International Competition Network

Unilateral Conduct Working Group

Questionnaire

Agency Name: **Bundeskartellamt**

Date: **4 November 2009**

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, in Germany a refusal to deal by a dominant company, or in some cases a company with "superior market power" in relation to its competitors, can constitute a violation of antitrust law.

Although there is no statutory definition of a "refusal to deal", the concept developed in German practice is substantially similar to the definition given in the introductory paragraphs above; i.e. a refusal to deal is generally understood as the unconditional refusal of a dominant firm to deal with a *rival*.

However, an anticompetitive refusal to deal must not always involve a *rival*. For example, in the context of distribution systems, it can – under certain circumstances – also occur where an upstream supplier of a good or service breaks off an existing relationship (or refuses to enter into a new relationship) with a downstream customer who meets the qualitative criteria that the supplier has put into place for other customers.[1]

It needs to be emphasized, though, that from a purely legal perspective, the definition of a "refusal to deal" is irrelevant; instead the element to be established is that the criteria stipulated by the respective laws (see below, *question 8*) are met in a given case.

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

The Bundeskartellamt applies Article 82 of the Treaty Establishing the European Community (hereinafter: "EC") and Sections 19, 20 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter: "ARC") that both address refusal to deal.

As far as the general relationship between Article 82 EC and Sections 19, 20 ARC is concerned, the Bundeskartellamt must principally also apply Article 82 EC, where it applies Sections 19, 20 ARC to cases that affect trade between member states.[2] In cases that do not affect trade between EC Member States, the Bundeskartellamt applies Sections 19, 20 ARC.

Article 82 EC states in part:

> *"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.*
>
> *Such abuse may, in particular, consist in:*
>
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
>
> *(b) [...]*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

[1] See e.g. the scenario concerning the decision of the Higher Regional Court of Munich (*Oberlandesgericht München*) dated 08 January 2009 (case no. U (K) 1501/08)), where the downstream customer was not a rival of the upstream company (cited according to legal database *juris*)

[2] Article 3 (1) clause 2 Regulation No. 1 /2003.

Section 19 (1) ARC provides for a *general prohibition* for dominant undertakings to abuse their market power as a blanket clause and is similar to Article 82 EC (first sentence). Similar to Article 82 EC (sentence 2), Section 19 (4) ARC sets out four non-exhaustive examples of forbidden abusive behaviour. These examples include impairing the ability to compete, demanding unfavourable or discriminating business terms and the refusal to provide network or infrastructure facility access. Section 19 ARC reads in part:

> *"(1) The abusive exploitation of a dominant position by one or several undertakings is prohibited.*
>
> *(2) [...]*
>
> *(3) […]*
>
> *(4) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services:*
>
> *1. impairs the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification;*
>
> *2. […]*
>
> *3. […]*
>
> *4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such concurrent use is impossible or cannot reasonably be expected."*

Besides Section 19 ARC, another provision, Section 20 (1) ARC adds that unfair hindrance and discrimination by dominant firms are prohibited. Section 20 (1) states specifically:

> *"(1) Dominant undertakings […] shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification."*

In refusal to deal scenarios with a genuinely national dimension, the Bundeskartellamt and the German courts have – depending on the circumstances of each individual case – generally applied either Section 20 (1) ARC separately[3], or in combination with Section 19[4].

Other than these general provisions, the German ARC also contains some *specific provisions*:

For example, the recently introduced Section 20 (4) clause 2 no. 3 ARC contains a specific provision that explicitly addresses *margin squeeze practices*, insofar as small and medium-sized companies are affected: [5]

> *"(4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market position directly or indirectly to hinder such competitors*

[3] See e.g. Higher Regional Court of Karlsruhe (*OLG Karlsruhe*) WUW/E DE-R 2213 – *BGB Kommentar* (2007).

[4] BKartA (case no. B7-11/09) WuW DE-V 1769 – *MABEZ Dienste* (English case summary available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B07-011-09-engl.pdf?navid=31).

[5] Please note that the amendments will only remain in force until December 31, 2012; after which date the original versions will be reinstated.

in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking […]

3. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods and services which is higher than the price it itself offers on such market,

unless there is, in each case, an objective justification for this."

Furthermore, Section 21 (1) ARC contains a special provision against requests to refuse to supply (so-called **"***boycotts***"**) which applies irrespective of a market power test:

"Undertakings and associations of undertakings shall not request another undertaking or other associations of undertakings to refuse to sell or purchase, with the intention of unfairly harming certain undertakings."

Boycotts in the sense of Section 21 (1) ARC usually involve joint actions by more than one company and can therefore not be considered as "unilateral conduct" by a dominant company. Consequently, they are not further addressed in the response to this questionnaire.

As noted above, section 19 (4) ARC sets out four examples of abusive behaviour, one of which includes specific provisions on the *refusal to provide access to a network or to infrastructure facilities* (Section 19 (4) no. 4 ARC). There are no separate provisions concerning refusals to deal involving IP rights – these types of cases are covered by the general provisions outlined above. The same holds true for margin squeeze scenarios that do not fall under the specific provision of Section 20 (4) clause no. 3 ARC.

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

Section 20 (1) ARC can under certain circumstances also apply to non-dominant firms. According to Article 3 (2) sentence 2 Regulation 1/2003, the member states are not precluded from adopting or applying on their territory stricter national laws which prohibit or punish unilateral conduct by companies. Section 20 (2) ARC provides that an undertaking with a position of "superior market power" in relation to other undertakings must not unfairly abuse its position or hinder another undertaking without an objective justification. "Superior market power" may be present in a horizontal or vertical context. The following submission focuses on abuse of dominance cases.

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?

Refusals to deal, if anticompetitive, are civil violations of antitrust law. They are investigated in administrative proceedings by the Bundeskartellamt; fines may be imposed. However, they may also be challenged in court by private parties (see answer to *question 7*).

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)?

