International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: French Competition Authority (France)
Date: December 8, 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 "constructive" refusals 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.

I. General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law?

Refusals to deal can violate French antitrust law.

2. Please state the statutory provisions or legal basis for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal?

The legal basis for the Autorité de la concurrence[1] (hereafter the "French Competition Authority" or the "Authority") to address refusal to deal is Article L. 420-2 of the French Commercial Code.

This provision prohibits firms from abusing their dominant position on the market, whatever form such an abuse may take, unless it is justified on efficiency grounds. It therefore encompasses all possible forms of refusals to deal.

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

By definition, Article L. 420-2 of the French Commercial Code only applies to dominant firms.

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?

As all other violations of Article L. 420-2 of the French Commercial Code committed by companies, a refusal to deal is an administrative violation of French antitrust law, enforced by the French Competition Authority, which is an independent administrative agency.

However, Article L. 420-6 of the French Commercial Code provides that individuals who personally play a decisive role in an anticompetitive agreement and/or in an abuse of a dominant position can be prosecuted before criminal judges and sentenced to a jail term of up to 4 years and/or to the payment of a fine of up to € 75,000.

To date, there are relatively few cases where this provision has been implemented. In addition, all such cases have related to cartels and/or bid-rigging. Therefore, current experience suggests that French criminal antitrust law is traditionally not enforced vis-à-vis unilateral conduct cases, despite the fact that it does cover such conducts as a matter of law.

---

[1] This expression is used also in cases actually adjudicated by the *Conseil de la concurrence,* an equally independent agency in charge enforcing competition law and policy in France, that was granted additional powers and transformed into the *Autorité de la concurrence* on 2nd March 2009.

II. 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 French Competition Authority has conducted 20 investigations of possible cases of refusal to deal over the last six years.

Out of these 20 investigations, 11 cases have first included an interim review, aimed at checking whether there was a need to grant interim relief as a matter of urgency or not, prior to an in-depth investigation on the merits. Interim measures were awarded in 4 cases. In 7 other cases, interim measures were refused, but the Authority went on with the in-depth investigation on the merits in 4 cases.

Please refer to **Appendix 1** for the list of these investigations.[2]

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

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

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

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

Out of the 20 cases investigated by the French Competition Authority over the last six years, the unilateral conduct under examination dealt, in whole or in part, with an alleged **refusal to access an essential facility** in 10 cases.

In 5 of these cases, the Authority has issued an interim decision: 2 decisions led to the conclusion that the grant of interim relief measures was not justified, without prejudice to an assessment on the merits (09-D-29, 08-D-02); 3 decisions led to the conclusion that the award of interim relief was justified and that there was a possible violation of antitrust law warranting an in-depth investigation on the merits (04-MC-01, 00-MC-01, 03-MC-04). One of these 3 decisions (03-MC-04) granting interim relief has been appealed before the Paris Court of Appeals, which has confirmed it, and then before the Supreme Court, which has annulled the judgment of the Paris Court of Appeals on the ground that it did not sufficiently evidence the existence of an essential facility.

[2] Appendix 2 summarizes in more details some of the Authority's decisions.

Of these 5 cases having led to an interim decision, 2 are now pending on the merits (09-D-29, 08-D-02) and 2 have been adjudicated on the merits. In one of these two cases (05-D-59), the Authority has found a breach of competition law and imposed a fine. The findings have been confirmed both by the Paris Court of Appeals and by the Supreme Court. In the other case (08-D-04) the defendant offered commitments that addressed the Authority's competition concerns.

As regards the 5 cases of alleged essential facilities that have not included an interim review prior to the in-depth assessment on the merits, 2 have led to a decision finding that there was no essential facility and consequently no breach of competition law (08-D-08, 07-D-20). In the 2 other cases (05-D-12, 05-D-25), the parties have asked to settle the matter, and offered commitments intended to alleviate the Authority's concerns. Since these commitments were put forward relatively early in time, before causing any substantial harm to consumer welfare, and since they met the Authority's concerns by providing access to the facility at stake, the cases were settled. In a last case (09-D-06), the defendants did not challenge the Authority's allegations, and offered commitments to facilitate access to the essential facility in question, which also entailed a reduction of their fines.

In 9 cases, the conduct at stake related, in whole or in part, to an alleged **refusal to allow interoperability**.

In 2 of these 9 cases, the Authority has issued an interim decision: One decision led to the conclusion that the grant of interim relief measures was not justified, without prejudice to an assessment on the merits (06-D-27); the other decision led to the conclusion that the award of interim relief was justified and that there was a possible violation of antitrust law warranting an in-depth investigation on the merits (03-MC-04).

