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

**Agency Name : Korea Fair Trade Commission**
**Date: 04. 11. 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.

○ The Korea Fair Trade Commission (KFTC) regulates a firm's refusal to deal as one type of competition law violations. Please refer to the response to Question 2 of the questionnaire for specific provisions.

○ However, KFTC's relevant provisions, unlike the definition of a refusal to deal set out in the introductory paragraphs above, do not confine the parties concerned in the refusal to deal to one's competing firms.

- For instance, where a firm refuses to deal with its affiliate's rival firms in order to enhance competitiveness of its affiliate, the firm's act may constitute a refusal to deal under the concerned provisions.

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)?

○ In addition to provisions concerning general types of refusals to deal, the KFTC has in place separate provisions regarding essential facilities.

***FYI: Guideline for review the abuse of market dominant position, eng.ftc.go.kr**

**<Provisions on general types of refusals to deal> Guideline IV. 3. D. (1).**

Act of considerably limiting the amount or content of goods or services traded or unfairly refusing to trade with a specific business

**<Provisions on refusals to deal concerning essential facilities> Guideline IV. 3. C.**

Act of refusing, stopping, or limiting the use of or access to essential input required to produce, supply, and sell the goods and services of the other business without justifiable reason

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

○ The refusal-to-deal provisions are not just applied to dominant firms but also to general firms as well(please refer to Guideline V. 1. for the refusal to deal provisions concerning general firms)

*** FYI : Guideline for review unfair trade practice, eng.ftc.go.kr**

- According to the definition in the introductory paragraph of the questionnaire, the responses to the questions below will discuss refusals to deal by only 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?

○ A refusal to deal can constitute both a administrative and criminal violation.

○ Regardless of its type, a refusal to deal can be a criminal violation, and in most cases, it is treated by criminal law when the level of the violation is objectively clear and serious to be recognized as substantially undermining competition in the concerned market.

○ So far, we have yet to confirm any case where a refusal to deal has been dealt with by criminal law.

***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)?

○ For a total of two refusal to deal cases (by dominant firms), the KFTC conducted in-depth investigations.

* Under the definition of the introductory paragraph of the questionnaire, we do not include the investigations of refusals to deal and exclusive dealing by general firms (hereinafter the same).

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.

○ For the past 10 years, the KFTC has handled a total of 2 refusal to deal cases. Specifics are set out in the below table, followed by English summary of each case.

| Case mane | Decision date | Type | In court | Criminal authority |
|---|---|---|---|---|
| POSCO's refusal to deal case | 2001. 4. 12. | essential facility | overturned | - |

| | | | | |
|---|---|---|---|---|
| Royal Industrial Tech Corp's refusal to deal case | 2006. 10. 10. | IP-licensing<br><br>essential facility | - | - |

< Summary 1>POSCO's refusal to deal case

POSCO accounted for 79.8% of the hot coil market of Korea and at the same time, took up 58.4% of the domestic market of cold rolled steel sheet, for which hot coil is main ingredient. Given this market situation, Hyundai HYSCO, a new entrant of the cold rolled steel sheet market, requested POSCO to supply its hot coil over several times, but POSCO refused the requests without any clear reasons. As a result, Hyundai HYSCO had no choice but to import hot coil from overseas including Japan to enter the downstream market, and during the process, far more cost was incurred, putting the firm in a very difficult situation. The KFTC saw that POSCO's act of refusal to deal is abusing its market dominance in the upstream market to obstruct its rival's business activities in the downstream market, thereby restraining competition. Therefore, the KFTC imposed a corrective order and a surcharge on POSCO.

However, the Supreme Court sided with POSCO, citing that KFTC's argument that POSCO's refusal to deal has restrained competition has not been fully backed by evidence. With regard to this ruling, the Supreme Court stated that to prove any anti-competitive effects of the refusal to deal, the possibility of price raise, output reduction, undermined innovation, reduction in the number of effective competitors and diversity reduction, etc. should be proved to be substantially high. In particular, the Supreme Court decided that as the regulation on abuse of market dominance is to protect not competing enterprises but competition itself, it is hard to recognize POSCO's refusal to deal as illegal just because it caused Hyundai HYSCO some loss, and so, to prove POSCO's act illegal requires sufficient proof of the firm's intent to restrain competition and anti-competitive effects of the act.

