International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: ***Office of Competition and Consumer Protection (UOKiK), Poland***
Date: ***November 4, 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, we do recognize all types of refusals to deal as possible violations.

All types of refusals to deal, fall within the scope of the same statutory provision (see question 2 below).

However, some borderline 'margin squeeze' cases may be qualified as price discrimination or predatory pricing, in which case a different statutory provision is applied.

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)?

Paragraph 2 point 5 of Article 9 of the Competition and Consumer Protection Act specifically prohibits "*counteracting the formation of conditions necessary for the emergence or development of competition*".

This very broad statutory provision also encompasses most exclusionary practices.

General provisions of Article 9 of the Competition and Consumer Protection Act (i.e. paragraph 1 of that Article), prohibiting any anti-competitive abuse of dominant position, can also be applied.

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

These provisions apply to dominant firms only.

A separate provision prohibits multilateral practices in the form of agreements on boycotts.

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?

They are civil/administrative violations, no criminal sanctions are foreseen by the competition law in Poland.

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)?

The number of in-depth investigations, which came to a conclusion, i.e. for which an administrative decision was issued in the years 2007-2008, was 16 (6 cases in 2007, 10 cases in 2008).

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.

In the past 2 years (2007-2008), we have found unlawful conduct in 12 out of the 16 cases, of which 3 could be classified as 'margin squeeze'.

In addition, we have found unlawful conduct in 2 'borderline' cases, one classified as price discrimination, and another as predatory pricing, both of which could also be viewed as 'margin squeeze' cases.

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.

Out of the 12 cases mentioned above, all have been challenged and some are still under appeal. Only one of the 12 decisions has been overturned to this date.

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

Not applicable.

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.

No official English translations are available.

Typical cases concern the practices exercised by local public utilities: cemetery operators, waste dump ground operators or bus-stop network operators. These operators usually have a dominant position in their local market and are often present in the downstream market: burial services, waste collection services or local passenger transport, respectively. Refusals to deal take various forms: from plain refusals to margin squeeze.

In the years 2007-2008, UOKiK has reviewed two larger cases: one regional-market case and one national-market case.

In the regional-market case, an electrical power grid operator refused (constructively) to connect a new wind-power generator farm to their grid. The operator was owned by a major power company, active in the power generation market. Unlawful conduct was found in this case.

In the national-market case, the (formerly monopolistic) telecommunications company, which had a dominant position in the Internet access services, was degrading the quality of IP (Internet Protocol) traffic, which originated in competing Internet service providers' (ISPs) networks. Unlawful conduct was found in this case.

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.

Such a possibility exists. However, due to practical difficulties (burden of proof), no private lawsuits based on Competition Act violations have been filed yet. If private lawsuits should be filed in the future, they will almost certainly be follow-on suits.

Evaluation of an actual refusal to deal

7. 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?

    Even partial exclusion, or a threat of exclusion, can be sufficient for UOKiK to find a violation. In margin squeeze cases, threatened exclusion can be demonstrated by showing that the dominant firm would not be able to survive (make a profit) in the downstream market if they were charged the upstream price/prices, which the rival firms are charged. In other 'constructive' refusal cases, the conditions (terms) of dealing are tested against their 'reasonableness', i.e. legality, indispensability and influence on rival's costs or product quality.

    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 does not have to be demonstrated.

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

    In order to find a violation, UOKiK has to demonstrate anticompetitive effect (actual or potential) or intent, or both. However, in refusal to deal cases, effect is usually easier to demonstrate, and intent is usually not investigated. Intent plays a role in determining the level of the fine.

    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. However, if there is a history of dealing, proving an (actual) exclusionary effect is usually easier.

    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?

    In general – no. However, the evidence of dealing with other parties could serve as a rebuttal of the dominant firm's frequent "inability to deal" or "lack of capacity" defense.

8. 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.