As regards the merits, 8 of the 9 cases of alleged refusal to allow interoperability have led to a decision on the merits. 2 decisions concluded that there was no infringement of competition law (04-D-54, 07-D-20). 3 other decisions accepted commitments alleviating the Authority's concerns and therefore allowing it to settle the case (05-D-12, 05-D-25, 08-D-04). Finally, 3 decisions concluded that there was an infringement and imposed a fine (07-D-33, 09-D-06, 09-D-24).

In 8 cases, the conduct at stake related, in whole or in part, to an alleged **constructive refusal to deal**.

In 2 of these 8 cases, the Authority has issued an interim decision: 1 decision led to the conclusion that the grant of interim relief measures was not justified and that no competitive issue warranted an in-depth assessment on the merits, thus allowing the Authority to close the case (04-D-54); 1 decision granted interim relief, pending an assessment on the merits, which is currently under process (03-MC-04).

Seven cases have been adjudicated on the merits. In 5 cases, the Authority has issued an infringement and fine decision (04-D-26, 05-D-75, 06-D-36, 09-D-06, 09-D-24). In 2 other cases, it has settled the case by accepting the commitments offered by the parties in order to meet its competitive concerns (05-D-25, 08-D-04).

Finally, in 5 cases, the conduct at stake related, in whole or in part, to an alleged **margin squeeze**.

Three of these cases led to a decision evidencing a margin squeeze and imposing a fine (04-D-48, 04-D-18, 09-D-24). 1 of these decisions was overturned by the Supreme Court (04-D-

48). In one case, defendant offered commitments which enabled the Authority to settle the case (07-D-43). One case is still pending (09-D-15), after a request for interim measures was rejected.

As evidenced by this brief summary, many of the cases handled by the Authority by way of an in-depth investigation deal with conducts including various elements (refusal to access an essential facility, refusal to allow interoperability, margin squeeze, and so on) which may call for an assessment according to different economic tests, but which ultimately relate to a broader, single strategy. This justifies implementing an effects-based approach, irrespective of the practice at stake (provided that the case is not clear-cut).

None of the above cases involved criminal antitrust authority.

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.***

Provided they have standing, private parties can sue companies that are liable for a refusal to deal, with a view to obtaining damages under general liability rules. The following case illustrates this possibility.

In the Dyneff case, Dyneff (a company established in southern France and active in the sector of oil distribution) claimed that Total had abused its dominant position, through dilatory tactics that eventually caused negotiations between the plaintiff and the defendant to fail. The purpose of these negotiations was for the two firms to form a joint-venture capable of operating a sea-line on the Mediterranean coast, which was a condition imposed by the local administration to authorize access and operations on that sea-line. On April 24, 2007, the Court of Appeal of Montpellier ruled that Total had adopted a fair and legitimate attitude towards Dyneff during the course of the negotiations, and that the local authorities were solely responsible for the temporary closing of the sea-line. Consequently, Dyneff's claim was rejected.

Dyneff also filed a complaint with the French Competition Authority, who also investigated the case.[3] Besides the allegation of dilatory conducts, Dyneff claimed that the refusal by Total to grant access to the sea-line on several occasions constituted a refusal to access an essential facility. The Authority however concluded that the sea-line was not an essential facility, since there existed alternative means for Dyneff to unload its ships.

[3] Decision n°08-D-27, *Dyneff vs Total*.

III. 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?***

The competitive concerns at stake with refusals to deal essentially relate to actual or potential exclusion of one or more competitors. Paying thorough attention to the theory of harm that is at work in a particular case helps to determine if there truly is a likely threat of exclusion.

It can be noted that exclusion of a *rival* is not a necessary condition for a refusal to deal to infringe competition laws. For instance, in the case concerning blood products, the supplier of the input was not an operator on the downstream market, hence the excluded firm was not a rival of the dominant firm. However, the Authority considered that the exclusion of this operator (who eventually went bankrupt) was serious and had had consequences on other pharmaceutical companies who had to find alternative lines of supplies.

To determine whether a refusal to deal (actual or constructive) raises competitive concerns, two elements have to be demonstrated. Firstly, the firm responsible for the refusal must hold a dominant position on the relevant market. This demonstration relies on the usual criteria that are put forward for the definition of the relevant market (barriers to entry, absence of substitutes, etc.). Secondly, it must be shown that the victim of the refusal to deal has no credible alternative solution than to rely on the supply from the dominant firm. Indeed, in decision 05-D-75, the Authority noted that a refusal to deal by a dominant firm is likely to lead to the exclusion of operators on the downstream market if the good or service in question is "indispensable" for competition on that market.

In the decision 04-D-26 concerning blood products, the French Competition Authority explained that a firm holding a dominant position on a market for a raw material could be held liable for an abuse of a dominant position, whenever it refused to sell its product to downstream firms for reasons that could be deemed non objective or discriminatory.

