International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Federal Antimonopoly Service of Russian Federation
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Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

According to Section 5 of Article 10 of the Federal Law No. 135-FZ "On protection of competition in the Russian Federation" refusal to deal is recognized as a possible violation of the Russian antitrust law. Generally, the term refusal to deal is used in the same manner as in

the introductory paragraph above, however, it also includes refusal to deal with downstream buyers that are not competitors in the relevant downstream market to the company refusing to deal with them. Additionally to that the Russian understanding of the refusal to deal does not include margin squeeze or constructive refusal to deal since such practices are addressed by other parts of the Russian antitrust law related to price discrimination.

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

The major statutory provision addressing the refusal to deal cases in Russia is Section 5 of Article 10 of the Law No. 135-FZ mentioned in the answer to Question 1. The parts of the Article related to refusal to deal run as follows:

"Article 10. Prohibition of abuse of dominant position by dominant economic entity

1. Actions (inactivity) by dominant company that result or may result precluding, restraining, abandoning competition and/or damage to other persons are prohibited, including the following actions (inactivity):

…

5) economically or technologically unjustified refusing or avoiding entering into agreement with separate customers (clients) in presence of possibility of production or shipment of the relevant good in case such refusing or avoiding the deal are not directly provided by federal law, normative acts by the President of the Russian Federation, normative acts by the Government of the Russian Federation, normative acts by authorized federal bodies of executive power or court decisions …"

There are no separate provisions to specific types of refusal to deal as described in the introductory paragraph. See also the answer to Question 1 for more detail.

According to Section 4 of Article 10 the provisions of this article do not apply to any forms of exercising IPRs.

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

As provided for in the Article 10 cited above the relevant provision apply 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?

Refusal to deal is a civil violation in Russia.

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)?

This data is not available because case statistics of Article 10 (i.e. unilateral violations) are conducted for all types of the unilateral violations and not by each type of the violation, including refusal to deal.

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.

See the answer to Question 5

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.

See the answer to Question 5

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

No refusal to deal cases were brought using criminal antitrust authority because refusal to deal is a civil violation in Russia.

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.

FAS imposed a fine of more than 10 million roubles on Sakhalin based supplier of aviation fuel TOK Joint-stock company for monopoly high pricing for aviation kerosin in Youzhno-Sakhalinsk aipost and technologically unjustified refusal to entering into contract with Vladivistok Avia Open joint-stock company on storing aviation fuel. TOK challenged the FAS decision in the court, however, the court upheld the FAS decision.

This case is provided as an example because it is rather typical violation by the aviation fuel suppliers that refuse to provide storage copacity for customers or other suppliers, i.e. for providers of the kerosin competiting with their own supplies. Similar cases were brought by FAS in other regions.

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.

Generally there is a possibility for the parties injured by the refusal to deal practices by

dominant company to challenge such practices in the court. However, in practice the injured parties apply to FAS for bringing the case. It is rather the alleged violators who challenge the FAS decisions in the court than the injured parties who apply courts on refusal to deal cases in Russia. See the answer to the previous question for an example.

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?

According to Section 5 of Article 10 of the Federal Law No. 135-FZ the refusal do deal is actually treated as a *per se* violation in case there is a technical and economic possibility for the alleged abuser to supply the commodity or service in question unless the defenses provided for in this article are valid (see the citation of the Article provided in the answer to Question 2). The underlying competitive concern of this treatment is that the refusal to deal actually excludes or potentially may exclude one, several, or all the competitors in the downstream market. Refusal to deal is also considered as a discriminatory practice since it may force the refused company to turn to alternative sources of supply that may be less advantageous in terms of cost and quality and, thus, the refused company would find itself in a worse competitive position compared to its rivals.

Thus, technical and economic possibility of supply should be demonstrated to prove the illegality of the refusal to deal in Russia.

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

Consumer harm may not be necessarily demonstrated to prove the illegality of the refusal to deal practice, although it may serve as an additional argument supporting the refusal to deal allegation and complementing to showing technical and economic possibility of supplying good/service in question by the alleged company. Besides, the proof of consumer harm may be used by the consumer affected by the practice for bringing the case on recovering the damage to the court.

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

The refusal to deal as such is generally considered as an intentional action, so there is no need to additional demonstration of intent.

    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?

No.

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?

No.

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.

Yes.

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.

The term "essential facilities" is not specifically defined in the Russian antitrust legislation. The refusal to deal practice is defined in terms of refusal or avoidance from entering into contract with a customer. Such contract may provide for any type of supply of goods and services, including services provided by means of use or granting access to essential facilities.

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

Yes. Any type of use of the intellectual property is exempted from antitrust legislation in Russia, including refusal to license such rights to downstream buyers and refusal to send them the relevant patents.

a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

No.

b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

In theory, yes, if there is a technical and economic possibility to provide such information to a downstream customer. However, such practices are not common in the Russian antitrust law enforcement experience.

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

Refusal to deal in the regulated industries is subject to Section 5 of Article 10 cited above, as well as to Law "On natural monopolies" and sector specific provisions.

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

No. The analysis does not change both for former and present state created companies.

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 term "constructive refusal to deal" as such is not defined and used in the Russian competition legislation and enforcement practice. However, the practices falling into this definition are defined as "creating discriminatory conditions" and prohibited by Section 8 of Article 10, unless defenses provided in this Article as well as in Article 13 are appropriate. Article 13 defenses are limited to the situations when the practice in question results into:

1) improvement of production, sale of goods or facilitation of technical and economic progress or increase of competitiveness of the Russian made goods in the world commodity market;

2) receiving benefits by customers that are comparable to benefits received by company exercising the practice ion question ("constructive" refusal to deal in this case)

3) conditions (1) and (2) are valid if there is no possibility for separate persons to eliminate the competition in the relevant market completely.

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 the Russian legislation the concept of margin squeeze is reduced to concept of creating discriminatory conditions for competitors in the downstream markets. The latter concept has been described in more detail in the answer to Question 13.

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.

The refusal to deal is presumed illegal in case there is a technical and economic possibility for the supplier to ship the relevant commodity or render the relevant service to the customer. This presumption is rebuttable in case such refusal to deal can be justified basing on provisions of any other federal law.

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.

Refusal to deal may be recognized as a legal practice only in case the company exercising it is not dominant.

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.

Article 13 defenses are applicable in case the refusal to deal takes place in the form of "constructive" refusal to deal and, therefore, fit into the definition of "creating discriminatory conditions." See the answer to Question 13.

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?

Refusal to deal is generally a subject to fine and cease and desist order. In case the violator company continues the illegal practice in will be fined for it again and receive another order. In cease it continues the violation afterwards it will be fined once more and my be subjected to structural separation into competing entities. Non compliance with the order is a separate violation subject to a separate fine. Thus, the violator company is motivated to return to legal

practices under the threat of mounting fines and structural separation. The price of the commodity after ceasing the refusal to deal violation is determined on the basis on prevailing market price by the company itself. Otherwise it will engage into price discrimination that is a separate violation.

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?

Both types of remedies may apply.

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.

The remedies described in the aswer to the Question 18 are the only remedies available according to the Law No. 135-FZ and the „Code on administrative violations."

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?

Refusal to deal is considered to be a *per se* violation because it leads to restraint of competition and output in the downstream markets. Constructive refusal to deal is considered as a creation of discriminatory conditions as described in the answer to Question 13. Exercise of IPR, including refusal to license or sell them to downstream customers is completely exempted from the Russian antitrust law basing on considerations of motivating innovation and dynamic competition.

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 significant changes in the Russian approach to refusal to deal can be expected in the next 1-2 years.