



**International Competition Network
Unilateral Conduct Working Group
Questionnaire**

Agency Name: Estonian Competition Authority

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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.

According to the Estonian Competition act the abuse of the dominant position in the goods market includes unjustified refusal to sell or buy goods. This is a general provision for all dominant undertakings. The undertaking with special or exclusive rights or in control of essential facilities has additional specific obligation to permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods.

A “constructive” refusal to deal (including the margin squeeze) may be also covered by the prohibition to directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions.

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 article 16 of the Competition Act provides for that any direct or indirect abuse by an undertaking or several undertakings of the dominant position in the goods market is prohibited, including directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (subsec 1) and unjustified refusal to sell or buy goods (subsec 6).

According to the article 18 (1) 1) an undertaking with special or exclusive rights or in control of an essential facility shall permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods.

An undertaking with special or exclusive rights or in control of an essential facility may refuse to grant other undertakings access to the network, infrastructure or other essential facility if the refusal is based on objective reasons set out in the article 18 (2), including cases where:

- 1) **the safety and security of the equipment connected with the network, infrastructure or other essential facility or the efficiency and security of the operation of such network, infrastructure or facility are endangered;**
- 2) **maintenance of the integrity or the inter-operability of the network, infrastructure or other essential facility is endangered;**
- 3) **equipment to be connected to the network, infrastructure or other essential facility is not in conformity with the established technical standards or rules;**
- 4) **the undertaking applying for access lacks the technical and financial capability and resources to provide services efficiently and safely to the necessary extent through or with the assistance of the network, infrastructure or other essential facility;**
- 5) **the undertaking applying for access does not hold the permit prescribed by law for the corresponding activity;**
- 6) **as a result of such access, data protection provided by law is no longer ensured.**

There are no other separate provisions for specific forms of refusal to deal.

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

The article 16 of the Competition Act applies to all dominant undertakings (including undertakings with special or exclusive rights or in control of an essential facility). The

article 18 covers only undertakings with special or exclusive rights or in control of an essential facility.

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?

In administrative procedure the Competition Authority (Director General) may issue a precept to a natural or legal person if the person abuses a dominant position and/or did not comply with the obligations of undertakings with special or exclusive rights or in control of essential facilities.

An obligation to perform the following may be imposed by a mandatory precept:

- 1) to perform the act required by the precept;
- 2) to refrain from a prohibited act;
- 3) to terminate or suspend activities which restrict competition;
- 4) to restore the situation prior to the offence.

The abuse of dominant position (including refusal to deal) and non-performance of obligations of undertakings with special or exclusive rights or essential facilities are usually treated as misdemeanours. According to the Penal Code only the repeated offence (if a punishment for a misdemeanour has been imposed on the offender for the same act) will be punishable as criminal offence. Both legal and natural persons are liable for the abovementioned offences.

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)?

Due to the manner of keeping statistic of activities the Estonian Competition Authority cannot provide you with such information. There are not records, which reflect the number of cases of specific abuses of dominant position as well as such detailed statistic as is foreseen on this questionnaire.

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.

There is very limited number of cases concerning the refusal to deal, when the Estonian Competition Authority issued the decisions finding the violation of particular provision of Competition Act (please see http://www.konkurentsiamet.ee/public/competition_act_july_2006.pdf). On its practice the Estonian Competition Authority issued decisions on violation of law on cases of refusal to deal in situation, when not only rivals, but also non-rivals and even final

consumers were involved. However, such cases are not discussed and presented on this questionnaire.

Please see also <http://www.konkurentsiamet.ee/?id=14441> Annual report 2008, page 18.

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.

By now there were no cases finding violation which were challenged in court and was overturned. The recent decision of Estonian Competition Authority (refusal to supply the electricity to network operators) is appealed in court, but there is no court decision on this case yet.

For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

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

No.

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.

Please see <http://www.konkurentsiamet.ee/?id=14441> Annual report 2008, page 18.

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, Estonian jurisdiction allows private parties to challenge a refusal to deal in court. The Estonian Competition Authority does not collect such information.

Evaluation of an actual refusal to deal

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

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

There is no obligation to expose the fact of actual exclusion of rival from the market or even wait for such results. It is sufficient to demonstrate the potential threaten to exclude a rival (or rivals) from the market. The analysis of threaten to exclude a rival

(or rivals) from the market depends on facts of case and specific aspects of sector involved.

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

There is no particular obligation to demonstrate actual or potential harm on consumers. However, if it is possible to indicate the potential harm on consumers the Estonian Competition Authority does it.

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

Indeed, the market player's intent play a role and it could be taken into the account, especially on investigation under misdemeanour procedure and the fact of intent reflects the size of fine imposed.

- 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?

Yes, this aspect (a history of dealing between the parties) could be taken into account. However, it is not obligatory requirement for finding liability.

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

Generally, the refusals to deal were not evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals. As already mentioned above, the Estonian Competition Authority had some cases, where non-rival customers or even final consumers were involved. If firm sells its product to everyone except its main rival the suspicion of unlawful refusal to deal could be relevant.