Straightforward refusals as well as other behaviors, such as dilatory tactics which eventually lead to buyers not getting supplied, may be the object of the Authority's scrutiny.

In the decision 06-D-36 concerning medical devices (CT scan and MRI), the Authority also recalled that both European and French case-law recognize as an abuse of a dominant position the refusal, by the owners or operators of a specific equipment that provides them with a particular position as suppliers on the market, to grant access or to offer discriminatory access to this equipment, without having to demonstrate the essential facility nature of that equipment.

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

Under European and French competition rules, harm caused by a refusal to deal, as well as harm caused by any anticompetitive agreement or abuse of a dominant position, may be either actual or potential, but its likelihood must be sufficiently evidenced in all cases.

The theory of harm depends on the specificities of each case. Refusal to deal may lead to upstream or downstream foreclosure, to the exclusion of a competitor, to a reduction of the variety of available offers, etc.: in all these cases, consumers are likely to suffer from the exclusionary effects.

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

Intent needs not be taken into consideration in the course of the competitive analysis of possible cases of refusal to deal, in the same way that it is not compulsory to prove intent when assessing cases of abuses of dominance in general.

That said, looking at the strategy designed or implemented by the company that is being investigated can contribute to the understanding of the underlying rationale of its behavior. This is for instance the case where the investigation has provided documents or other types of evidence showing the existence of a strategy to exclude competitors from the market through the implementation of a refusal to deal.

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?

Current experience suggest that situations where a prior course of dealing existed between the parties are not evaluated differently from situations where the parties have never entered into any contract prior to the refusal to deal.

Under the essential facility doctrine, five conditions need be met in order to find liability (see answer to question 9 below). These five conditions apply including in cases where a prior commercial relation existed between the parties. However, in such cases, the fifth condition of the essential facility doctrine (whether access to the facility is technically possible) is, by nature, considered to be fulfilled outright by the fact that such access was once granted.[4]

There a mainly two types of scenarios involving past dealing history which can lead to a finding of liability.

<u>1) Cases where the ongoing contractual relation between the parties is terminated without objective justifications</u>

In an interim measures case, Euris vs. Cegedim,[5] the French Competition Authority examined, under the essential facility doctrine, the termination of an existing partnership between Cegedim and Euris, which allowed Euris to access Cegedim's database *OneKey*, described by

[4] Decision n°09-D-06, *SNCF/Expedia*, § 240.

[5] Decision n°09-D-29, *Euris vs. Cegedim Dentrite France*, § 28-35, 60.

Euris as the world reference database to offer health professionals different services to help them steer their marketing resources. The Authority considered that the plaintiff's claim was not sufficiently substantiated to assess whether Cegedim's database was indeed an essential facility to which its owner should have granted access to. It thus rejected the request for interim measures and ordered further investigation to determine whether Cegedim's database should or not be considered an essential facility. In its decision concerning blood-based products,[6] the Authority considered that the unilateral termination of a supply agreement, without notice and without objective justification, constituted an abuse of a dominant position.

In a case relating to the sale of historical site books,[7] the French Competition Authority reviewed the decision of a dominant entity to stop purchasing a certain volume of these books from a commercial partner. The Authority ruled that this decision did not exclude the partner from the market and that it did not amount to an abuse of dominant position, even if it had the effect of favoring the dominant firm's own competing book production.

2) Cases where the ongoing contractual relation between the parties goes on under conditions so unfavorable that they lead to the *de facto* exclusion of a competitor

In decision 06-D-36 concerning medical imaging devices (CT scan and MRI),[8] the French Competition Authority examined an agreement whereby a group of physicians, owning a scanning and a magnetic resonance imaging (MRI) device, granted access to these equipments to competing physicians under unfavorable terms. The competitors' rights of access were insufficient to treat all their patients. The Authority stated that this access was so limited that it amounted to excluding competitors from the market and found that the owners of the medical equipment abused of their dominant position.

In SNCF/Expedia[9], the French Competition Authority examined the conditions under which the French railway operator (SNCF) granted access to its online booking system to travel agencies located downstream on the market. It first observed that SNCF's online booking system was an essential facility for travel agencies wanting to sell train tickets. It then checked whether the access was subject to unjustified restrictions. It noted that SNCF imposed the purchase of a particularly expensive license in order to access its online booking system, which favored its subsidiary, voyages-sncf.com, active in the downstream market of online travel booking, to the detriment of competing travel agencies. On these grounds, the Authority concluded that SNCF had abused its dominant position.

