International Competition Network Unilateral Conduct Working Group Questionnaire

Agency Name: Netherlands 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.

Yes, the Dutch Competition Act recognizes a refusal to deal as a possible violation of the Dutch antitrust law. According to Section 24 of the Dutch Competition Act (equivalent to Article 82 EC Treaty) "Undertakings are prohibited from abusing a dominant position". No examples of what constitutes abuse are stated in the Dutch Competition Act itself. However, the Act's explanatory memorandum, as adopted by Parliament, mirrors the wording of Article 82 EC, referring to specific examples of abuse, including refusal to deal. References to the requirement for Dutch competition law to follow closely EC Competition rules are contained within the Dutch Act and the Act's explanatory memorandum. In this respect, the NMa seeks guidance from the decisions of the European Commission, the case-law of the Court of First Instance and the European Court of Justice as well as the Enforcement Priorities of the European Commission on the application of Article 82 EC.

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)?

There are no separate statutory provisions or guidelines for specific forms of refusal.

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

The relevant provisions only apply 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?

It is a civil 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)?

In the last 10 years the NMa has conducted three in-depth investigations of a refusal to deal. In two cases decisions were issued, in one case the NMa is still in the process of in-depth investigations.

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.

On 10 September 1998 the NMa issued a decision in Case 1, Holdingmij de Telegraaf v. NOS en HMG; on 19 October 1998 the NMa issued a decision in Case 650, Norsk Hydro Energy v. Samenwerkende Electriciteitsproductiebedrijven.

Case 1, Holdingmij de Telegraaf v. NOS and HMG:

Parties:
De Telegraaf is a Dutch publishing company of newspapers and magazines.

NOS is a Dutch public broadcasting body, which acts as an umbrella for (other) Dutch public broadcasting organizations as well as candidate organizations that are officially granted broadcasting time under the Dutch Media Act. Each public broadcasting organization runs, at least one, so-called weekly TV guide.

HMG (now known as RTL Nederland) was a media company, owned by RTL Beheer B.V. (of which CLT and VNU are shareholders) with a 65 per cent share and by Veronica Holding B.V. (Veronica) with a 35 per cent share. Publishing company Veronica Uitgeverij B.V. (owned by Veronica for 80 per cent and by RTL Beheer B.V. for 20 per cent) runs two weekly TV guides, which are Veronica Blad and Veronica Satellite. HMG and NOS had signed a mutual agreement, under which NOS was allowed to publish its weekly TV listings in Veronica Blad and vice versa.

De Telegraaf claimed that it was refused access to the listings for publication in a weekly tv-guide.

Theory of harm:
Notwithstanding the intellectual property rights they own, or claim, broadcasting organizations have a de facto monopoly when it comes to the production and first publication of their weekly TV listings. This is because TV schedules are by-products of the programming process, which is controlled by the television producers and which is only known to them. Furthermore, the listings only become marketable products once the schedules have become final, right before the actual broadcast. Third parties are therefore unable to compile reliable listings for publication in their own weekly TV-guides.

Instead, they need to obtain these listings directly from the broadcasting organizations or from undertakings to which the rights of these listings have been transferred.

In addition, the de facto monopoly of all broadcasting organizations regarding their own TV listings is elevated to a legal monopoly, insofar they claim copyright protection under copyright laws, or insofar as parties to which they have transferred their rights claim the same kind of protection.

The arrangement between HMG and NOS meant that HMG and NOS made reciprocal agreements such that HMG made available to NOS its own TV listings, in principle under the same restrictive provisions.

This means that consumers in the Netherlands are thus only able to get the complete TV listings by buying one of the TV guides of the broadcasting organizations directly from them. As a result of the selective licensing policies of NOS and HMG regarding the TV listings, they keep the supply on the market for weekly TV listings artificially to themselves (closed shop). Third parties, such as De Telegraaf, that are not broadcasting companies, but who want to enter this market as suppliers, are thus excluded.

Conclusion:

The NMa ruled that HMG and NOS abused their dominant positions by not making their TV listings available to De Telegraaf, which, as a consequence, was unable to include this information in its newspapers' weekly sections. By imposing an order subject to periodic penalty payments, the NMa forced HMG and NOS to make available within 4 months the TV listings of its member public-broadcasting companies to third parties, including De Telegraaf, in return for a reasonable fee.

Appeal:

In its ruling, at first instance, the District Court of Rotterdam followed the NMa's line with regard to NOS. With regard to HMG, the District Court ruled that there was no evidence of a refusal to supply, since HMG had already made De Telegraaf an offer to supply when it was involved in the legal proceedings with the NMa.

In the appeals procedure, in 2002, the Dutch Trade and Industry Appeals Tribunal (CBb) stated, inter alia, that it did not agree with the line of reasoning that merely from the existence of a considerable demand for a yet-to-be-released product it can be inferred that it should be considered a new product. In this case, this would mean that a product could already be considered new if it were merely distinguishable from other products by having a substantially lower price or because it was offered in combination with another product. This could not be approved by the Court.

The CBb therefore ruled that, at the time of the appealed decision's publication, the requirements, following from the case-law of the European Court of Justice, (as interpreted at that time under *Magill*), had not been met in order to consider the refusal of NOS to make available the weekly TV listings to De Telegraaf an abuse of a dominant position within the meaning of Section 24 of the Dutch Competition Act.

Case 650, Norsk Hydro Energy v. Samenwerkende Electriciteitsproductiebedrijven (Sep):

Parties:
Sep, a trade association of Dutch electricity companies, with certain regulated exclusive rights and obligations, was the owner of the Dutch interconnecting network, the transmission grid for public electricity supply. Norsk Hydro is a global player in, among other things, fertilizer, oil, gas, aluminium and magnesium.