The Bundeskartellamt has conducted roughly ten in-depth investigations of a refusal to deal over the past ten years.

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

The Bundeskartellamt found unlawful conduct in four of the cases it investigated over the past 10 years.[6] Two of those cases – *Mainova* and *Scandlines* – could properly be characterized as involving essential facilities, one – *Freie Tankstellen* – involved a margin squeeze scenario. None of the cases concerned IP-licensing (there have, however, been private cases that involved IP-licensing; see below, *question 7*). Here are the cases in chronological order:

- *Scandlines Deutschland GmbH*[7]

  In December 1999, the Bundeskartellamt prohibited Scandlines Deutschland GmbH – in which Deutsche Bahn AG and the Kingdom of Denmark each held an indirect share of 50% - from refusing competing ferry companies access to the Puttgarden terminal upon payment of an adequate fee.

  The proceedings were based upon two complaints from competitors who wanted to start ferry service along the Puttgarden-Rödby (Denmark) route, but whose application for shared use of the Puttgarden terminal had been rejected by Scandlines, the terminal owner. The Bundeskartellamt determined that Scandlines held a dominant position both with respect to its control of the terminal facilities, and the downstream market of providing ferry services from Puttgarden and Rödby. The alternative transportation routes were not interchangeable with the Puttgarden-Rödby route, while legal and physical obstacles prevented the competitors from constructing their own terminal at Puttgarden.

  The Bundeskartellamt found that the public's interest in opening up the market to competition outweighed Scandlines' interest in having the exclusive and unlimited use of its terminal.

- *Freie Tankstellen*[8]

  In August 2000, the Bundeskartellamt prohibited several gas companies from charging wholesale prices to independent gas stations (so-called "*Freie Tankstellen*") that exceed the retail prices they charge to end customers. The

[6] Please note that this includes only cases in which a formal decision was made.

[7] BKartA case no. B9-16/98 – *Scandlines Deutschland GmbH* (decision in German available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B9_199_97_16_98.pdf?navid=41).

[8] BKartA case no. B8 -77/00 – *Freie Tankstellen* (decision in German available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B8_77_00.pdf?navid=41).

proceedings were based upon several complaints by independent gas stations and their associations.

- *Mainova AG*[9]

  In October 2003, the Bundeskartellamt prohibited the energy supplier Mainova AG from denying GETEC net GmbH and Energieversorgung Offenbach AG (EVO) connection to its medium-voltage network.

  Mainova AG supplied the city of Frankfurt with electricity. Its shareholders included the city of Frankfurt am Main and the E.ON group. GETEC net and EVO depended on this network connection in order to be able to operate site network facilities on premises used for business or housing purposes and to supply end customers located there with electricity generated by the companies themselves or by third suppliers. The establishment and operation of site networks represented a newly emerging market in which Mainova AG attempted to eliminate competition from the outset.

  According to the Bundeskartellamt's decision, both site network operators were entitled to have access to Mainova AG's medium-voltage network pursuant to Section 19 (4) no. 4 ARC in exchange for an adequate fee, because without such access they would have been unable to compete in the market of supplying end customers with electricity.

- *Deutsche Post AG*[10]

  In February 2005, the Bundeskartellamt prohibited Deutsche Post AG from hindering or discriminating against certain providers of postal services called "mail consolidators".

  These mail consolidators collected and sorted mail items weighing under 100 grams and fed them into Deutsche Post's sorting centers. Deutsche Post awarded discounts of 3-21% on the regular postage for these services only to its own major customers and not to the mail consolidators. Small and medium-sized senders generally do not reach the minimum volumes of letters required by Deutsche Post to qualify for the higher levels of the discount echelon. They could thus only reduce their postage costs by utilizing the services of the mail consolidators, who would pool the mail volumes of various senders, allowing each of them to achieve higher discounts.

  The Bundeskartellamt found that Deutsche Post, as a dominant company, could not treat providers of mail services feeding in items collected from one large customer and the mail consolidators feeding in items collected from various customers differently without any objective justification. Deutsche Post was also prohibited from hindering the activities of the mail consolidators by refusing them access to the service of mail delivery (without the services of collection, pre-sorting and feeding into the delivery system) without any objective justification. The Bundeskartellamt determined that Deutsche Post must abstain from its discriminating behavior, and grant the mail consolidators the same discounts as those it granted to large customers.

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[9] BKartA case no. B11-12/03 – *Mainova AG* (decision in German available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B11_12_03.pdf?navid=41).

[10] BKartA case no. B9-55/03 – *Deutsche Post AG* (decision in German available at *http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell05/B9-55-03.pdf?navid=41*).

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.

In all four cases detailed above, the accused party elected to appeal the Bundeskartellamt's determination in court. Of these four cases, two decisions were upheld, and two overturned:

- *Scandlines Deutschland GmbH*

  The Düsseldorf Regional High Court (*OLG Düsseldorf*) overturned the decision of the Bundeskartellamt in August 2000.[11] The Federal Court of Justice (*Bundesgerichtshof*), however, rejected the arguments of the Düsseldorf Regional High Court overturning the decision of the Bundeskartellamt in September 2002, and sent the case back for further review.[12] The Düsseldorf Regional High Court, however, did not issue a further opinion because the two entities seeking access to the Puttgarden terminal no longer existed. In 2003, Eidsiva Reederi SA – the Norwegian owner of one of the original complainants – reasserted its complaint before the European Commission. The Commission referred the case back to the Bundeskartellamt in 2006, which then instituted a study to determine whether the Puttgarden port basin could accommodate another ferry service. The Bundeskartellamt is currently in the process of investigating the matter.

- *Freie Tankstellen*

  The Düsseldorf Regional High Court (*OLG Düsseldorf*) overturned the decision of the Bundeskartellamt in February 2002.[13] It found that the Bundeskartellamt had not sufficiently demonstrated that the prerequisites of Section 20 ARC were met.