- 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.

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.

Yes, there are special provision sin Estonian Competition Act in relation to the essential facilities. Under § 15 of Act An undertaking is deemed to control essential facilities or to have a natural monopoly if it owns, possesses or operates a network, infrastructure or any other essential facility which other persons cannot duplicate or for whom it is economically inexpedient to duplicate but without access to which or the existence of which it is impossible to operate in the goods market. Under § 18 subparagraph 1, point 1 an undertaking with special or exclusive rights or in control of an essential facility shall permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods.

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

Estonian Competition Authority has had no such cases, where unlawful refusal involved intellectual property.

- a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?
- b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

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

Generally the analysis does not change if the refusal occurs in a regulated industry. However, Estonian Competition Authority takes into the account the sector-specific regulations and requirements before issuing the decision on violation of Competition Act.

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

No.

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?

There are no such specific provisions in Estonian Competition Act under which the violation could be defined specifically as constructive refusal to deal. There is particular provision relating to the unjustified refusal to sell or buy goods. (Competition Act § 16 point 6). However, there is separate provision, which covers also the issue of prices (Competition Act § 16 point 1). It is prohibited for dominant firm directly or indirectly to impose unfair purchase or selling prices or other unfair trading conditions. Under administrative procedure in case of price under argument the burden of proof lays not purely on Estonian Competition Authority, but also on the defendant. Indeed, the Competition Authority should prove the violation, however, the dominant firm should be able to justify its conduct, including the pricing issue.

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?

There is no particular provision in Estonian Competition Act concerning the margin squeeze, as possible unlawful refusal to deal. However, there are other provisions in § 16 of Estonian Competition Act (abuse of a dominant position), which allow to deal with de facto margin squeeze cases (§ 16 point 1).

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?

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.

Under § 16 point 1 of Estonian Competition Act unjustified refusal to sell or buy goods by dominant firm is prohibited.

Under subparagraph 1 of § 18 of Estonian Competition Act an undertaking with special or exclusive rights or in control of an essential facility shall permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods.

So the matter of justification of refusal to deal and fairness of conditions is the focal issue under investigation.

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.

Under subparagraph 2 of § 18 of Estonian Competition Act an undertaking with special or exclusive rights or in control of an essential facility may refuse to grant other undertakings access to the network, infrastructure or other essential facility if the refusal is based on objective reasons, including cases where:

- 1) the safety and security of the equipment connected with the network, infrastructure or other essential facility or the efficiency and security of the operation of such network, infrastructure or facility are endangered;**
- 2) maintenance of the integrity or the inter-operability of the network, infrastructure or other essential facility is endangered;**
- 3) equipment to be connected to the network, infrastructure or other essential facility is not in conformity with the established technical standards or rules;**
- 4) the undertaking applying for access lacks the technical and financial capability and resources to provide services efficiently and safely to the necessary extent through or with the assistance of the network, infrastructure or other essential facility;**
- 5) the undertaking applying for access does not hold the permit prescribed by law for the corresponding activity;**

6) as a result of such access, data protection provided by law is no longer ensured.

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.

Under subparagraph 2 of § 18 of Competition Act there are established justifications of refusal to deal (access) which are acceptable under law. In enforcement activities the Estonian Competition Authority applies the national competition law and general principles of competition law of EU.

Generally, the burden of proof of violation lays on the Competition Authority. However, there is a difference between investigation under administrative procedure and misdemeanour procedure. Under Estonian Competition Act, which generally bases on the administrative law all natural and legal persons and the representatives thereof and all state agencies and local governments and the officials thereof are obliged to provide the Competition Authority with all required documents, information and explanations and have rights and possibility to bring all the facts justifying their conduct (see also p.13). In case of investigation under misdemeanour procedure, which is on large extent the same as criminal, the collecting all the evidences and burden on proof the fact violation lays totally on the Estonian Competition Authority. There are no legal mechanism to force defendant to co-operate with Competition Authority.

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?

On recent case on refusal to supply the electricity to network operators, the dominant supplier was require by mandatory precept of Estonian Competition Authority to continue the supplies according to the terms of agreement concluded between parties. So there was no need to deal with price issue on this case.

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?

In case of the regulated industries the scope of the regulatory provisions in sector-specific law matters. If there are no particular provisions in sector-specific law, which regulate issue of refusal to deal, the general provisions of Competition Act apply and relevant remedies could be imposed as for any non-regulated industry.

On recent case of refusal to supply the electricity to network operators the Competition Authority applied the remedy under the Competition Act, because the sector-specific law – the Electricity Market Act do not contains the provisions regulating the issue of refusal to deal on the production level (electricity generation and wholesale).

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 explain your response.

N/A

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?

Estonian Competition Authority has not very extensive practice with refusal to deal cases. There is no specific policy consideration with respect to refusal to deal in the cases of abuse of dominant position. Still, in the cases of undertakings in control of essential facilities incentives for innovation and investment may be taken into account when evaluating the access conditions to the essential facility.

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.

No additional comments.