Theory of harm:
Hydro Agri (Dutch daughter company of Norsk Hydro) wanted to import electricity. It then wanted to transport this electricity to its plant in Sluiskil (Netherlands). Such transportation would require Hydro Agri to make use of the transmission network, the so-called interconnecting network, which was owned by Sep. There were no viable alternatives for Hydro Agri to do so. However, Sep had refused to facilitate transportation within the Netherlands, effectively blocking the import of electricity by Norsk Hydro. Sep justified its refusal to transport this imported electricity by invoking the Dutch Electricity Act 1989. Sep argued that Hydro Agri would supply, partially or completely, third parties with the imported electricity, in violation of the Electricity Act 1989.

Conclusion:
It was concluded that Sep had a dominant position with regard to interregional transportation of electricity using grids within the Netherlands.
Sep's interconnecting network was Hydro Agri's only viable option to have the imported electricity transported. The fact that Sep refused to cooperate or that it attached unreasonable conditions to such cooperation constituted an abuse of a dominant position.
Sep argued that Norsk Hydro would act contrary to the Dutch Electricity Act 1989, because it would supply electricity suppliers with the imported electricity. The NMa rejected Sep's arguments, because this Act actually did allow an importer to sell self-generated electricity to a third party and to import all electricity that it needed for personal use. It found that Sep should have investigated the facts further and if necessary, imposed conditions on the contract, rather than refusing outright to facilitate transport.

The NMa subsequently imposed a NLG 14 million fine on Sep (approximately €6.5 million).

Appeal:

The CBB upheld the NMa's decision on appeal. The Court made it clear that it was no defence for the Sep to refuse to facilitate transport on the grounds that Norsk Hydro might infringe the Electricity Act. It was not for SEP to police the enforcement of that Act. In its decision on appeal, the CBb reduced the fine to €3.5 million, taking into account the fact that it appeared plausible that Sep's violation of Section 24 of the Dutch Competition Act stemmed out of its misinterpretation of its regulatory obligations, and thus out of carelessness rather than on purpose (Sep had made an error of judgement by treating its obligation to transport as secondary to what it perceived as the importance of the public supply of electricity).

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.

Both decisions were challenged in court. The CBb annulled the decision of the NMa in . Holdingmij de Telegraaf v. NOS and HMG. The CBb upheld the decision of the NMa in the Sep case, but reduced the sanction.

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

None.

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

See above.

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.

The Dutch jurisdiction allows private parties to challenge a refusal to deal in court. However, no (representative) cases have been brought to court.

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?
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?

Section 24 of the Dutch Competition Act stating that "Undertakings are prohibited from abusing a dominant position" is equivalent to Article 82 EC. Therefore, the answers to all questions can be found by referring to the decisions of the European Commission, the case-law Court of First Instance and the European Court of Justice, as well as the Guidance paper of the European Commission on the application of Article 82 EC.

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 sectorspecific 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 not a specific or separate section in the Dutch Competition Act determining "essential facilities". Refusing to provide access to essential facilities can be seen as an abuse of a dominant position and therefore a violation of Section 24 of the Dutch Competition Act.

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?

EC law is followed on this point.

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

No, not if the case is dealt with under the Dutch Competition Act. However, account would be taken of the relevant regulatory framework in the analysis.

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

The analysis will not change.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

Yes. Also with regard to a constructive refusal to deal, the NMa follows the framework established by the decisions of the European Commission, the case-law of the Court of First Instance and the European Court of Justice as well as the Guidance paper of the European Commission on the application of Article 82 EC.
This means that a constructive refusal to deal is seen as a separate form of abuse, apart from predatory pricing and excessive pricing.

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?

In general, the Article 82 Enforcement Priorities published by the European Commission constitutes the framework for the NMa in its assessment of cases of margin squeeze. This means that a margin squeeze is seen as a separate form of abuse, apart from predatory pricing and excessive pricing.

A margin squeeze is said to arise when upstream prices and downstream prices by the dominant integrated firm are set in such a way that it "does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis" (Article 82 Enforcement Priorities of the European Commission). Only when (a) the firm is dominant upstream, (b) the downstream input is an objectively necessary input to compete on the downstream market and (c) the margin squeeze is likely to lead to consumer harm, the NMa will carry out an investigation into a margin squeeze.

Presumptions and Safe Harbors

1. 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, the Dutch Competition Act contains no presumptions of illegality with respect to a refusal to deal.

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, the Dutch Competition Act contains no safe harbors with respect to a refusal to deal (besides of course not having a dominant position). In order to determine whether there is a presumption of legality, an economic analysis of the relevant circumstances has to be carried out.

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.

Within the framework of the Dutch Competition Act, there are no general justifications or defenses permitted for a refusal to deal. This has to be analyzed on a case-by-case basis.

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?

No remedies were imposed in the cases completed by the NMa. (In the Telegraaf case, the NMa had imposed an injunction on the parties, at an earlier stage in proceedings, obliging them to provide the disputed listings under reasonable conditions. The NMa did not specify those reasonable conditions, leaving that to negotiation between the parties. When negotiation failed, the parties requested the NMa to specify the conditions, but this did not occur, as the case was in any event not upheld by the Court.)

In a merger case, the KPN-Reggefiber case of December 2008, involving fibre-glass services, a remedy was imposed by the NMa compelling third party access, under specific conditions involving price ceilings and non-discrimination. In this case, the Dutch Telecom Regulator advises the NMa on the monitoring of the price ceilings, allowing the NMa to benefit from the Regulator's extensive price monitoring experience. This case is currently under appeal before the Dutch courts.

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?

N.a.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? 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.

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?

The NMa has no specific policy considerations for specific types of a refusal to deal.

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. The NMa does not expect major developments in the criteria by which refusal to deal cases are assessed.