- *Mainova AG*

  The Düsseldorf Regional High Court affirmed the decision of the Bundeskartellamt in 2004,[14] and the Federal Court of Justice did so as well upon further appeal in 2005[15]. Mainova AG then appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe, which in May 2009 declined to hear the case.[16] With that the judgment of the Bundeskartellamt became final.

- *Deutsche Post AG*

  The Düsseldorf Regional High Court affirmed the decision of the Bundeskartellamt in April 2005.[17] Following a decision from the European

[11] See OLG Düsseldorf WuW/E DE-R 569 – *Puttgarden II* (2000).
[12] See BGH WuW/E DE-R 977 – *Fährhafen Puttgarden* (2002).
[13] See OLG Düsseldorf WuW/E DE-R 829 - *Freie Tankstellen* (2002); see also OLG Düsseldorf WuW/E DE-R 589 – *Freie Tankstellen* (2001).
[14] See OLG Düsseldorf WuW/E DE-R 1307 – *GETECnet* (2004).
[15] See BGH WuW/E DE-R 1520 – *Arealnetz* (2005).
[16] See BVerfG WuW/E DE-R 2667 – *Arealnetz* (2009).
[17] See OLG Düsseldorf WuW-E DE-R 1473 – *Konsolidierer* (2005).

Court of Justice in March 2008 that EC law did not permit Deutsche Post to discriminate against the mail consolidators, Deutsche Post withdrew its appeal. With that the judgment of the Bundeskartellamt became final.

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.

N / A.

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

All antitrust proceedings in Germany are civil in nature.

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.

See cases detailed above (*question 6*). Another important case is the case against Deutsche Telekom AG (hereinafter also: "DTAG") regarding an alleged margin squeeze for certain telecommunication services:[18]

- *Deutsche Telekom AG – MABEZ services (non-infringement decision)*

  The alleged margin squeeze concerned the pricing of connection services on the wholesale level and certain mass call services (hereinafter: MABEZ services) on the retail level. The mass call services are characterized by large traffic volumes within short intervals. MABEZ services are often used for the active participation of large numbers of readers or viewers, e.g. for TV-prize draws and opinion polls.

  Due to the large number of incoming calls, MABEZ services require a technical platform to operate the incoming calls. Further, connection services are required that connect the incoming calls with the technical platform operated by the provider.

  Any provider of MABEZ services will regularly have to purchase connection services from DTAG. Prices for these services are subject to regulation by the Federal Network Agency (*Bundesnetzagentur*). The connection services purchased by DTAG will usually also include certain services needed for MABEZ services (e.g., invoicing, billing, assumption of the default risk (*Ausfallrisiko*)).

  In 2008 9Live, a national German TV station, had invited tenders for MABEZ services for its TV-prize games; the final contract had been awarded to DTAG. NextID, a value-added service provider and competitor of DTAG on the market for MABEZ services, thereafter lodged a complaint with the Bundeskartellamt because of an alleged infringement by DTAG of Art. 82 EC and Sections 19, 20 ARC in the form of a margin squeeze and substantiated this with a detailed statement of costs.

[18] See above (footnote 4).

The Bundeskartellamt initiated proceedings to examine possible infringements of Art. 82 EC and Sections 19, 20 ARC, but ultimately saw no grounds to take further enforcement action due to the lack of probability of an infringement. The investigation was based on the evaluative concept that is explained in more detail below (*question 14*).

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 – in fact, the vast majority of cases concerning refusals to deal consist of private challenges. The Bundeskartellamt estimates that there have been more than 50 such cases in the past 10 years.[19] Below are short descriptions of recent representative cases:

- *Reisestellenkarte*[20]

  In March 2009, the Federal Court of Justice held that the defendant (an airline) had violated Art. 82 EG when it withdrew its permission to allow the plaintiff, a credit card company, to separate out the amount of sales tax included in the cost of the flights offered by the defendant in the credit card statements that the plaintiff provided to its customers.

  The plaintiff had offered to businesses a type of credit card called a "Lodge Card," which unlike a regular credit card included in its bill the amount of sales tax included in the cost of certain travel expenses. This significantly relieved the administrative burden of the companies who used these cards, because in reporting and verifying their taxes to the tax authorities they could simply submit their lodge card statements rather than the individual receipts from every business trip.

  To separate out the sales tax in this manner, however, the entity issuing the card needs the permission of the individual service providers under German tax law. A fully owned subsidiary of the defendant was also active in the Lodge Card business, and had a market share of 90-95%. In the upstream market of domestic flights within Germany, the defendant held a market share of roughly 73% of the market.

  The Federal Court of Justice held that by withdrawing its permission to the plaintiff, the defendant was attempting to use its power in the upstream market to hinder the plaintiff from competing against its own subsidiary in the Lodge Card market.

  As the case affected the trade between EC Member States, the Federal Court of Justice applied Article 82 EC and used the relevant criteria as applied by the Commission and the European courts.[21]

- *Orange-Book-Standard*[22]

  In May 2009, the Federal Court of Justice held that a party accused of patent

[19] In these cases, the refusal to deal did not necessarily always concern a downstream *rival* of the dominant company (see answer to *question 1*).
[20] BGH WM 2009 1863 (cited according to legal database *juris*).
[21] See paras 10, 35 of the decision (footnote 20).
[22] BGH WuW/E DE-R 2613 – *Orange-Book-Standard* (2009).

violation can raise as a defense that the patent holder has abused a dominant market position by refusing to grant a patent license to the accused on non-discriminatory and fair terms (*nicht diskriminierende und nicht behindernde Bedingungen*).

The patent holder only abuses his position, however, when the accused has made the patent holder an unconditional offer for a patent license which the patent holder may not reject without violating the prohibition on unfair abuse of a dominant position (*Behinderungsverbot*) or discriminatory treatment. In the event that the accused has been using the invention or ideas covered by the patent, s/he must have honored the terms of the unconditional patent license in order to raise the defense.

