARY REQUIREMENTS FOR JUSTIFICATIONS AND DEFENSES

Several competition agencies note that justifications and defenses have to satisfy one or more conditions in order to be considered.[152]

The most frequently cited condition is having an objective basis.[153] This implies that, for instance, benefits that are purely speculative or would arise at some time in the distant future are disregarded.

Another noted condition is that there must be a clear causal link between the efficiency and the refusal to deal and that a justification can be accepted only if there is no less anticompetitive alternative to the conduct.[154] Some agencies refer to this as the "proportionality" requirement.[155]

Eight competition agencies underline that in evaluating a refusal, along with any justifications and defenses, they must carefully weigh the pro- and anticompetitive effects.[156] Only when the pro-competitive effects outweigh the anticompetitive effects can the justification be accepted.

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essential input. The European Commission is prepared to consider claims that the refusal to deal is necessary to realize an adequate return on investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account.

[149] For example, Japan, Jersey, Korea.

[150] Canada, Jersey, Turkey.

[151] A Canadian court found in the *Nadeau* case that heavy regulatory restrictions created a quota system for the supply of the relevant product, preventing it from being available in "ample supply," a concept developed in Canadian case law. The court accepted he justification for the refusal to deal.

[152] See, for example, Denmark, European Commission, Japan, Jersey and Spain.

[153] Bulgaria, Canada, European Commission, France, Germany, Hungary, Italy, Jersey, Singapore, Switzerland, Slovak Republic, Pakistan, Poland, Serbia, Spain, Sweden, United Kingdom.

[154] Denmark, European Commission, France, Japan.

[155] Jersey, Singapore, United Kingdom.

[156] Canada, Denmark, European Commission, Germany, Jersey, Mexico, Pakistan, South Africa, Spain. The Hungarian competition agency reports that a dominant undertaking may justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely.

Some agencies explicitly require that efficiencies and cost savings that result from the refusal to deal will ultimately benefit the consumer.[157] These agencies are unlikely to consider benefits that the supplier fully internalizes.

C. BURDEN OF PROOF

Most agencies agree that it is the competition agency's burden to show the anticompetitive effects, but the companies that refuse to deal must substantiate and, if possible, prove the proffered defense.[158]

VI. REMEDIES IN REFUSAL TO DEAL CASES

In response to the question regarding the types of remedies that are available in refusal to deal cases brought by competition agencies as well as in private cases, 4 agencies stated that cease and desist orders were available, 23 stated that access to the refused good could be mandated, 18 had fines as a possible remedy, and several have authority to seek criminal sanctions although only one agency has done so.[159] A few agencies noted the ability to impose structural measures to restore competition, but only one notes that such a remedy was imposed.[160] Twenty-four responses stated that the same remedies are available for refusals to deal in regulated industries. One agency stated that it had no remedy options at all.[161]

Only a few responses acknowledged that the decision to bring a case is influenced by the administrability of the potential remedies. The *United Kingdom* notes that the Office of Fair Trading considers a range of issues when considering whether to proceed with a competition case, one of which may be "whether or not there is a reasonable chance that an appropriate remedy would be available." *Israel* notes that it never declined to pursue a refusal to deal case for lack of an appropriate remedy.

A. CEASE AND DESIST ORDERS

In 24 jurisdictions, a cease and desist order to terminate the illegal conduct is available under the competition laws.[162] The *European Commission* notes that "In

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[157] European Commission, Japan, Jersey, Pakistan, Russia.

[158] Bulgaria, Canada, Costa Rica, European Commission, Estonia, Germany, Honduras, Hungary, Italy, Jersey, Korea, Mexico, Pakistan, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

[159] See responses to questions 18 to 20. Criminal sanctions have been imposed in two cases in Israel.

[160] The Bulgarian agency's response notes that, in accordance with the Law on Protection of Competition that took effect in December 2008, the CPC has the right to impose behavioral and/or structural measures to restore competition. The Mexican agency notes that their competition law empowers the CFC to impose behavioral remedies if they will effectively eliminate the refusal to deal, and structural remedies on recidivist undertakings. The European Commission notes that it has imposed structural remedies in Article 9 decisions.

[161] See the Jordanian agency response.

[162] Cease and desist orders are a possible remedy in Belgium, Bulgaria, Canada, Chile, European Commission, Germany, Honduras, Hungary, Italy, Japan, Jersey, Korea, Lithuania, Mexico, New Zealand, Poland, Russia, Singapore, Slovak Republic, Spain, Taiwan, Turkey, United Kingdom, and

certain cases, the Commission 'simply' ordered the dominant undertaking to bring an end to the infringement." In one instance this meant ordering the company to continue providing service that it had begun to refuse.

