International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Commission for the Supervision of Business Competition
Date: 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.

   Yes, it does. The Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition is not specifically use or define the term of "refusal to deal". However, the types of refusal to deal are stipulate separately as

provisions in the Law. These behaviors are such boycott (Article 10), exclusive dealing (Article 15 “a” and “b”), tied-sales (Article 15 “c”), and discriminatory practices (Article 19 “d”). Not all of these behaviors are treated in term of dominant position and or unilateral conduct, in which most behavior could be joint or concerted action with other business actors (horizontal). Unilateral refusal to deal is deal with article on tied sales that treat as illegal conduct and discriminatory practices that treat as rule of reason. Other articles are concerted type of refusal to deal under a per se illegal violation. Refusal to deal by dominant business actor is stipulates as Abuse of Dominant Position (Article 25) which involve specification on certain market share and type of violation, including determining conditions for sales, limiting market and technological development, and creating entry barrier.

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)?

   As mentioned earlier, we have separate provisions for specific forms of refusal. These include article on boycott (Article 10), exclusive dealing (Article 15 “a” and “b”), tied-sales (Article 15 “c”), and discriminatory practices (Article 19 “d”). Please refer to our law (attached) for complete articles.

   Apart from that, KPPU does not have any guideline regarding refusal to deal yet until this moment. However, we do issued a guideline on market control (Article 19) which also covers the article 19 “d” on discriminatory practices.

   Refusal to deal that was carried out by the dominant firm related with intellectual property (IP license) did not become the KPPU’s authority, because of the Law Number 5 Year 1999 arranged an exclusion provision (Article 50 “b”) for IPR.

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

   The provisions are applied to dominant firms and other firms. Violation by dominant firm is specifically under the provision of Article 25 on Abuse of Dominant Position.

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?

   Aforementioned behaviors could be treated as violation that could be impose by administrative and criminal sanction stipulated by Article 47 and 48 of the 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)?

During the past nine years, KPPU had never handled any refusal to deal case. Investigation on refusal to deal case is as the same with any other case as violation of Law Number 5 Year 1999.

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.

   There is no case regarding refusal to deal until this moment.

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.

   No, it does not. There is no specific regulation on private challenge. The Law Number 5 Year 1999 only allows business actors to challenge KPPU's Decision to the district court when they are objected to the KPPU's Decision.

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?

      Generally, the competitive concern involves with such actions which:

      a. causes a loss or may be suspected of potentially causing a loss to other business actors; or

b. limits other business actors in selling or buying any goods and or services from the relevant market; or

c. limits development of technology; or

d. creating entry barrier; or

e. creating monopolistic practice and unfair business competition.

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

No. There is no harmful effect to the consumer.

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

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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?

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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?

Yes. If refusal to deal was carried out by a dominant firm, the provisions will be applied was the Article 25 Law Number 5 Year 1999 regarding dominant position. The analysis concerning the existence of abuse of dominant position afterwards will use the analysis concerning refusal to deal. The main frame of refusal to deal based on prohibition of refusing some business actor against the other business actors. Literally, the term of "the other business actors" according to the provisions of this article cover the existing competitor, potential competitor, and also not competitor.

If firm sells its product to everyone except its main rival, refusal to deal is unlawful. Because the term of "the other business actors" as being stated in the Law only over competitor in the same relevant market.

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 management against "essential facilities" was given by the government to the State Owned Company (*Badan Usaha Milik Negara*/ BUMN) and or the body or the agency that was formed or indicated by the government. Based on Article 51 Law Number 5 Year 1999, monopoly and or concentration of activity related to the production and or marketing of goods and or services affecting the livelihood of society at large and branches of production of a strategic nature for the state, was exempted from the Law Number 5 Year 1999. The regulation concerning the State Owned Company authority to manage "essential facilities" was arranged firmly in the Constitution of the Republic of Indonesia (*Undang-Undang Dasar* 1945/ UUD 1945), exactly in the Article 33 UUD 1945. Refusal to deal that was carried out by State Owned Company is unlawful if State Owned Company carried out boycott against the certain business actors that caused loss for the certain business actors.

Decision making in State Owned Company usually submit by its management, which was agreed by The Minister of State Owned Company. In case of State Owned Company do refusal to deal, then the State Owned Company will not be applied by the Law Number 5 Year 1999. KPPU based on the Article 35 letter e Law Number 5 Year 1999, has had authority to submit advice and recommendation if the policy proven caused a monopolistic practices and unfair business competition.

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)?

       Intellectual property was an object that was exempted from Law Number 5 Year 1999 based on the provision of the Article 50 letter b. If there is patent versus trade secret, then the violation of the spreading of the trade secret against patent, for instance, could be applied by the Article 23 Law Number 5 Year 1999.

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

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

    There is no different treatment between violation in regulated industry or non regulated industry in our analysis.

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

    There is no different treatment between violation in regulated industry or non regulated industry in our analysis.

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?

    Law Number 5 Year 1999 did not identify the regulation in a specific manner concerning "constructive" refusal to deal. However, if it is happens, KPPU will use the Article 25 regarding dominant position to analyze this case, or used other provisions that were related to the situation.

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?

    No. it does not.

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.

    Yes. It is illegal when involving agreement with other business actors.

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.

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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.

The justification or defenses are permitted for refusal to deal was refer to the provisions of the Article 50 and Article 51 Law Number 5 Year 1999. Except if refusal to deal also was carried out by violating another provisions in Law Number 5 Year 1999.

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?

Not applicable.

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?

There is no remedy available for the regulated industry. Nevertheless, KPPU has a duty to provide advice and opinion concerning the regulated industry related to monopolistic practices and or unfair business competition.

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.

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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?

    Until today, guideline on these violations are being drafted.

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.