If the accused regards the license fee demanded by the patent holder to be so high as to constitute an abuse of its dominant position, or if the patent holder refuses to calculate a license fee, then the accused satisfies the prerequisite of making an unconditional offer for a patent license where the license specifies that the patent holder will set the fee at a level constituting a reasonable compensation (*die Höhe der Lizenzgebühr nach billigem Ermessen bestimmen*).

The patent holder in Orange-Book-Standard owned various patents related to data drive devices and had licensed them to certain businesses. The accused sought a license for the patents, offering a 3% licensing fee, which the patent holder rejected. The accused proceeded to use the patents, and the patent holder subsequently sued. In defense, the accused asserted that the patent holder's refusal of its licensing terms amounted to an abuse of a dominant position, insofar as the patent holder had issued other licenses and was discriminating against the accused. This defense failed, however, because the accused could advance no evidence indicating that the patent holder had granted the other licenses at a 3% fee.

Other relevant cases include for example:

- *Standard-Spundfass II*[23]

  In July 2004, the Federal Court of Justice held that a patent holder violates the prohibition against discrimination contained in Section 20 (1) ARC, when it uses the circumstance that entry into a downstream market – because of an industry norm or similar conditions – is dependent on the use of its patent, and then limits entry into the downstream market in a way that violates the principles of free competition.

  In Standard-Spundfass II, the German subsidiary of an Italian company began producing a type of barrel that represented the standard in the chemical industry, and was subsequently sued for patent infringement. The genesis of the barrel's design dated back to 1990, when leading firms in the German chemical industry requested the production of a plastic barrel from which waste material could more easily be removed. The patent holder and three other companies formed a working group and discussed designs; ultimately the design of the patent holder was accepted and became the industry norm. The patent holder granted the three German companies of the working group a free license to produce the new barrel, but sold licenses to companies located in

[23] BGH WuW/E DE-R 1329 – *Standard-Spundfass II* (2004).

other EU member states. The patent holder refused, however, to grant the accused a free license.

The Federal Court of Justice held that the patent holder would only be entitled to damages for the infringement if his refusal to grant the accused a free license did not run afoul of the prohibition against discrimination found in Section 20 (1) ARC. The Court indicated that the question would turn on whether the distinction between the free and purchased licenses was economically justified, or whether it amounted to arbitrary discrimination and sent the case back for further review.

- *Sparberaterin*[24]

  In July 2004, the Federal Court of Justice held that a different treatment of downstream customers by a dominant company was not justified, when it was aimed at inducing the customers to violate their contractual relations with respect to their own customers.

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.

In *cases that affect trade between EC Member States*, German courts have applied Art. 82 EC and have evaluated the respective cases based on the relevant criteria.[25] This submission does not cover Art. 82; please see the submission provided by the European Commission.

In *cases that do not affect trade between EC Member States*, German courts have generally applied only Sections 19, 20 ARC (see above, *question 2*).[26] The subsequent analysis focuses on the criteria stipulated by Sections 19, 20 ARC, as also laid down in a recent submission to the OECD:[27]

In Germany, the elements that have to be established in order to find a refusal to deal anticompetitive include:

- Dominance, or at least "superior market power";
- hindrance / discrimination[28]; and
- absence of an objective justification.

As a first step, the application of Sections 19, 20 ARC requires that the relevant undertaking is dominant in a given market. Regarding the determination of market

[24] BGH WuW/E DE-R 1377 – *Sparberaterin* (2004).
[25] BGH *Reisestellenkarte* (footnote 20).
[26] See e.g. the case by the OLG München cited above (footnote 1).
[27] *Rondtable on Refusals to Deal – Note by Germany* – (29.09.2007), OECD Doc. DAF/COMP/WD(2007)91.
[28] Please note that the relevant behavior must in discrimination scenarios additionally relate to *business activities which are usually open to similar undertakings* (see Section 20 (1) ARC). This prerequisite is not being dealt with in this submission (see e.g. *Markert*, in: Immenga/Mestmäcker, Wettbewerbsrecht, Band 2 GWB, 2007, § 20, para 94).

dominance and superior market power, the general criteria laid down in Sections 19 (2), (3) ARC and 20 (2) ARC apply.

Hindrance is a behavior which has objectively negative effects on the affected firm. However, such a behavior is not abusive solely because of its negative effects. Rather, it must be determined whether or not the behavior constitutes objectively justified competition on the merits.[29]

Regarding the absence of an objective justification, this element requires a comprehensive weighing up of interests and is the central element in the assessment of abusive practices under German law. The weighing up of interests allows and calls for a broad consideration of all relevant facts of each individual case. In weighing up the different interests concerned, the purpose of the ARC, which is to ensure that competition between undertakings is, as much as possible, free of limitations, has to be taken into due consideration at all times. This means primarily ensuring that markets remain open and artificial barriers to entry are not being raised. All the interests of the parties concerned and directly involved in a given case must be considered. In refusal to deal cases, the following aspects typically play an important role in the weighing up of interests:[30]

- Degree of market power of the supplier;
- degree of hindrance/discrimination;
- whether there has previously been a supply relationship (see below, lit. d);
- whether there is an actual or potential substitute which competitors in the downstream market could use to replace the product in question; and
- all other aspects of the individual case.

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?

The competitive concerns regarding a refusal to deal first of all relate to certain foreclose strategies by dominant undertakings. These strategies might include raising barriers to entry or raising a (potential) rival's costs. Another particular concern that typically arises in refusal to deal scenarios is that a firm dominant in an upstream market may attempt to extend its market power into a downstream market (so-called "leveraging of market power"). More specifically, by refusing to supply an upstream input to a competitor, the dominant undertaking may prevent a rival from competing in the downstream market.