B. MANDATED ACCESS

Twenty-three agencies reported that they could mandate access to the refused good or service.[163] Several agencies described this remedy as typically being a requirement to supply the good or service on some non-discriminatory basis consistent with market prices and previous sales by the dominant firm.[164] As the *Russian Competition Authority* notes, "the price of the commodity after ceasing the refusal to deal violation is determined on the basis [of the] prevailing market price by the company itself." *Mexico* states, "in all cases the CFC ordered responsible firms to provide access to the product or service; and that this access has to be non-discriminatory and that the fees or prices charged shall be cost oriented." *Bulgaria* notes that "the dominant undertaking should offer [the] contract under non-discriminatory conditions and at reasonable prices."

Several authorities expressed reluctance to set the price of the mandated sale.[165] As the *Turkish Competition Authority* stated, "even in situations where the TCB decides a duty to deal, it tries to avoid acting as a price regulator by either not mentioning the price or using vague terms." *Costa Rica* notes that in two cases the defendant was ordered to provide access to rivals, but the price was not fixed because their Commission does not have the power to set prices. The *United Kingdom* reports that in one matter (*Albion Water*), the Competition Appeal Tribunal declined to order a specific margin to be maintained between the defendant's common carriage charge and its retail price because of the practical difficulties in setting a retail margin remedy, and the lack of detail about costs and revenues of the defendant.

The gravity of mandating access was noted by the *European Commission*: "The Commission considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on a dominant undertaking. Such a finding can only be based on a rigorous case by case investigation and a careful balancing of conflicting considerations."

C. MONETARY PENALTIES

In 18 responding jurisdictions, monetary penalties (fines) are a possible remedy.[166] For example, *Canada's* competition act was amended in March 2009 to

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United States. Although some countries did not identify any refusal to deal cases during the relevant period (ten years), they listed the remedies that would be available.

[163] Access is a possible remedy in Bulgaria, Canada, Chile, Costa Rica, Czech Republic, El Salvador, European Commission, France, Finland, Germany, Honduras, Hungary, Ireland, Israel, Jersey, Lithuania, Mexico, Romania, Russia, Switzerland, Turkey, United Kingdom, and United States.

[164] Bulgaria, Chile, Czech Republic European Commission, France, Germany, Ireland, Mexico, Russia, Switzerland, Turkey, United Kingdom.

[165] Costa Rica, Turkey, United Kingdom, United States.

[166] Fines are a possible remedy in Belgium, Bulgaria, Canada, European Commission, Finland, France, Japan, Jersey, Germany, Lithuania, Mexico, New Zealand, Pakistan, Russia, Singapore, Spain, Sweden, Turkey, and United Kingdom.

allow the Commissioner to seek administrative monetary penalties in abuse of dominance cases. A person or firm found guilty of an offense may face a penalty of up to CDN $10 million when an initial order is issued by the Tribunal, and up to CDN $15 million for any subsequent order. In *Singapore* the Competition Commission may impose a financial penalty of up to 10% of the turnover of the business of the firm in Singapore for each year of infringement, up to a maximum of three years. The *Spanish* response notes that in *Gas Natural 2,* the defendant was found to have abused its dominant position as owner of the network for gas transport and distribution by refusing access to a competitor in the downstream market, and was fined €492,000. The *Jersey* response notes that in the *TTS* decision the JCRA imposed a fine of £15,000 on a government-operated undertaking for refusing to provide third-party access to a waste disposal facility.

D. REMEDIES IN REGULATED INDUSTRIES

Twenty-four authorities reported that the remedies available in regulated industries are the same as in non-regulated ones.[167] In *New Zealand*, specific regulation is provided for in the telecommunications and dairy sectors, and the Commission is responsible for enforcing both the Telecommunications Act (regarding access to the incumbent telecommunications network provider) and the Dairy Industry Restructuring Act (regulating access to raw milk from the major dairy cooperative). Similarly, *Jersey* cites the JCRA's dual role as both a competition law enforcer and sector-specific regulator. In its role as the telecommunications regulator in Jersey, the JCRA has placed numerous access requirements on the dominant incumbent operator, such as providing mandatory interconnection obligations, providing a reference interconnect offer, and offering technical standards and specifications required for interconnection. These remedies imposed in a regulatory context "are more specific than, and likely extend beyond, access provisions arising out of general competition law."[168]

In Singapore, remedial action for goods or services regulated by any other written law or code of practice relating to competition and under the purview of a sector regulator (such as telecoms, postal, electricity, media, and airport services) will be dealt with by the sector regulators under its own law or code of practice relating to competition. Hence, remedies under the competition act are not necessary in regulated industries. *Indonesia* also does not have authority to impose remedies in regulated industries. The *Estonian* agency states that "the scope of the regulatory provisions in sector-specific law matters. If there are no particular provisions in sector-specific law, which regulate [the] issue of refusal to deal, the general provisions of Competition Act apply."

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[167] Regulated industries are subject to the same potential remedies in Bulgaria, Canada, Costa Rica, Czech Republic, European Commission (noting *Deutsch Telecom* and *Telefonica* cases), El Salvador, Finland, Germany, Honduras, Hungary, Japan, Korea, Lithuania, Mexico, New Zealand, Russia, Slovak Republic, Spain, Sweden, Taiwan, Turkey, United Kingdom, and United States.

[168] See response from Jersey.