International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Danish Competition Authority
Date: December 4th 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.

Answer: Yes, in Denmark a refusal to deal/refusal to supply by a dominant company is recognized as a possible violation of the provisions in the Danish Competition Act on abuse

of a dominant position. The term is not used in a manner different from the definition used in the introductory paragraph.

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)?

Answer: The legal basis is article 11 of the Danish Competition Act on abuse of a dominant position. Article 11 should be interpreted in accordance with the case law on article 82 (now article 102) of the European Commission and the European Courts. There are no separate provisions for specific forms of refusal to deal.

The Danish Competition authority has decided – in principle – to follow the guidance paper from the European Commission on prioritization of cases relating to article 82 (now 102)[1]. However, as this paper is a prioritization paper, there could be cases, that the Commission would decide not to prioritize, but which the DCA would choose to prioritize.

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

Answer: The relevant provision only applies to dominant companies.

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?

Answer: A refusal to deal can both be administrative and criminal. Intent or gross negligence will have to be demonstrated to make a refusal to deal-case a criminal violation. Refusal to deal as a criminal violation applies in principle to all forms of refusal to deal.

Third parties are also able to claim damages before the courts.

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)?

Answer: Since 2001, the Danish Competition Authority has concluded 8 in-depth investigations of alleged refusal to deal in-depth. 4 of the case were challenged before the Competition Appeals Tribunal. They were all upheld.

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years?

Answer: In one case (clearing of taxi cheques and taxi debit cards, cf. below).

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.

1) Pradan Auto Import A/S' (2001)

[1] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

A customer complained that Pradan Auto Import (importer of spare parts for cars) refused access to a database of product codes. The Competition Council found that access to the database was not necessary to achieve information on product codes.
No English version available

2) **'Sækko A/S' (2002)**

The Competition Authority received a complaint about Sækko A/S' refusal to supply incontinence products to a small private operator. The complaint was dismissed as the plaintive who resells incontinence products could obtain substitutable products from alternative suppliers.
No English version available

3) **Refusal to grant access to Communication Systems for Gaming Machines (2003).**

The Competition Authority dealt with a complaint that two major gaming machine manufacturers, CompuServe Game A / S (CG) and the Danish Automat Expert A / S (DAE), denied a third corporation to use the two large producers communication boxes, called CG Link and DatBoks, in connection with the complaining company's gaming machines. The Competition Council found that the two producers' refusal to allow access to their communication boxes did not constitute an abuse under the Danish Competition Act § 11, since it is neither impossible or unreasonably difficult for a firm on the Danish market, alone or with other undertakings to make its own communication system with the same solutions DAE's and CG's Communication boxes.
No English version available

4) **SIS International a/s (2003)**

The CJC Group, who among other things deals furniture for use in the educational system, submitted a complaint regarding SIS International A / S, a manufacture of furniture for offices and for the education sector. The CJC Group had been terminated as a distributor of SIS International's products, and SIS International therefore ceased to supply the CJC Group. The Competition Authority found that SIS International did not hold a dominant position in the relevant market and dismissed the complaint.
No English version available

5) **Batavus Bicycles (2004)**

The case concerned the market for bicycles where Falkon Cykler (a bicycle dealer) complained that HF Christiansen A / S and Denmark Batavus had ceased the supply of bikes. The Competition Authority did not find grounds to intervene in light of the available information, since the two suppliers of bicycles did not have a dominant position in the relevant market.

