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# Hong Kong Competition Law Series: Part 20

2015 - THE YEAR OF COMPETITION IN HONG KONG

## Refusal to Deal

### REFUSAL TO DEAL

Businesses are generally free to decide with whom they will do business.

Refusal to deal may be problematic when a business with a substantial degree of market power controls an essential input or distribution channel, and, by withholding that input or preventing access to the distribution channel, forecloses a business from the relevant market or damages its ability to compete effectively in that market.

### WHEN CAN YOU SAY NO?

A business with substantial market power may legitimately refuse to deal with a party if the party:

- Is not reliable, e.g., is a bad credit risk.
- Lacks requisite capability, e.g., is unable to provide sufficient customer or after-sales service.
- Does not meet reasonable, objective and fairly applied criteria, e.g., advertising and product display criteria.

### WHEN MAY REFUSAL TO DEAL BECOME AN ISSUE?

Only in very rare cases will a refusal to deal contravene the Second Conduct Rule. The Competition Commission may consider:

1. Whether or not it is technically and economically feasible for the business to provide the input.
2. The history of dealing between the parties – whether a business relationship was abruptly terminated without justification.
3. The terms and conditions at which the products are generally supplied, or are supplied in other contexts.

Exceptionally, a business may be under a duty to deal on non-discriminatory terms with a competitor or potential competitor if the input it controls is so important that without access to it other businesses will be unable to compete.

This may arise in the intellectual property context, where a business holding an essential intellectual property right (IPR) agrees to allow the IPR to be incorporated into an industry standard and license the IPR on fair, reasonable and non-discriminatory terms, but subsequently reneges on its promise or seeks to restrain use of the IPR by a willing licensee.

## Next Week

Next week we will consider margin squeeze, a form of exclusionary abuse where a business with substantial market power in an upstream market seeks to leverage its market power into a related downstream market.

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