No. We do understand and appreciate the concept of "essential facility", but our approach to these cases does not (essentially) differ. If a firm has a dominant position, it's product/service is almost always "essential" to some extent. In other words, the

presence of an "essential facility" would serve as evidence of a dominant position in the market related to that facility.

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.

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

We have no experience with refusals to deal involving intellectual property.

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

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

Yes, we believe it could. One case pursued by UOKiK referred to a similar behaviour: a firm which produced a software platform for regional offices of the National Health Service, was making it difficult for competitors providing patient management software for clinics to achieve full interoperability with the afore-mentioned platform: providing incomplete information, often with significant delays. The behavior was characterized as an anticompetitive agreement, as the NHS played (apparently, without serious intent) a major role in denying other operators full access to the interoperability information.

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

No, though conflicts may arise concerning the identity of the agency best placed to deal with the issue, In addition, freedom of action of the regulated eneterprise may also have to be examined, since if constructive refusal to deal (e.g. margin squeeze) is a result of regulatory intervention (sectoral regulator ordering the undertaking to apply given prices in the market), the undertaking cannot be held liable for anticompetitive effects of such a behavior, as it had no freedom of action to avoid the anticompetitive consequences.

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

No.

Evaluation of constructive refusals to deal

12. 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?

No. While determining, whether conditions offered by an incumbent amount to a constructive refusal to deal we look at the reasonableness of those conditions, particularly from the incumbent's perspective: would it be able to survive in the market if it were supplied under such terms? Are the conditions markedly different from the way the incumbent treats itself, its subsidiaries, or other market players?

Evaluation of "margin squeeze"

13. 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?

    Yes, but the same statutory provision is applied to refusals to deal, margin squeeze and some predatory pricing cases. The practice has to have an (actual or potential) effect of significantly reducing or excluding downstream competition. The firm has to be dominant only in the upstream market, but usually will be strong also in the downstream market. Whenever possible, a cost-based test is applied, similar to the one used in predation cases, aiming to establish, whether the downstream product/service is sold below costs, taking upstream price offered to competitors as the cost of an input. The duration of price cuts (margin squeeze) or degradation matters, insofar UOKiK has to demonstrate at least a potential for exclusion. The analysis does not change in case of regulated industries, however, a 'duty to deal' provision eases the burden of proof, as it implies that the dominant has the ability and capacity to deal.

Presumptions and Safe Harbors

14. 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.

There are no formal legal presumptions, however, a plain refusal to deal would be almost automatically judged illegal if the dominant firm operates in the downstream market and has the capacity to deal with the rival (e.g. if they dealt with them in the past), as an anticompetitive effect in such cases is easy to demonstrate.

15. 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.

Justifications and Defenses

16. 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.

An objectively proven inability to deal ('lack of capacity') constitutes the most successful defense.

Remedies

17. 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 only remedies available to UOKiK are a cease-and-desist order or an administrative settlement. In the cases mentioned in questions 6 and 7, all findings of violations resulted in a cease and desist order. UOKiK is not equipped with constructive-remedy tools (the most we can do is to declare an infringement and, possibly, initiate proceedings for non-compliance later; jurisprudence of courts specifically forbids us from ordering an undertaking to take positive action) , however, we have recently been giving more attention to the wording of our decisions, so that they give clear clues to the defendants, as to which particular aspects of the practice are deemed unlawful, why, and what actions on the part of the undertaking may bring an infringement to an end.

Administrative settlements are reached infrequently, as the defendants are reluctant to admit wrongdoing. We had one such case since the year 2007 (settlement reached in 2009).

18. 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?

Not applicable.

19. 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.

Not applicable.

Policy

20. 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?

Most violations dealt with by UOKiK take place in (ineffectively) regulated markets,

where some form of 'duty to deal' is imposed, but not effectively enforced by the regulator. In addition, most defendants are former or current state or local monopolies. The anticompetitive effect is therefore usually then rather obvious, and the incentives to innovate or invest have not constituted a great concern in the cases reviewed so far.

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.

There have been no major developments in our approach lately.