Even where the upstream firm does not itself compete in the downstream market, moreover, a refusal to supply an input to a downstream firm could raise competitive concerns. For example, if the downstream firm offers to purchase the input on terms substantially similar to those of other downstream firms, a refusal by the upstream firm could constitute an unlawful

[29] See BGH WuW/E BGH 1829 (1835ff.) – *VW Ersatzteile II* (1981) and OECD Roundtable on Refusals to Deal – Note by Germany (footnote 27), para. 5.

[30] *See OECD Roundtable on Refusals to Deal – Note by Germany* (footnote 27), para 9; see also *Markert*, in: Immenga/Mestmäcker (footnote 28), § 20, para 152.

discrimination under Section 20 (1) ARC. Such discrimination could be indicative of an agreement whereby the upstream firm undertakes to shield its downstream customers from competition. This sort of behavior could allow the downstream firms to charge supracompetitive prices, which would then in turn be shared with the upstream suppliers.

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

German antitrust law has the objective to protect the competitive process rather than focusing directly on consumer harm. Consequently, it is not necessary for a certain conduct to cause direct consumer harm. However, protecting the competitive process can – at least indirectly – also prevent consumer harm. The reason is that in the long-run, anti-competitive refusals to deal will usually result in less product diversity, less innovation and higher prices which will then also harm consumers.

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

In principle, it is not necessary to show that the dominant firm intended negative effects on competition or the violation of antitrust provisions, because abuse of dominance is an objective concept. However, if there is evidence of intent, this may be of relevance in the process of weighing up the interests involved, as the Bundeskartellamt will usually not recognize a justification if the relevant conduct is used to deliberately squeeze competitors out of the market.[31] Furthermore, if an investigation were conducted in administrative fine proceedings, intent would also be relevant, in particular with respect to the determination of the level of fines.

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?

A prior course of dealing between the parties is not a requirement for finding liability, but the existence of such a history can have an impact on the analysis of the refusal to deal insofar as terminating an existing relationship is less likely to be objectively justified than a refusal to enter into a relationship in the first place.[32]

Still, it is entirely possible that a party who terminates a previously existing relationship has objectively justified reasons for doing so. Such circumstances include in particular a situation where a supplier organizes its distribution system according to objective qualitative and/or quantitative criteria and the retailer does not meet these criteria.[33]

Such selection criteria have to satisfy the general competition law principles applicable to distribution systems, and reasonable periods of notice must be

[31] See e.g. the „Bekanntmachung Nr. 124/2003 des Bundeskartellamtes zur Anwendung des § 20 Abs. 4 S. 2 GWB“ (*Notice on the application of § 20 Section 4 sentence 2 ARC*; available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Bekanntmachung_Einstandspreis.pdf).
[32] See *OECD Roundtable on Refusals to Deal – Note by Germany* (footnote 27), paras 14/15.
[33] See BGH WuW/E BGH 1885 – *Adidas* (1981).

met.[34] The termination of an existing supply relationship may also be justified if the retailer faces insolvency. However, the supplier cannot invoke this justification if the retailer provides sufficient securities (e.g., payment in advance, etc.).[35]

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?

A prior course of dealing between the dominant firm and firms that are not rivals or potential rivals could have an impact on the analysis of the refusal to deal insofar as such a behavior may constitute a discrimination of the main rival. Also, it may shed light on the motivation of the dominant firm for refusing to deal with a potential rival, and may therefore indicate that the dominant firm lacks an objective justification for its refusal to deal. However, these would be just pieces of evidence to be weighed in the overall array of facts.

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.

Yes, in 1998 Section 19 (4) no. 4 ARC was introduced specifically to deal with essential facilities cases (see above, *question 2*).

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.

As noted in the quotation above (*question 2*), essential facilities in Germany consist of "networks or other infrastructure facilities" to which competing businesses need access in order to compete successfully on an upstream or downstream market, and which the potential competitor could not possibly replicate for legal or other factual reasons.

For examples of situations where a refusal to deal involving essential facilities has been found unlawful, see the descriptions above of the *Mainova* and *Scandlines* cases in response to *question 6*.

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

In principle, an unfair hindrance and/or discrimination may also occur where the owner of an intellectual property right refuses to grant a license.[36] However, because intellectual property rights by their very nature allow the owner exclusive access to them, intellectual property cases leave – compared to regular refusal to deal cases – more room to assert an objective justification for an unfair hindrance and/or

[34] See e.g. BGH WuW/E BGH 2983 – Freundschaftswerbung (1987); see also *Markert*, in: Immenga/Mestmäcker (footnote 28), § 20, para 153.
[35] See e.g. OLG Karlsruhe (footnote 3), para 25.
[36] See BGH *Standard Spundfass II* (footnote 23); *Markert*, in: Immenga/Mestmäcker (footnote 28), § 20, para. 171.

discrimination. For instance, in a situation where the intellectual property constitutes a necessary upstream input in a downstream product, an undertaking desiring to compete in the downstream market which had been refused access to the intellectual property could not simply use that intellectual property on the bare assertion that the refusal violates the antitrust laws. Instead, German courts have ruled the undertaking would have to have made a reasonable offer to use the intellectual property that had been rebuffed, and it must have complied with the terms of that reasonable offer while it used the intellectual property.[37] This compromise aims to respect the integrity of intellectual property by ensuring that its owners receive proper compensation for its use, while simultaneously recognizing that intellectual property in some circumstances can be used as a weapon to damage the competitive process. See the descriptions of the *Orange-Book-Standard* and the *Standard-Spundfass II* cases in response to *Question 7* for further elaboration.

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

No. The Federal Court of Justice has not differentiated between the type of intellectual property right (e.g., patent, trade secret [*gewerbliches Schutzrecht*] and copyright [*Urheberrecht*]).[38]

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

Up to date, there have been no such cases under German antitrust law. In principle, the general criteria laid down above (*question 8*) would be applied. The evaluation would probably also be influenced by the relevant enforcement practice of the European Commission. Under Article 82 EC, the Commission has held that where a company attains a dominant position in an upstream market, a refusal to provide interface information that would make a downstream product produced by a competitor interoperable may constitute an abuse of a dominant position.[39]

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

No, this would generally not affect the antitrust analysis. The Bundeskartellamt has principally also applied the general criteria laid down above (*question 8*) to refusal to deal cases that occurred in regulated industries.[40] Nevertheless, in these scenarios, the specific regulatory environment of each particular case needs to be taken into due account.