No English version available

6) **Dansk Reklamefilm A/S (2005)**

Dansk Reklame film A/S (Danish Advertisement Film), a cinema screen collector in Denmark changed its minimum requirement of number of sold tickets from 10,000 to 15,000 per year for a theatre to be eligible for signing a contract, a so-called standard agreement, with Danish Advertisement Film. This meant that 19 cinemas were not able to let their screen out on hire. The Commission Council found that this was actually a matter of 'refusal to supply' with that special feature that Danish Advertisement Film was actually a buyer. However the Council also found that it was not an abuse as the change in minimum requirement of sold tickets was objective as Danish Advertisement Film operated at a loss in cinemas who sold between 10,000 and 15,000 tickets a year.

http://www.konkurrencestyrelsen.dk/en/competition/decisions/decisions-2008-and-earlier/national-decisions-2005/konkurrenceraadets-moede-den-22-juni-2005/dansk-reklame-film-danish-advertisement-film/

7) **The Expanded Fight against Plasmacytosis in North Jutland (2005)**

The case concerned mink producers in the northern part of Jutland. Producers of feedstock for minks had made a set of agreements and amendments to their regulations to expand the fight against plasmacytosis (infectious disease that can hit mink). The producers are organized as cooperative societies owned by the mink farmers. The Danish Competition Authority considered that the notified agreements imply elements that are restrictive to competition for farmers as well as for feedstock producers. On the other hand, The Danish Competition Authority considered that a possible refusal to supply to farmers who refuse to follow the rules for expanded fight against plasmacytosis will not be contrary to the provisions of section 11; subsection 1, as the reasoning for the refusal to supply is considered objective, impartial and reasonable, inter alia because mink farmers who did not want to participate in the eradication inflicts an increased danger of infection on other farmers.

http://www.konkurrencestyrelsen.dk/en/competition/decisions/decisions-2008-and-earlier/national-decisions-2005/konkurrenceraadets-moede-den-31-august-2005/the-expanded-fight-against-plasmacytosis-in-north-jutland/

8) Clearing of taxi fare tickets (2006)

The Competition Council found that four out of five large players in the market for taxi rides had abused their joint dominant position as they by very short notice stopped collaborating with the taxi-company Taxamotor concerning common acceptance of taxi fare tickets from the parties. The four other companies were told to resume the clearance co-operation with the fifth company Taxa Motor.

http://www.konkurrencestyrelsen.dk/en/competition/decisions/decisions-2008-and-earlier/national-decisions-2006/konkurrenceraadets-moede-den-31-maj-2006/5-taxi-companies-in-greater-copenhagen-have-abused-their-collective-dominant-position/

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.

Answer: Yes, private parties can challenge a refusal to deal in court. To the DCA's knowledge, there has so far not been any case, where a private party has decided to challenge a refusal to deal directly in court, i.e. without first challenging the refusal to deal before the administrative system (the Danish Competition Council and the Competition Appeals Tribunal.)

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal?

Answer: The starting point for the assessment of an alleged refusal to deal is the freedom of companies to choose its trading partners. This fundamental right also applies to dominant companies. A too interventionist approach in refusal to deal cases might hamper innovation, because the dominant firm might loose the incentives to innovate if it is obliged to supply to rivals.

That being said, in some instances a refusal to deal can lead to a restriction of competition on a downstream market, especially if the dominant company itself is active on the downstream market. Therefore the evaluation of any refusal to deal case must be based on an assessment of the specific facts of each concrete case and of the likely effects on competition and consumers.

The interpretation of the Danish provisions on abuse of dominance is made in accordance with the case law of the Community Courts.

Historically, the Danish case law on refusal to deal cases has led to two cumulative conditions that would have to be met in order to find a refusal by a dominant company anticompetitive:

- The refusal relates to a product that is of significant importance to the buyer
- The supplier has not put forward an objective, fact-based and reasonable explanation for the refusal, which is administered consistently.

The Danish Competition Authority has decided – in principle – to follow the European Commissions guidance paper on the application of article 82[2] in its application of the relevant Danish provisions on abuse of dominance.

This means that in future cases on refusal to deal it will be considered that a refusal might have anticompetitive effects if three cumulative conditions are met:

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
- the refusal is likely to lead to the elimination of effective competition on the downstream market; and
- the refusal is likely to lead to consumer harm.

In the application, eventual specific conditions relating to the Danish market will be taken into consideration.

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.

Answer: Yes, Danish Competition law recognizes the concept of essential facilities. The concept is interpreted in accordance with case law form the Community Courts.