In the aforementioned decision concerning blood-based products[10], the French Competition Authority also considered that the blood transfusion institute (acting on the upstream market of blood supply), who used dilatory techniques in order to delay the renewal of a supply agreement, and who unilaterally terminated, without notice, this agreement (which led to the bankruptcy of the commercial partner on the downstream market of transformed blood products), had abused its dominant position.

---

[6] Decision n°04-D-26, *Reims Bio/GIPCA*, § 70.

[7] Decision n°08-D-08, *Editions Gisserot vs. Centre National des Monuments*, § 52-94, see summary in Exhibit [●].

[8] Decision n°06-D-36, *Imagerie Médicale du Nivolet*, § 120-163.

[9] Decision n°09-D-06, *SNCF/Expedia*, § 235-253.

[10] Decision n°04-D-26, *Reims Bio/GIPCA*, § 70.

It must be noted that refusals to deal can also be challenged under another provision when a prior course of dealing existed: Article L. 442-6 I-5° of the French Commercial Code provides that a termination without an adequate advance notice can constitute a civil wrong likely to trigger liability. However, this provision is enforced by commercial judges only and can only give rise to damages. The French Competition Authority does not have jurisdiction to apply this provision.

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.

French case-law and decisional practice recognize a distinct offense of refusing to provide access to an essential facility. Essential facilities have been defined in several decisions, most lately in the Authority's opinion concerning the passenger rail transportation sector,[11]but also cases such as SNCF/Expedia,[12] Integral Process vs. Masimo Europe Limited,[13] Imagerie Médicale du Nivolet,[14] Neuf Telecom vs. France Telecom,[15] Dallay vs. Yvert & Tellier[16] and EUROPQN.[17]

Five criteria must be met for an equipment to be defined as an essential facility and for its owner to be liable under the essential facility doctrine:

- first, the facility is held by a firm with monopoly power or with a dominant position on the relevant market;
- second, access to the facility is strictly necessary (i.e. indispensable) to compete on a downstream or upstream market, or on a neighboring market.;
- third, the facility cannot be duplicated by competitors under reasonable economic conditions;
- fourth, access to the facility is refused or subject to unjustifiable conditions;
- fifth, access to the facility must be technically possible.

The "essential" nature of a facility is characterized by the first, second, third and fifth conditions. Whenever the fourth condition is satisfied, the owner of the facility is liable for an abuse of a dominant position.

The Neuf Telecom vs. France Telecom decision of November 7, 2005, concerning the market for high-speed Internet connection, is worth mentioning. The French Competition Authority considered that France Télécom's refusal of Neuf Télécom's request, and the inappropriate conditions it subsequently proposed, amounted to a refusal of access to the local loop and the

[11] Opinion n°09-A-55, *Passenger rail transportation*, § 81-85, 120, 124, 126 and 206.

[12] Decision n°09-D-06, *SNCF/Expedia.*

[13] Decision n°07-D-20, *Integral Process vs Masimo Europe Limited*.

[14] Decision n°06-D-36, *Imagerie Médicale du Nivolet*.

[15] Decision n°05-D-59, *Neuf Telecom vs French Telecom*.

[16] Decision n°05-D-25, *Dallay and Yvert & Tellier*.

[17] Decision n°05-D-12, 20 Minutes/Métro vs EUROPQN.

installations located between this loop and the connection points. The Authority demonstrated that the loop and the associated installations constituted altogether an essential facility, in view of the fact that the loop had not yet been unbundled.

By refusing access to an essential facility, France Télécom was able to remain the sole supplier of services routing broadband Internet (ADSL) traffic between subscribers and ISPs (Internet Service Providers), whilst preventing potentially more innovative and efficient competitors from entering the market. As a result, the ISPs were unable to benefit from competition on the market and were therefore deprived of more attractive technical or price conditions, which they could have passed on to their customers.

The Authority considered that these practices were extremely serious and had caused significant damage to the economy. In light of the seriousness and duration (1999-2002) of the practices concerned, it decided to fine France Télécom Euros 80 million for having prevented its competitors from accessing the wholesale ADSL Internet market.

The question of whether digital rights management systems (DRMs) could constitute an essential facility was raised in the VirginMega v. Apple case.[18] There, the French Competition Authority considered it did not have enough elements concerning the nascent market in question to conclude on the essential nature of DRMs, and that the refusal to deal leading to the absence of interoperability between VirginMega's and Apple's DRMs was not, at that point of development of the market, contrary to competition law.

In the "Presse 2000" case[19], the Authority also looked at whether the software "Presse 2000" was to be considered an essential facility. It concluded this was not the case, but however considered that access to the software had to be granted since a lack of access would raise rivals' costs too much.

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

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

On the basis of the (limited) experience acquired thus far, it appears that, if the criteria set out in question 9 are fulfilled, the analysis does not materially differ when the refusal involves intellectual property. The French Competition Authority is likely to develop and refine its approach in the near future, on a case-by-case basis.