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

No, this would generally not affect the antitrust analysis. The Bundeskartellamt has principally also applied the general criteria laid down above (*question 8*) to refusals to

[37] BGH *Orange Book Standard* (fotnote 22).
[38] BGH *Standard Spundfass II* (footnote 23), page 1332.
[39] See European Court of First Instance (CFI), Case T-201/04, *Microsoft Corp. v Commission* (2007).
[40] See BKartA case no. B7-11/09 (footnote 4) and BKartA case no. B9-55/03 (footnote 10).

deal made by former state-created monopolies (see also the previous answer to *question 11*).[41]

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, Germany recognizes the concept of a constructive refusal to deal, and the definition used is substantially similar to that presented in the introductory paragraph.[42]

Because any constructive refusal to deal scenario will necessarily be fact-dependent, it is difficult to formulate clear-cut rules that determine whether a given practice amounts to a constructive refusal to deal. That said, the Bundeskartellamt would apply its general principles detailed in response to *questions 2 and 8* to a constructive refusal situation.

In analyzing the terms claimed to constitute a constructive refusal to deal within this framework, the Bundeskartellamt would look at terms offered in similar situations by the dominant firm to other undertakings, and/or what other firms are currently offering to customers in similar situations in the same or comparable markets. The Bundeskartellamt would then consider the justifications advanced by the dominant firm, and weigh them up against any anticompetitive effects caused by the constructive refusal. The ultimate determination would hinge on whether the objective justification for the behavior and its pro-competitive effects outweighed the anticompetitive impact.

Evaluation of "margin squeeze"

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

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

Yes, German law recognizes the concept of margin squeeze. Margin squeeze scenarios

[41] See the cases mentioned in footnote 40.
[42] See *OECD Roundtable on Refusals to Deal – Note by Germany* (footnote 27), para 6.

can be handled under the general provisions of Sections 19, 20 ARC (subsequently a.) as well as under the specific provisions of Section 20 (4) clause 2 no. 3 ARC (subsequently b.). The relevant criteria have also been laid down in a recent OECD submission.[43]

a. General provisions of Sections 19, 20 ARC

Margin squeeze cases are principally dealt with under the general provisions of Sections 19, 20 ARC. The Bundeskartellamt has in the past recognized margin squeeze practices as a separate, stand-alone form of abuse (*eigener Behinderungstatbestand*).[44] These practices are to be distinguished from refusal to deal at the wholesale level as well as from predatory pricing at the retail level, both of which also constitute separate, stand-alone forms of abuse under Sections 19, 20 ARC. In contrast to refusal to deal proceedings, which (may) focus on excessive pricing at the wholesale level (so-called constructive refusal to deal), and predatory pricing proceedings, which focus on abusive pricing at the retail level, margin squeeze proceedings focus on the relation between the prices on the wholesale and the retail levels.

Concerning the definition of the relevant behavior, the Bundeskartellamt has defined margin squeeze as a situation in which the difference between the price charged by a vertically integrated dominant undertaking on the downstream market (i.e. the retail price for consumers) and the price charged on the upstream market (i.e. the wholesale price for competitors) is either negative or not sufficient for the dominant undertaking (or an 'as efficient competitor') to cover its product-specific costs for providing its own retail services on the downstream market.[45] This definition was influenced by the practice of both the European Commission and the European Court of First Instance.[46]

The elements that have to be established in order to find a margin squeeze scenario anticompetitive under Sections 19, 20 ARC include:

- Market dominance;
- unfair hindrance; and
- absence of an objective justification.

As a first step, the application of Sections 19, 20 ARC to margin squeeze scenarios requires that the relevant undertaking be dominant in a given market. Recently, the Bundeskartellamt found that it was – at least for margin squeeze scenarios – necessary and sufficient that the relevant undertaking was dominant only on the *upstream* (wholesale) market.[47] Consequently, dominance on the downstream (retail) market is generally not required. Regarding the determination of market dominance and superior market power, the general criteria laid down in Sections

[43] *Working Party No. 2 on Competition and Regulation, Margin Squeeze – Note by Germany* (12.10.2009), OECD Doc. DAF/COMP/WP2/WD(2009)18.
[44] See, e.g., BKartA case no. B7-11/09 (footnote 4), para. 49.
[45] See BKartA case no. B7-11/09 (footnote 4), para. 49.
[46] See BKartA case no. B7-11/09 (footnote 4), para. 49, footnote 8, in which the Bundeskartellamt cites, for example, the Commission Decision of 04.07.2007 Case Comp/38.754 – *Wanadoo Espana vs. Telefonica*, para. 278ff. and the Decision of the Court of First Instance of 10.04.2008 Case T-271/03 – *Deutsche Telekom/Kommission*.
[47] See BKartA case no. B7-11/09 (footnote 4), para. 51.

19 (2), (3) ARC and 20 (2) ARC apply (see also the previous answer to *question 8*).

As far as the unfair hindrance is concerned, the criteria laid down above (*question 8*) apply. For margin squeeze scenarios, the Bundeskartellamt has recently found that a *negative difference* between the prices a dominant undertaking charges on the downstream market (i.e. retail prices for consumers) and the prices it charges on the upstream market (i.e. wholesale prices for companies with which it competes on the downstream market) will generally be taken as an indication of an unfair hindrance in the sense of Sections 19, 20 ARC.[48] Furthermore, it has emphasized that the hindrance effect (*Behinderungswirkung*) was "evident" in these cases.

