

Unilateral Conduct Working Group Questionnaire

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to ekraus@ftc.gov and arno.rasek@bundeskartellamt.bund.de, and provide a contact person who can answer possible questions on your response.

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law
- f. Other (please identify)

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

3. If there are multiple objectives, how are these balanced or reconciled?

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (*e.g.*, small, transition, or recently-liberalized), please explain.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present yes/no
- Acquisition or creation of dominance/substantial market power yes/no
- Attempt to acquire or create dominance/substantial market power yes/no
- Other (please identify)

Why did your jurisdiction choose these stages?

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a "safe harbour"? yes/no

If so, please respond as applicable:

- What is the market share level of the dominance presumption? _____
- Is the dominance presumption rebuttable? yes/no
- What is the market share level of the safe harbour? _____
- Is the safe harbour absolute (i.e., dominance/substantial market power cannot be found below the specified percentage level)? yes/no
- What is the legal basis of the presumption statute /case law/guidelines
- What is the legal basis for the safe harbor? statute /case law/guidelines

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? yes/no

If so, please explain why and in which circumstances.

5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined? yes/no

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?¹

- | | |
|---|--------|
| - Market share of the firm and its competitors | yes/no |
| - Market position and market behavior of competitors | yes/no |
| - Durability of market power | yes/no |
| - Barriers to entry or expansion | yes/no |
| - Economies of scale and scope/network effects | yes/no |
| - Buyer power | yes/no |
| - Access to upstream markets/vertical integration | yes/no |
| - Access to essential facilities | yes/no |
| - Market maturity/vitality | yes/no |
| - Financial resources of the firm and its competitors | yes/no |
| - Profits of the firm | yes/no |
| - High prices (at absolute or comparative level) | yes/no |

Please specify any other criteria that you use to assess single-firm dominance/substantial market power. _____

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/no

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. **[NB: Jurisdictions that do not consider themselves "small" economies are welcome to skip this question.]**

¹ The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms, energy, water, and railways* sectors.

I. State-created Monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned², state-controlled³, state-enabled or facilitated⁴, recently privatized and/or liberalized, regional monopolies,⁵ etc.

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.⁶

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?

² Those undertakings that are 100% owned by the State.

³ The control belongs to the State, without taking into consideration the amount of the % of the State share.

⁴ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

⁵ Includes public/private undertakings that are granted exclusive rights within a certain region.

⁶ The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

- Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law) ?

6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:

- What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?
- To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.

D. General

1. From among the following, how would you characterize your jurisdiction:
developed / developing / transitioning?

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.