International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Competition Council of the Republic of Lithuania
Date: 16 October, 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.

Refusal to deal is recognized as a possible violation in the jurisdiction of Lithuania. When deciding cases on alleged refusal to deal the Competition Council of the Republic of Lithuania (hereinafter – the CC) also refers to the practice of the European Commission and

the European Court of Justice. In the enforcement practice of the Law on Competition refusal to deal usually is treated as refuse to supply by a dominant undertaking the essential good or a charge of a prohibitively high price.

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

*Article 9 of the Law on Competition of the Republic of Lithuania gives a general prohibition to abuse a dominant position, it states: "It shall be prohibited to abuse a dominant position within the relevant market by carrying out actions which restrict or may restrict competition, limit without cause the possibilities of other undertakings to act in the market, or violate the interests of consumers, including***:** *1) direct or indirect imposition of unfair prices or other purchase or selling conditions; 2) limitation of trade, production or technical development to the prejudice of consumers; 3) application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage; 4) making the conclusion of contract subject to acceptance by the other party of supplementary obligations which, by their commercial nature or usage, have no connection with the subject of such contract." There are no any other legal provisions or guidelines in which the notion of refusal to deal would be developed or explained in more detail.*

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

Article 9 of the Law on Competition applies only 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?

Administrative violation.

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)?

Seven cases.

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.

Unlawful conduct was found in 5 cases concerning essential facilities and in 2 cases concerning margin squeeze.

Cases concerning essential facilities: one decision of the CC was upheld, one - overturned, in one case a fine imposed by the CC was reduced in half, and in one case the CC's decision was overturned and the case was sent back for the supplementary investigation.

Cases concerning margin squeeze: one decision of the CC was overturned and the case was sent back to investigate it newly, but after completion of investigation the CC made the same decision as the previous one.

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

No one.

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.

Essential facilities: AB Lietuvos telekomas accused the company UAB Interprova (the claimant) of the infringement of the exclusive rights granted to AB Lietuvos telekomas in accordance with the Law on Telecommunications and blocked the ISDN flows and telephone lines operated by UAB Interprova. As a result, UAB Interprova was prevented from the provision of the internet telephony services and suffered a loss of about LTL 1 million (EUR 289 620), since the blocking of the telephone lines made it impossible for the company to operate in the market and compete with other companies rendering the data transmission services. In order to be able to render services to the consumers the telecommunications service provider must have an access to the terminal points of the telecommunications network to which the users are connected. Such connection is possible only using the existing local infrastructure. For the purpose of providing the data transmission services UAB Interprova had concluded the agreement on the lease of dedicated lines with AB Lietuvos telekomas.

Enjoying the dominant position in the fixed public telecommunications network market and the market for the lease of the telecommunications networks AB Lietuvos telekomas passed a decision to block the lines leased by UAB Interprova and about 30 more undertakings providing the internet telephony services, as a result eliminating competition and consolidating its dominant position in the internet telephony services market. Such actions by AB Lietuvos Telekomas were qualified as the restriction of the internet telephony services and market monopolization in breach of the Law on Competition. Besides, by such actions AB Lietuvos telekomas injured a public interest, restricted potential competition, and caused damage for consumers.

The Competition Council decided to obligate AB Lietuvos telekomas to resume the provision of the services concerned to UAB Interprova and fined it LTL 2 077 000 (EUR 601 540.77).

AB Lietuvos Telekomas appealed the decision to the court. By the ruling of 11/06/2003 the Court of appellate instance upheld the CC's decision.

Margin squeeze: TEO AB, LT (previously AB Lietuvos telekomas) abused its dominant position in internet services market by imposing unfair prices referred to as "price squeezing". The investigation was started upon the request of 6 undertakings. One of the

major objects of the investigation was the provision of the ADSL (the digital subscribe line that allows more bandwidth downstream, - from the network to the customer site – than upstream) internet access services to the final users.

The services were provided on the basis of the wholesale TEO AB, LT ADSL internet access framework. The comparison of the prices for services provided by undertakings operating in the market revealed that in the retail market TEO AB, LT was rendering certain ADSL internet access services to its final users (households and business customers) at the price that was lower than the prices offered to other customers in the wholesale market. Such actions restricted the possibilities for other companies to compete over prices when providing services in the retail market to the final consumers.

The CC's decision was to obligate TEO AB, LT to terminate the actions constituting an infringement of the Law on Competition and adjust the terms for the provision of the ADSL access so that the direct or indirect imposition of unfair prices or other terms for the purchase of the services would be eliminated. For this infringement TEO AB, LT was fined LTL 3 011 000 (EUR 872 045.87). For more information see at www.konkuren.lt/en/anual/2006_eng.pdf

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.

Article 50 of the Law on Competition grants the right to undertakings whose legitimate interests have been violated by actions performed in contradiction of Articles 81 or 82 of the Treaty or other restrictive actions prohibited by this Law to appeal to the Vilnius Regional court with a claim concerning the termination of illegal actions. The CC has no information regarding such cases.

Evaluation of an actual refusal to deal

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

The Competition Council of the Republic of Lithuania has no much experience in dealing with cases regarding refusal to deal. There are no established or defined any concrete criteria for evaluating the legality of refusals to deal in our jurisdiction. Every case is considered on case-by-case basis referring to the practice of the European Commission, the European Court of Justice, etc.

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

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

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

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

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

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.

   There is no definition of the notion "essential facilities" in our jurisdiction. This term is understood referring to the explanation and practice used in the EU. In our practice refusal to deal involving "essential facilities" was found unlawful when a dominant firm having such facilities in its possession did not provide or restricted the access to other undertakings which could not operate in the relevant market (usually downstream) without having access to those facilities. And as result, the competition was eliminated or significantly restricted.

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.
    No; also see point 8.

    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. *N; also see point 8.*

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain. *No; also see point 8.*

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 is no definition of a term "constructive" refusal to deal in our jurisdiction; also see point 8.

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 definition of a term" margin squeeze" in our jurisdiction, also see point 8.

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. *See point 8.*

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. *See point 8.*

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. *See point 8.*

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?

Almost in all cases (except one case of "essential facilities") of refusal to deal decided by the CC were imposed fines and the obligation to terminate the prohibited restrictive actions. In two cases of "essential facilities" the dominant undertakings were obliged to provide or renew the access to the facilities.

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?

Under the Law of Competition the sanctions applied are the same for all undertakings infringing the said Law.

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.

    The Law on Competition clearly defines what kind of sanction could be applied to undertaking for the abuse of a dominant position.

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? *See point 8.*

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.

    At the moment it is not foreseen any changes or developments in the area.