In contrast, if there is a *positive difference* between the retail price and the wholesale price, the existence of an unfair hindrance in the sense of Sections 19, 20 ARC cannot be recognized without due evaluation.[49] In these cases, it has to be shown that the difference between the retail price and the wholesale price is not sufficient for the dominant undertaking (or an 'as efficient' competitor) to cover its product-specific costs on the downstream market.[50] As a relevant measure of cost, the Bundeskartellamt has – at least for the telecommunications sector – in a recent case used the long run average incremental costs (*langfristige durchschnittliche Zusatzkosten*).[51]

As far as the *objective justification* of margin squeeze practices is concerned, the criteria described above within the context of *question 8* apply: Consequently, a comprehensive weighing up of interests is required. In this process, criteria like the price setting freedom and the market power of the dominant undertaking are taken into account.[52] Furthermore, it may play a role whether the dominant undertaking is dominant not only on the upstream, but also on the downstream market.[53] Intent may also be of relevance. The Bundeskartellamt will usually not recognize a justification if the dominant undertaking's price-setting strategy is used to squeeze competitors out of the market deliberately. Should a price setting strategy be pursued in such a way that the wholesale price is *higher* than the dominant firm's own retail price, the Bundeskartellamt will generally take this as an indication of intent and will consequently, as a rule, not recognize a justification.[54]

b. Specific provisions of Section 20 (4) clause 2 no. 3 ARC

In December 2007, amendments to the ARC concerning abusive practices entered into force.[55] These mainly introduced specific provisions for the energy and food sectors, but one of them – the newly introduced Section 20 (4) clause 2 no. 3 ARC

[48] See BKartA case no. B7-11/09 (footnote 4), para. 53.
[49] BKartA case no. B7-11/09 (footnote 4), para 53, 64ff.
[50] BKartA case no. B7-11/09 (footnote 4), para. 64.
[51] BKartA case no. B7-11/09 (footnote 4), para. 65.
[52] BKartA case no. B7-11/09 (footnote 4), para. 52.
[53] BKartA case no. B7-11/09 (footnote 4), para. 52.
[54] BKartA case no. B7-11/09 (footnote 4), para 52/53.
[55] These provisions were introduced by the "Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels" (*Act on the Prevention of Price Abuse in the Areas of Energy Supply and Food Trade*). Regarding this act, see, for example *Ritter*, Regierungsentwurf zum Gesetz zur Bekämpfung von Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels, in: WuW 2008, page 142.

– explicitly deals with margin squeeze practices.[56] The text of the new Section is cited above (*question 2*).[57]

The introduction of this new Section goes back to the competitive situation in the German markets for gasoline stations:[58] The wholesale price that gasoline companies charged to independent gas stations (so-called "*freie Tankstellen"*) was sometimes higher than the retail price they charged to end consumers. The Bundeskartellamt had tried to prosecute the allegedly unlawful conduct based on the existing general statutory provisions,[59] but it had proven quite difficult to demonstrate that the relevant prerequisites were met[60] (see above, *question 6*). Against this background, an important reason for the introduction of the new provision was that it extended the presumption contained in Section 20 (4) clause 2 ARC (cf. quote above: "An unfair hindrance […] exists […]") to margin squeeze cases.[61] Consequently, any margin squeeze that falls under Section 20 (4) clause 2 number 3 ARC is now presumed (*Vermutungsregel*) to be an unfair hindrance of competition.

As far as the definition of the relevant behavior is concerned, Section 20 (4) clause 2 no. 3 ARC requires a *formal* comparison of the price charged by the undertaking with superior market power on the upstream market (i.e. wholesale price charged to small and medium-sized companies with which it competes on the downstream market) and the price charged on the downstream market (i.e. retail price charged to individual customers); cost considerations are not taken into account. The price on the upstream (wholesale) market must not be higher than the price on the downstream (retail) market.

The elements that have to be established in order to find a margin squeeze scenario anticompetitive under Section 20 (4) clause 2 no. 3 ARC include:

- Superior market power;

- unfair hindrance (presumed if a margin squeeze as defined by section 20 (4) clause 2 no. 3 ARC is recognized); and

- absence of an objective justification.

The first prerequisite that needs to be fulfilled in order for Section 20 (4) clause 2 no. 3 ARC to be applicable is that the relevant undertaking possesses superior market power in relation to its small and medium-sized competitors on the downstream market.[62] As far as the relevant definition is concerned, the criteria laid down in Section 19 (2) no. 2 ARC can be applied. Consequently, factors like financial power, access to supplies and markets, links with other undertakings, legal and factual market entry barriers as well as market shares may be taken into account. Regarding the definition of small and medium-sized enterprises, these

[56] Regarding the new section 20 (4) clause 2 number 3 ARC see, for example *Westermann*, in: Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht), München, 2008, Bd. 2, § 20, para 166ff. and *Loewenheim*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, München, 2009, § 20, para. 157ff.

[57] Please note that the amendments will only remain in force until December 31, 2012; after which date the original versions will be reinstated (footnote 5).

[58] See *Ritter* (footnote 55), page 143/144.

[59] See BKartA *Freie Tankstellen* (footnote 8).

[60] As a consequence of these difficulties, the above mentioned decision (see footnote 59) was not upheld in court (above, footnote 13).

[61] See „Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Technologie" (*Recommendation and Report of the Parliament's Committee on Economics and Technology*), BT-Drucks. 16/7156, page 10/11.