Two cases may be mentioned to illustrate the current experience.

In the NMPP case[20], the company Nouvelles Messageries de la Presse Parisienne (NMPP) was refusing to grant access to Messageries Lyonnaises de Presse (MLP) to its software *Presse 2000*, which was designed to facilitate the distribution by intermediaries of newspapers and magazines to the 32 000 points of sale in France. In a first decision on interim measures, the French Competition Authority accepted the plaintiff's request for interim measures, ordering NMPP to provide MLP with an access to the software in question, on the ground that it was likely that such a software constituted an essential facility (especially considering the

[18] Decision 04-D-54 of Novembre 9, 2004.

[19] Competition Council, Decision n°08-D-04 of 25 February 2008.

[20] Decision n°08-D-04, *NMPP*.

intermediaries' reluctance to manage two different software at the same time). The Paris Court of Appeal confirmed the interim measures, stating that NMPP's software could not be reproduced on reasonable economic terms, and that it indeed constituted an essential facility. The Cour de cassation (Supreme Court) however annulled this decision, arguing that the Court of Appeal had failed to demonstrate that the software was an essential facility, insofar as it had not established the absence of alternatives available on reasonable economic terms.

The case was then referred back to the Paris Court of Appeal, which had to rule again on the validity of the interim measures. On this second occasion, the Court of Appeal ruled that NMPP's software *Presse 2000* was not an essential facility, since MLP had its own software. The Court noted that even though this alternative solution required intermediaries to work with two software, or to manually export the data from one software to the other (estimated at an hour of work every day), this did not amount to unreasonable economic or technical difficulties. The Court added that MLP had not demonstrated that the creation of a software similar to that of NMPP could not be achieved on profitable economic terms.

Meanwhile, the Authority continued to investigate the case on the merits, and was concerned about the impact of NMPP's refusal to grant MLP direct access to its software. It worried that this refusal would generate disruptions for intermediaries, and that it would lead to a discriminatory management of the newspapers concerned. NMPP came forward with commitments addressing the Authority's concerns, that would allow the direct importation of information relative to the newspapers distributed by MLP into its own system. The French Competition Authority considered that these commitments were likely to eliminate the competition distortion which penalized MLP and accepted these commitments.

In another case concerning two companies publishing postage stamp valuation catalogues, Dallay and Yvert & Tellier, the company Dallay accused Yvert & Tellier of hindering the development of the market for catalogues listing collector postage stamps by unfairly refusing to allow its direct competitors access to the numbering system used in its catalogue.[21] The French Competition Authority considered that Yvert & Tellier's numbering system acted as a *de facto* standard for valuing and dealing stamps. Consequently, it was reasonable to assume that Yvert & Tellier held a dominant position in the market for catalogues listing French postage stamps and their values. It then considered that Yvert & Tellier's refusal to grant other market operators licenses to use its numbering system might constitute an abuse of a dominant position. Yet, the commitments offered by Yvert & Tellier (to grant valuation catalogue publishers a license to create correspondence tables between their own numbering systems and that of Yvert & Tellier, under conditions and against payments) were deemed sufficient to eliminate the competition concerns raised in this particular case.

In the VirginMega vs. Apple case already mentioned, the French Competition Authority could not conclude that DRMs could constitute an essential facility. It noted that the market was only burgeoning, that other DRM were available on the market, and that the interoperability problem only concerned the possibility for consumers to download directly music from the platform to the hardware (the iPod): many other uses of the music bought on the platform were possible and indeed implemented by the buyers. However, the Authority invited stakeholders to carefully follow the evolution of the market and to file a complaint if new evidence emerged that such a refusal could lead to an anticompetitive abuse of dominance.

[21] Decision n°05-D-25, *Dallay and Yvert & Tellier*.

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

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

The analysis does not change if the refusal to deal occurs in a regulated industry, or if it is made by a former state-created monopoly.

IV. *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?

The French Competition Authority has earned some experience of "constructive" refusals to deal, whereby a dominant firm on a market for an equipment, service or raw input grants access that is subject to unjustified restrictions. On this basis, liability can be found, for instance, where a dominant firm offers to supply its rivals on discriminatory or unreasonable terms, such as extremely high prices or degraded services.

For example, in the SNCF/Expedia case,[22] the Authority considered that SNCF had abused its dominant position by imposing the use of a particularly expensive license to travel agencies in order to access its online booking system, which was indispensable to selling train tickets (recall that SNCF has a legal monopoly on passenger rail transportation in France). This tariff put travel agencies at a competitive disadvantage with SNCF's subsidiary, voyages-scnf.com, which was also active in the downstream market of travel agencies. In determining whether the price of the license was too high, the Authority compared it with the price charged by other online booking systems, which appeared much lower while allowing for the distribution of a wider range of services (hotels, cars…).