< Summary 2> Royal Industrial Tech Corp's refusal to deal case

Royal Industrial Tech Corp and Shinhwa Electronics are both engaged in the industry of production and installation of fire detection system. Especially, Royal Industrial Tech Corp owns a patent to exclusively use major technologies related to fire detection system. Meanwhile, Construction company A invited open bids for a fire detection system installation project for which Royal's patented technology is required. In the concerned bidding, Shinhwa Electronics was selected as a successful bidder under the system where award is given to the lowest bidder (followed by Woo Seok Electronics, and Royal Industrial Tech Corp in order). Once determined as the successful bidder, Shinwha over several times requested Royal to provide estimates of the concerned fire detection system. However, Royal refused such requests. In response, Shinhwa informed Construction A that it would give up its right to the contract. Meanwhile, Company A let the second lowest bidder Woo Seok Electronics participate in the project and Woo Seok Electronics requested Royal for estimates of the system. The estimated price provided by Royal was quite high, hovering over 48% of the average transaction price. Then, Woo Seok Electronics concluded that it might not be able to make profits based on the estimate, and informed Company A of its intent to withdraw from the contract. Eventually, the 3$^{rd}$ lowest bidder Royal was awarded the project.

The KFTC saw that Royal's refusal to license its IP constituted an abuse of market dominance to exclude its rival. In particular, the KFTC concluded that besides its refusal to deal with

Shinwha, Royal called for a price that Woo Seok couldn't afford to pay, which also virtually amounted to a refusal to deal. Through this refusal to deal, Royal's rivals actually couldn't participate in major open bids, which was tantamount to anti-competitive effects. Also intent to restrain competition was verified as Royal argued that it couldn't help refusing to deal in order to prevent its rivals from entering the relevant market. Recognizing this, the KFTC imposed a corrective order on Royal for its refusal to deal.

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.

- In principle, any party who has suffered damage by a refusal to deal that is in violation of the Korean competition law is allowed to directly bring the refusal to deal case to court without law enforcement by the KFTC to determine illegality of the concerned act.

- Yet, we have yet to confirm any cases in Korea where private parties tried to challenge a refusal to deal in 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?

        - When it comes to determining illegality of a refusal to deal as one type of abuse of market dominance, we mainly consider whether the act might cause any anti-competitive effects such as price raise, output reduction, deterred innovation, fewer viable competitors and diversity reduction.

        - In particular, with regard to excluding rivals, we do not require direct exclusionary effects as an essential factor, but rather proving the concern of exclusionary effects is sufficient.

            - The probability of exclusionary effects is determined in consideration of the background and motives for the refusal to deal, pattern and appearance of the act, features of the relevant market, level of harm to transaction partners by the act, and changes in the price and output of the relevant market.

        - Meanwhile, rival firms deemed to face exclusion are not limited to firms operating in the market directly related to the refusal to deal, but include ones operating in the markets which supply raw materials, parts and intermediate materials required to produce the relevant product or the markets which use the relevant product to make new products.

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

- Whereas consumer damage caused by restrained competition is not an essential requirement to be proved, it still is an important matter of consideration. In addition, not just consumer damage that actually was incurred at the present time but also consumer damage that might occur in the future could be a factor for consideration.

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

- Intent to restrain competition should exist to prove illegality of refusal to deal. (This is what the Supreme Court said in its ruling on POSCO's refusal to deal case.)

- But where objective anti-competitive effects are proven, the undertaking's intent or purpose can be presumed.

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?

- Under the Monopoly Regulation and Fair Trade Act, refusals to deal include refusals to start dealing as well as refusals to continue dealing. Therefore, a history of dealing between the parties is not a requirement for finding liability.

- Yet, refusals to start dealing and refusals to continue dealing might show differences in terms of the background, motives and the impact on transaction partner. These differences will be taken into consideration as critical factors 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?

- Whether or not the dominant firm has had a similar course of dealing with firms other than the transaction partner at issue is one of important factors for consideration for finding liability.

  - Where the dominant firm has been normally dealing with other firms but refused to deal with its major rival firm only, such a refusal is likely to be seen as having the purpose to exclude its rival firm.

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.

○ The KFTC has in place a separate provision on refusal to deal concerning essential input on top of the provision on general forms of refusals to deal. The following is elaboration on the concerned provisions.

- The concerned provisions here are not confined to refusals to deal regarding essential input but include refusals to continue dealing and refusals to provide access, etc.

*** Guideline for review the abuse of market dominant position IV. 3. C.**

[refusal to provide access to essential input] Act of refusing, stopping, or limiting the use of or access to essential input required to produce, supply, and sell the goods and services of the other business without justifiable reason

**[Concept of essential input]**

○ "Essential input" includes tangible and intangible factors such as network and equipment; it must satisfy the following

- Without using the essential input, production and supply or sales of the goods or services are impossible; thus preventing the business from participating in the regular trading field or a serious inferiority in competition that cannot be avoided in the concerned trading field is continuing.