[62] Regarding this prerequisite see, for example *Loewenheim* (footnote 56), § 20, para. 131ff. and the Notice No. 124/2003 (footnote 31), page 3.

terms have to be defined in relation to the size of the undertaking with superior market power. The Bundeskartellamt has emphasized in its Notice no. 124/2003 that companies with a turnover of less than EUR 50 million may – in relation to companies with a turnover of more than EUR 500 million – be considered small and medium-sized.[63]

As has already been shown, another prerequisite that needs to be fulfilled is the absence of an objective justification. This requires a comprehensive weighing up of interests.[64] As part of the weighing process, the competitive interests of small and medium-sized companies have to be weighed up against the interests of the undertakings with superior market power. In this process, the aim that competition between undertakings should – as much as possible – be free of limitations, must be considered at all times.[65] As a consequence, the freedom of market participants to set their own prices as they deem fit (*Preisbildungsfreiheit*) must be granted a particular and distinct degree of respect.[66]

Aspects that also play an important role in the weighing process include, for example, the degree of superior market power on the downstream market, the degree of unfair hindrance, and whether there has previously been a supply relationship between the relevant parties. Particular interests that might be considered on behalf of the undertaking with superior market power include, for example, significant price reductions by competitors or market entry strategies. In this context, it may play a role whether or not the undertaking with superior market power (also) dominates the upstream (wholesale) market.[67] Because if it does not dominate this market, it would also generally not be under a duty to deal with its competitors. This, in turn, could influence the justification to the benefit of the undertaking with superior market power. Furthermore, intent may also play a role in the weighing process, as a justification will usually not be recognized if the margin squeeze is used to squeeze competitors out of the market deliberately (*Verdrängungsabsicht*).[68]

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.

No.

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.

[63] See Notice no. 124/2003 (footnote 31), page 3.
[64] See, e.g., *OECD Roundtable on Refusal to Deal – Note by Germany* (footnote 27), para. 9ff.
[65] See Notice no. 124/2003 (footnote 31), page 7 and *Loewenheim* (footnote 56), § 20, para. 160.
[66] See, for example OLG Düsseldorf WuW/E DE-R 2235 (2240) – *Baumarkt* (2008) and *Henk-Merten*, Die Kosten-Preis-Schere im Kartellrecht, 2004, page 141ff.
[67] See, for example, *Bechtold*, Kommentar zum Kartellgesetz, München 2008, § 20, para. 84h; *Westermann* (footnote 56), § 20, para. 167.
[68] See Notice no. 124/2003 (footnote 31), page 7.

No.

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.

As noted above in response to *question 8*, one important element in order to find a refusal to deal anticompetitive is the absence of an objective justification for the relevant conduct. Aspects that typically play an important role in this context have been mentioned above (*question 8*). In civil cases – and generally also in administrative proceedings – the dominant firm bears the burden of proof for the existence of an objective justification.[69] Examples where refusals to deal were found to be objectively justified include:

- Where a supplier ceased supply of an input because its customer / competitor had unlawfully copied the design of the supplier;[70] and
- where a car manufacturer offered its own leasing firms preferential conditions that it did not grant to other leasing firms.[71]

Conversely, refusals to deal were found to be illegal where the following justifications were advanced:

- A phone directory refused to deal with an advertisement agency because that agency sought to reduce advertisement prices to end-customers by rearranging previous advertisement contracts;[72] and
- where a health insurance refused to deal with a private provider of patient transports because it wanted to keep the market exclusively for public providers of patient transports.[73]

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?

In all four cases discussed in response to *question 6*, the Bundeskartellamt ordered the relevant undertakings to cease refusing to deal with the complainants and to enter into a reasonable business relationship. Specifically:

- The Bundeskartellamt ordered *Scandlines* to cease refusing access to the relevant facilities upon payment of an adequate fee. However, this decision was

[69] See *Markert*, in: Immenga/Mestmäcker (footnote 28), para 236.
[70] BGH WuW/E BGH 2535 - *Lüsterbehangsteine* (1988).
[71] BGH WuW/E BGH 2755 – *Aktionsbeiträge* (1991).
[72] BGH – *Sparberaterin* (see above, footnote 24).
[73] BGH WuW/E BGH 2707 – *Krankentransportunternehmen* II (1991).

overturned by the Düsseldorf Regional High Court partly because it lacked legal certainty (*Bestimmtheit*).

- In *Freie Tankstellen*, the Bundeskartellamt ordered the relevant companies to stop charging wholesale prices to independent gas stations that exceeded the retail prices they charged to end consumers.
- The Bundeskartellamt ordered *Mainova AG* to allow *GETEC* net and *EVO* access to its medium-voltage network in exchange for a reasonable fee. However, a determination on the level of the fee was not made.
- The Bundeskartellamt ordered *Deutsche Post* to cease discriminating against small and medium-sized businesses who utilize the services of mail consolidators, and to provide such businesses with the same discounts provided to its larger customers.

Of the cases discussed in response to *question 7*, only the *Reisestellenkarten* and the *Sparberaterin* case yielded a relevant remedy. In the Reisestellenkarten case, the Federal Court of Justice determined that the defendant could not refuse the plaintiff permission to separate out the amount of sales tax included in the cost of the defendant's flights in the statements that the plaintiff provided to its customers. However, the Court also found that the plaintiff would be required to pay the defendant a reasonable fee, and remanded the case back to the Düsseldorf Regional High Court to determine what that fee would be. In the Sparberaterin case, the Federal Court of justice upheld a ruling by the Higher Regional Court of Stuttgart that had established a duty to deal with the relevant downstream customer.[74]

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?

All of the determinations reached in the cases detailed in response to *questions 6 and 7* were based on the antitrust laws, and could be applied to undertakings in regulated or non-regulated industries.

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.

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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

[74] OLG Stuttgart WuW/E DE-R 1191 - *Telefonbuch-Inserate* (2003).

importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

Refusals to deal in themselves are considered neither pro nor anticompetitive. There is no rule stating that any specific form of refusal to deal (with the exception of boycotts, noted above in response to *question 2*) is problematic.

As discussed above, however, refusals to deal may have anticompetitive effects insofar as a dominant firm aims to extend its dominance into other markets, or to protect its market power, or the market power of its customers, from legitimate competition.

Dominant 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.[75] This general principle yields only where the prerequisites mentioned above (*question 8*) are met.

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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[75] See BGH – *Sparberaterin* (footnote 24); *Markert*, in: Immenga/Mestmäcker (footnote 28), § 20, para 141.