In Imagerie Médicale du Nivolet,[23] the Authority considered that the group of physicians owning medical imaging devices (CT scan and MRI) offered a degraded service to three physicians, who could only access the MRI device less than two hours per month while they needed around 3 hours ½ per week to treat all their patients (around 20 000 patients a year). The Authority noted that, in the meantime, other physicians were granted, without justification, several times longer access than that of the three plaintiffs. This led the Authority to a finding of an abuse of dominant position on the part of the group owneing of the medical equipment.

In the decision concerning blood-based products,[24] the Authority considered that the dilatory techniques used by the upstream supplier of raw material (the blood transfusion institute), aimed at delaying the renewal of a supply agreement, constituted an abuse of a dominant position.

It should also be noted that in a recent Opinion,[25] the French Competition Authority set out the conditions for a successful liberalization of the passenger rail transport sector. As part of this deregulation, it considered that SNCF would have to allow new rail operators to access train stations, considered to be essential facilities, so that the latter can both provide services therein and be provided with a certain number of services. The risks of abuse that were identified notably reside in the pricing for this access and the allocation of spaces within the rail stations.

---

[22] Decision n°09-D-06, *SNCF/Expedia*, § 236-248.

[23] Decision n°06-D-36, *Imagerie Médicale du Nivolet*, § 120-163.

[24] Decision n°04-D-26, *Reims Bio/GIPCA*, § 70.

[25] Opinion n°09-A-55, *Passenger rail transportation*, § 81-85, 120, 124, 126 and 206.

V. 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?

Margin squeeze can amount to an abuse when a vertically integrated company, which both holds a monopoly or a dominant position on an upstream market and is active on a related downstream market open to competition, determines its prices on these markets in such a way that it is impossible for a competitor on the downstream market to compete without suffering losses.

The method followed by the French Competition Authority in recent cases is summarized below.

1) The existence of a margin squeeze

In order to determine whether there is a margin squeeze, the Authority applies the "equally efficient operator" test, which consists in checking whether the dominant firm's downstream arm could trade profitably on the basis of the wholesale price charged to downstream competitors for the relevant product or service. The existence of a margin squeeze is demonstrated if the test shows that the downstream arm of the vertically integrated company would not be able to make a profit based on the price charged to downstream competitors, looking at the following data:

(i) the costs related to the dominant firm's downstream operations;

(ii) the revenues related to the dominant firm's downstream operations; and

(iii) the wholesale price charged to downstream competitors for the relevant product or service.

In accordance with the practice of the European Commission on margin squeeze, the Authority has stated, in a decision issued in 2004, that the relevant cost measure for the assessment of a margin squeeze in the telecommunications sector is the long run average incremental cost. Furthermore, the Authority, in its annual report for 2008, has also stated that the relevant revenue measure for the assessment of a margin squeeze should in principle encompass all sources of revenue available to a potential equally efficient competitor active on the downstream market. Regarding the assessment of profitability over time, the Authority has so far taken a static approach, by comparing month-by-month or year-by-year, the revenues and the costs including the amortization of investments.

2) The effects of a margin squeeze

In itself, the mere existence of a margin squeeze is not necessarily an abuse, although there is a presumption that a margin squeeze is anticompetitive when the following conditions are fulfilled:

- first, the vertically integrated company holds a monopoly or a dominant position on the upstream market (it is not necessary to demonstrate that the vertically integrated firm also has downstream dominance);
- second, the upstream product or service concerned is objectively necessary for competitors to be able to compete effectively on the downstream market;
- third, there is a sufficient level of coordination between the dominant firm's upstream and downstream arms;
- fourth, the dominant firm has the ability to suppress the margin squeeze effect in the event that its pricing policy is subject to regulation.

If so, the margin squeeze is considered to be abusive unless justified by efficiency gains.

3) The implementation of the margin squeeze theory in recently liberalized markets

The decisions of the Authority in margin squeeze cases have essentially concerned recently liberalized markets, i.e. the energy and the telecommunications sectors.

The Authority issued its first margin squeeze decision in 2001, in response to a complaint filed in 2000 by the French Telecommunications Regulatory Authority. This case concerned the price offered by France Télécom to Renault for its fixed to mobile calls. The Authority noted that this price was lower than the call termination charge set by France Telecom to end calls on its network and paid by the other operators (the charge for carrying the call from the landline network to France Télécom's mobile network). Consequently, any competing operator wishing to submit an offer for fix to mobile communications would have been unable to offer Renault a price that was competitive with the tariff offered by France Télécom without making a loss. The Authority concluded that the price France Télécom was charging Renault included a margin squeeze, that it ruled out any effective competition in this market, and fined the company a total of 40 million Francs (approximately 6.1 million Euros).

In the *Connect ATM* case, the Authority examined practices implemented by France Télécom on the wholesale market for broadband Internet access. The Authority considered in 2004 that France Télécom's refusal to give other operators access to the local loop in the first place, combined with the inappropriate conditions it subsequently imposed, amounted to an abuse and fined France Télécom a total of 20 million Euros. In a decision dated January 11, 2005, the Paris Court of Appeal upheld the Authority's substantive analysis on the merits, and doubled the fine to 40 million Euros.

The Authority also intervened in the energy markets at the time of their full liberalization. In 2007, the Authority considered that the price paid by Direct Energie to EDF for electricity supplies did not enable Direct Energie to compete with EDF's prices on the downstream market without suffering losses, a situation which could have been considered to be a margin squeeze and could have constituted an abuse of EDF's dominant position on the market for the production of electricity. The Authority therefore enjoined EDF to submit, within two months, "*a proposal for electricity wholesale supplies or any other technically or economically equivalent solution enabling alternative suppliers to compete effectively with EDF's retail offers to electricity consumers on the free market, without sustaining any margin squeeze*". In its decision on the merits issued in December 2007, the Authority approved EDF's commitments because it considered that the new wholesale offer proposed by EDF

would allow alternative retail suppliers to effectively compete with the incumbent operator's retail sales on the free market.

VI. 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.

No.

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.

Like all abuses committed by dominant firms, anticompetitive refusals to deal are prohibited, unless justified.

For instance, in cases of interoperability, the French Competition Authority may accept a defense based on efficiency gains, provided that such efficiencies are relevant and properly evidenced.

In this respect, the duration of the practice is a key point to be considered. A short duration can be accepted as a defense argument if the duration of the practice is too short to harm competitors. For example, in its opinion in TV exclusivity offers by Internet providers[26], the Authority considered that a short transitory period of time (one to two years) was possible in view of the need to further develop this new market with attractive exclusive offers.

Technical constraints can also be taken into account by the Authority. In the Unik case,[27] the Authority rejected the request for interim measures by one of Orange's competitors, because it considered that, despite the fact that Orange had indeed tried to ensure compatibility (notably by launching compatibility surveys), its was blocked by technical factors.

Market structure may be important too. In the VirginMega case,[28] the existence of competing downloading platforms showed that the practice at stake would not eliminate competition, and the Competition Authority thus rejected the complaint. Absence of effective reduction of competition was also taken into account in the Integral Process vs. Masimo Europe Limited case.[29] Conversely, in the Yvert & Tellier case, the Competition Authority considered that the refusal to deal was unlawful since it indeed harmed competition.[30] The same conclusion was reached in the EUROPQN case.[31]

Absence of real demand for compatibility can also be put forward. It is not sufficient that competitors lodge theoretical claims for compatibility, they shall also demonstrate that there is a genuine demand for interoperability. This was taken into account, although remedies were however requested, in the SNCF/Expedia case.[32] Indeed, according to the literature, there may be cases where the absence of interoperability could possibly rather strengthen competition.

---

[26] Competition Authority, Opinion n° 09-A-42 of 7 July 2009.

[27] Competition Authority, Decision n°09-D-15 of 2 April 2009.

[28] Competition Council, Decision n°04-D-54 of 9 November 2004.

[29] Competition Council, Decision n°07-D-20 of 19 June 2007.

[30] Competition Council, Decision n°25-D-25 of 31 May 2005.

[31] Competition Council, Decision n°05-D-12 of 17 March 2005.

[32] Competition Council, Decision n°09-D-06 of 5 February 2009.

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?

Confronted with anticompetitive refusals to deal, the French Competition Authority has either imposed a fine on the dominant undertaking (see the cases described in questions 8.d. and 13) or required detailed commitments from them so as to eliminate its competition concerns. In these latter cases, the Authority usually orders the owner of the rights or the facility to grant access to it/them on a non-discriminatory basis, while allowing it to assert its property rights.

The three main examples of remedies and commitments applied to refusals to deal can be found in the Yvert & Tellier, NMPP and EUROPQN cases.

As for the Yvert & Tellier and NMPP cases, see questions 10 and 13 above.

In the EUROPQN case[33] (of 17 March 2005), the companies 20 Minutes and Métro, two editors of free daily newspapers financed entirely through advertising, brought a complaint before the Authority because the association EUROPQN (which brings together the large national daily newspaper editors) refused to include 20 Minutes and Métro newspapers in its biannual audience rating study.

The plaintiffs considered that this refusal prevented them from accessing the advertising market on fair competition terms, and claimed that such behavior amounted to both an unlawful horizontal agreement and an abuse of dominant position. They also added to their complaint a request for interim measures, which was rejected by the Authority.[34]

The Authority first noted that EUROPQN's study was seen as the reference tool by purchasers of advertising space, and widely used by all market players in the advertising sector. It noted that other existing studies were very expensive and did not guarantee the compatibility of their figures with the ones used by EUROPQN. Therefore, free newspaper editors were forced to build rough estimates of their audiences which weakened their position in commercial negotiations, and clearly put them at a competitive disadvantage compared to other editors whose newspapers were included in EUROPQN's study. In addition, given the demand of advertising agencies for a unified benchmark, the Authority indicated that an absence in EUROPQN's study could not be offset by an inclusion in another separate study, which would only allow for a comparison of free newspapers among themselves but would not permit a comparison of free newspapers with paid-for newspapers.

The Authority concluded that the access to EUROPQN's study entailed, if not a condition to enter the advertising space sale market, at least a significant competitive advantage. Therefore, EUROPQN's refusal to include 20 Minutes and Métro newspapers in its study could amount to both an unlawful horizontal agreement and an abuse of dominant position.

EUROPQN committed to include 20 Minutes and Métro in its study on a non-discriminatory basis, by applying the same criteria and methodology as the ones used for other national newspapers, and to publish the results in a way that allows for full comparison between all newspapers. The Authority accepted these commitments, a solution which led to the settlement of the case prior to the imposition of a fine.

---

[33] Decision n°05-D-12, 20 Minutes/Métro vs EUROPQN.

[34] Decision 04-D-40 of 3 August 2004.

The Authority does not usually directly intervene with regards to price setting between the parties. In its commitment decisions, the Authority is generally happy to simply note the tariffs proposed by the parties. In a decision,[35] the Authority detailed and discussed the access price calculation rules proposed by the parties but not the final level: "*On the basis of this analysis guide, the [Authority] perceives the mode of calculation described above as taking into account the pertinent costs for the service concerned and having to lead to an equitable payment. In order to reduce the negotiation time of the contract aimed for in § 71 above, the NMPP indicate that the price of billable access for 2008 should be between 600 000 to 700 000 euros before tax. The [Authority] takes note of this.*" Moreover, in this decision, the Authority was led to solve the issue of choosing the rate of return on capital to be used « *This contribution will be increased by the rate of return on the invested capital, calculated by applying an annual rate of 6%, the rate of 8% initially proposed by the NMPP having been considered as reflecting remuneration of risky investment by the [Authority], which therefore cannot be regarded as being the case of the Presse 2000 system*".

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?

Not applicable.

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.

Not applicable.

[35] Décision n° 08-D-04 du 25 février 2008 relative à des pratiques mises en œuvre par les Nouvelles Messageries de la Presse Parisienne (NMPP)

IX. Policy

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

The French Competition Authority enforces a unified and consistent policy vis-à-vis all unilateral conduct cases. It assesses whether or not the behavior of the dominant firm, considered in its context, is likely to hurt consumer welfare, by having the object or effect, actual or potential, of excluding efficient competitors from the marketplace.

The evaluation carried out in each case rests on a balanced sharing of the burden of proof between the antitrust agency and the dominant firm. Direct evidence of an exclusionary strategy may certainly be decisive, although it is by no means a prerequisite for enforcement by the Authority. Evidence of actual market foreclosure or of likely exclusionary effects are sufficient to ground a finding of infringement, a fine and, as the case may be, a remedy. However, in cases where the Authority considers that a conduct forecloses efficient competitors from the marketplace, or that it is likely to harm competition, the dominant firm that is being investigated has the possibility of claiming that its conduct is justified by likely efficiency gains, in which case its must adduce cogent and convincing proof of the net effect of this behavior on consumer welfare.

This overall policy framework drives the Authority to pay due attention to the effects of given unilateral conducts on competition, in light of all relevant facts of the case, and it thus applies irrespective of the type of behavior under examination (e.g. refusal to deal, tying, etc.). However, the specific context of each case may well lead the Authority to adapt or fine-tune the test(s) used in order to assess whether, on balance, a given conduct is anticompetitive or not.

The Authority, acting either on its own motion or upon complaints from market players, has a significant experience of cases involving refusal to deal by dominant firms. It must be stressed that a non-insignificant part of the cases where the Authority took action following a complaint resulted in a decision finding that the alleged practice was not illegal, in view of the evidence assembled in the case-file. These statistics serve as a useful reminder that, while refusals to deal are not considered per se legal, they are not per se illegal either, but assessed in view of a "rule of reason"- type analysis, in line with the Authority's global policy on unilateral conduct.

***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*.**

See answer to question 21.