- A specific business must own or control the input exclusively

- Reproducing or changing the input after using or accessing it is impossible in reality, both legally and economically

**[Other business]**

○ "Other business" pertains to the owner of essential input or business participating in the trading field wherein the affiliate is expected to participate in the near future or it is currently participating

**[Significance of refusals to deal, etc.]**

○ Act of refusing to, stopping, or limiting in terms of essential input refers to refusal, stopping, or limitation of access to essential input or any acts that bring about such results, including the following cases :

- where a firm calls for prices or conditions too unreasonable to be virtually or economically impossible to meet

- where a firm presents noticeably discriminatory prices or unfair conditions compared to others

**[Justifiable reasons for refusals to deal]**

- where fair compensation for investment by the business providing the essential input is considerably hindered. Note, however, that the reduction of profit caused by intensified competition shall not be considered a hindrance to fair compensation

- where the essential input cannot be provided without reducing considerably the amount provided to the existing user

- where the quality of service secured in providing the essential input may be hindered considerably

- where providing the essential input is technically impossible due to the noncompliance with the technological standards

- where the life or physical safety of service users may be put in jeopardy

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?

- The KFTC does not apply a separate set of criteria to refusals to deal involving intellectual property.

- However, a legitimate exercise of intellectual property rights pursuant to general principles may be exempted from application of the MRFTA. Yet, where a firm refuses to license intellectual property essential for production of a certain product without any reason, thereby blocking other firms from entering the market, such an act is dealt with by the same legal principles as for general forms of refusals to deal.

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

- In case the refusal occurs in a regulated industry, there is high possibility that laws other than competition law might be used.

  - For instance, the Telecommunications Business Act, a governing law for the telecommunications sector, specifically regulates whether there is obligation to deal concerning essential facilities, price terms and conditions in dealing, etc.

- Where the refusal to deal in a regulated industry violates other laws as well, this can be taken into consideration as an important factor to determine liability under competition law.

- Meanwhile, a legitimate refusal to deal pursuant to other laws concerning a regulated industry may be exempted from application of competition law.

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

- Under the MRFTA, the refusal to deal provisions are applied to public and private firms alike.

***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 KFTC regulates not just explicit refusals to deal but also acts that are to presumed to be de facto refusals to deal by offering to supply on unreasonable terms.

  - "where a firm calls for prices or conditions too unreasonable to be virtually or economically impossible to meet"
  - "where a firm presents noticeably discriminatory prices or unfair conditions compared to others"

***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?

- We have no provision on margin squeeze or related enforcement experience.

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.

- The MRFTA has no provision to presume illegality of the refusal to deal.

However, given the following statutory difference, the refusal to deal involving essential

input is more likely to be presumed illegal than other types of refusals. Still, the refusal to deal involving essential input is not automatically presumed to be per se illegal.

- <refusals to deal involving essential input> the act of refusing to provide essential input **"without justifiable reason"**

- <general types of refusals to deal> the act of "**unreasonably**" refusing to deal with a certain firm

- Based on the above provisions, usually, the burden of proof concerning refusals to deal involving essential input falls upon the defendant company, while in case of other general types of refusals to deal, the burden of proof falls upon the KFTC.

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.

- Where the concerned firm's market share is less than 10%(if calculation of market share is not available, the annual turnover is less than 2 billion won), the firm's refusal to deal is regarded as relatively less anti-competitive, which in principle is to be exempted from KFTC examination.

  * FYI : **Guideline for review unfair trade practice**

***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.

- In case of refusals to deal over essential input, the Guideline specifically defines justifications or defenses as follows.

  - where fair compensation for investment by the business providing the essential input is considerably hindered. Note, however, that the reduction of profit caused by intensified competition shall not be considered a hindrance to fair compensation

  - where the essential input cannot be provided without reducing considerably the amount provided to the existing user

  - where the quality of service secured in providing the essential input may be hindered considerably

  - where providing the essential input is technically impossible due to the noncompliance with the technological standards

  - where the life or physical safety of service users may be put in jeopardy

- While there is not an explicit provision on the burden of proof, the defendant firm should prove in practice that there were reasonable circumstances for its refusal to deal, which would make it not liable.

***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?

    - The corrective orders the KFTC imposed against the aforementioned refusal to deal cases were stated in a passive tone like "shall not commit the same offense," and there have not been active corrective orders imposed against refusals to deal such as imposing certain transaction duties or transaction terms.

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***

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?

- N/A

21. 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.