10. Does the analysis differ if the refusal involves intellectual property?

Answer: In Denmark, the assessment of a refusal to deal involving intellectual property follows the case law as stated in the Microsoft judgment[3].

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

Answer: In principle the analysis does not change. However, in many regulated industries, the concrete sector specific regulation provides that the dominant firm has a duty to supply on reasonable terms. In any event, the Danish Competition law does not apply if the issue in question is regulated in another law.

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

Answer: Denmark does not have concrete case-law on this specific issue, but in principle, the analysis could change because the dominant firm would no longer be able to explain a refusal to deal with detrimental effects on innovation and investment. For former state monopolies,

[2] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings
[3] See case T-201/04, Microsoft vs. The European Commission.

all or most of the innovation and investments has been made with tax-payers money, therefore an objective explanation referring to the protection of an investment would probably not be accepted.

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?

Answer: Yes, we recognize the concept of a constructive refusal to deal. The concept covers situations where the conditions related to the supply, e.g. in terms of price, quality etc. is such that the conditions can be compared to a de facto refusal to deal.

The concept is interpreted in accordance with the case law from the Community Courts.

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?

Answer: The concept of margin squeeze is recognized in Danish competition law. The Danish case law on margin squeeze mainly relates to the telecoms sector. 4 out of 5 cases were in the telecoms sector. Of the 5 cases mentioned, 1 ended up with a decision concluding that the dominant telecoms operator had abused its dominant position through margin squeeze.

The Danish Competition Authority has decided – in principle – to follow the European Commissions guidance paper on the application of article 82[4] in its application of the relevant Danish provisions on abuse of dominance.

This means that in future cases on margin squeeze it will be considered that a margin squeeze is likely to constitute an abuse of a dominant position, if the price charged by the integrated dominant firm downstream is less than the price charged by the integrated dominant firm upstream plus the LRAIC of the downstream division of the integrated dominant firm.

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.

Answer: 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

[4] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

legality? Please explain the terms of any presumptions or safe harbors.

Answer: As regards refusal to deal in the form of Margin Squeeze, there would normally be a safe harbor for the dominant company, if the price it charges downstream is equal to or higher than the sum of its price charged to customers upstream plus the ATC of its downstream division.

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.

Answer: The Danish Competition Authority has decided – in principle – to follow the European Commissions guidance paper on the application of article 82[5] in its application of the relevant Danish provisions on abuse of dominance.

As a consequence, claims by the dominant company of efficiencies created by the refusal to deal will be considered as well as any claim by the dominant company that an obligation to deal would have negative consequences for its incentives to innovate.

As regards efficiencies, the company would have to show, that the following four cumulative conditions are met:

- the efficiencies have been, or are likely to be, realized as a result of the conduct,
- the conduct is indispensable to the realization of those efficiencies and there must be no less anti-competitive alternatives that are capable of producing the same efficiencies,
- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare,
- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

As regards claimed negative effects on the level of innovation, the dominant company has the burden of proof of demonstrating any negative impact which an obligation to supply is likely to have on its own level of innovation. If a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified with an assertion that an obligation to deal would have negative effects on innovation.

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?

Answer: The four other companies were told to resume the clearance co-operation with the fifth company on the same conditions prevailing before the boycott.

[5] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

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?

Answer: N/A.

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?

Answer: No.

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?

Answer: As already mentioned the starting point of an assessment of a refusal to deal is that – generally speaking – any company, whether dominant or not, should have the right to choose its trading partners. Intervention on competition law grounds therefore requires careful consideration, especially if the application of competition law would lead to an obligation to supply for the dominant company.

Such an obligation may undermine companies' incentives to invest and innovate and possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant companies to invest less in the activity in question. And competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves.

To initiate a refusal to supply case, it is not necessary for the refused product to have been already traded. It is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified. However, if the company has already supplied the product in question, it will be more difficult for the dominant company to invoke the "recoupment of investment" argument.

The Danish Competition Authority assesses claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realize a return on its investments. It falls on the dominant company to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation.