International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Belgian Competition Authority (Directorate General)
Date: 4 January 2010

Refusal to Deal

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

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

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

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

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

General Legal Framework

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

Yes, a refusal to deal as defined in the introductory paragraphs can constitute an abuse of a dominant position.

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

Article 3 of the Belgian Competition Act (similar in wording to article 102 TFEU, ex article 82 EC).

There are no separate provisions for specific forms of refusal. Margins squeeze may also constitute an abuse of a dominant position.

A refusal to sell separately because of tying may not only be a type of abuse of a dominant position, but it may also constitute an unfair trade practice. The unfair trade practice law is, however, under review.

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

The antitrust provision that may apply to refusals to deal only applies to dominant firms (regulated industries may be subject to specific provisions that are not part of antitrust law and that are not enforced by the competition authority).

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

A refusal to deal that constitutes an abuse of a dominant position is an administrative violation that may give cause to a civil law liability.

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

Two plus one margin squeeze case.

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

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

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

Unlawful conduct was found in two refusal to deal cases and in one margins squeeze case. One refusal to deal case was confirmed on appeal, in the other two cases, appeal is still pending.

- One refusal to deal case was concerned with type approval services to be offered by the importers for parallel imported motorcycles;

- One refusal to deal case established that a major fruit and vegetable auction house did not apply objective criteria for refusing their services;

- The margin squeeze case found that the incumbent telecom operator's whole sale and retail tariffs for mobile telephony constituted a margin squeeze that unlawfully impeded the market access for challengers.

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

Yes. We have no data on cases.

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

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

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

d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

Unjustified refusals to deal by a dominant company are assumed to be harmful. In case of schemes or marketing arrangements, the Court of Appeal decided that no actual impact on the Belgian market needs to be demonstrated. It is sufficient to establish a potential effect.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

There is no distinct antitrust offense.

If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

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

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

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

The competition authority did not yet need to address these issues.

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

The specific provisions of telecom-, electricity- or gas regulations will be taken into account in the competition law assessment of market behavior.

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

There is no evidence of a difference in approach depending on former ownership, but priority will usually be given to complaints concerning recently liberalized services.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

Yes, we recognize the concept of a "constructive" refusal to deal as defined in the introductory paragraphs, e.g. in respect of margin squeezes.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's

competition laws?

As for a refusal to deal, it is sufficient to prove the existence of the practice (in this case a margin squeeze) and its potentially negative impact on competition[1].

Presumptions and Safe Harbors

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

An unjustified refusal to deal by a dominant firm is generally presumed illegal. If the refusal was motivated, the complainant or competition authority needs to prove that the justification was insufficient. If the refusal was not justified, the refusing firm needs to establish that its refusal was justified.

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

The technical answer is no, but in practice some justifications, if factually correct, virtually create a safe harbor, e.g. a track record of a bad debtor.

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

There is no closed or even open list of justifications and defenses. Just a few examples:

– Inability to supply,

– Inability of the purchaser to pay,

– Any other serious logistical problem that is either not caused by the refusing firm, or at least not the result of an illicit wish to refuse to sell.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

[1] Décision n° 2009-P/K-10 du 26 mai 2009, *Affaire CONC-P/K-05/0065 : Base/BMB „Comme l'a souligné l'auditeur, il suffit de démontrer que le comportement abusif de l'entreprise en position dominante tend à restreindre la concurrence ou, en d'autres termes, que le comportement est de nature ou susceptible d'avoir un tel effet. En d'autres termes, pour certains comportements, les effets (potentiels) peuvent être déduits du fait que certaines conditions sont réunies (comme dans le cas du ciseau tarifaire) pour constater une infraction. »*

An order to stop the illicit practice, and an administrative fine in the type approval and mobile telephony cases.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

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

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

The Directorate General has repeatedly expressed concern in respect of refusals to start up a new commercial relationship. We consider that such refusals should not be considered unlawful in case the refusing supplier and the customer are in any way competing in respect of the goods or services for which the services of the refusing firm are allegedly required.

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.

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