International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Taiwan Fair Trade Commission
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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.

A: In general, a firm has no duty to deal with its competitors. However, in some circumstances, there may be limits on the freedom for a firm with market power. A refusal to deal may constitute a possible violation of Taiwan's competition law, the Fair Trade Act

(FTA) although there are no specific provisions to regulate refusals to deal in the FTA. The practices concerned have been handled along with other forms of anti-competitive behaviours and thus never been formally and clearly defined.

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)?

A: Under the FTA, a refusal to deal can be handled in two ways. Market position of the parties concerned may determine the Fair Trade Commission's choice of appropriate enforcement tools:

(1) Article 10 of the FTA prohibits monopolistic enterprise to obstruct, directly or indirectly, any other enterprise from competing by unfair means. A refusal to deal can be considered as an unfair method by a monopolistic enterprise to hinder competitors to enter into the relevant market.

(2) For enterprises own more than 10% of market share but do not fit into the definition of monopoly by the FTA, Article 19 provides a legal basis for the Fair Trade Commission (FTC) to prevent such enterprises to engage in practices which are likely to lessen competition or to impede fair competition:

- Article 19(1)(ii) disallows enterprise treating another enterprise discriminatively without justification. Factors shall be taken into account while considering the justification including supply and demand conditions in the market, cost differences, transaction amounts, credit risks, and other reasonable grounds.
- Article 19(1)(vi) prohibits enterprise dealing with its trading counterpart on the condition that unduly restricts that trading counterpart's business activity. Restriction in this provision refers to the circumstances under which an enterprise engages in restrictive activity in regards to tie-ins, exclusive dealing, territory, customers, use, or otherwise. In determining whether the restriction is justifiable, factors as the intent, purposes, and market position of the parties, the structure of the market concerned, the characteristics of the goods traded, and the impact that carrying out such restrictions would have shall be considered.

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

A: Article 10 of the FTA applies only to dominant firms but Article 19 applies for all firms rather than just being limited to dominant firms. In practice, 10% of market share is usually viewed as the threshold of Article 19 for determining if an enterprise has sufficient market power to engage in illegal conducts likely to lessen competition. However, it doesn't surely constitute a safe harbor and a positive presumption based on past cases, the extent of independency between trading parties is also an index of market power.

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: A refusal to deal is a civil/administrative violation, according to Article 31 and article 41 of the FTA. In addition, the violation of Article 10 and 19, as mentioned in Q2, may become a criminal if the violating undertaking does not follow the orders by the FTC to cease and rectify the conduct, according to Article 35 and 36 of the FTA.

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)?

A: There were 14 cases related to refusal to deal investigated by the FTC in the last 10 years.

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.

A: The FTC found only 1 case in violation of the FTA in the 14 cases.

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

A: N/A.

   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.

A: *Case: Refusal to deal with competing firm (http://www.apeccp.org.tw/doc/Taipei/Case/D0524200.htm)*

In October 2000, the FTC decided that Chinese Petroleum Corporation (the CPC) misused its monopolistic position in aviation fuel provision market at the CKS Airport's domestic routes to refuse deal with a new entrant Wen-Chiu Ltd. Co. with undue method.

The CPC was the only body charged with exploring, producing, importing, refining, and marketing petroleum products, including aviation fuel, in Chinese Taipei. In January 1999, the aviation fuel was opened for importation. Nevertheless, before the Formosa Petrochemical Corporation, another petroleum refinery in Chinese Taipei, was established and approved to provide aviation fuel on May 9, 2000, the CPC still owned monopolistic position in aviation fuel provision market.

Wen-Chiu was one of the aviation fuel filling companies which operated in the CKS International Airport. After the aviation fuel provision market for domestic routes at the CKS Airport being opened, Wen Chiu intended to enter this market and thus requested for price quotations from the CPC who was the sole provider. The CPC, however, asserting that it was in the process of studying and developing a pricing structure for domestic aviation fuel, delayed in offering the quotations. Meanwhile, the CPC actively negotiated and concluded the fuel-supply agreements for the year of 2000 with all of airline companies on domestic routes at the CKS Airport. The CPC then, in January 2000, refused to offer quotations to Wen-Chiu, stated there was no need to do so.

The FTC found out, in its investigation, the refining and transportation costs of aviation fuel at the CKS Airport were the same for international and domestic routes. The CPC also admitted that the primary difference between two routes was the taxes assessed, and other costs differed insignificantly. In its conclusion, the FTC decided that the CPC's refuse to offer the price quotations to Wen-Chiu was unjustifiable. The CPC was obligated to facilitate the liberalisation of petroleum products markets. The refusal to deal with new entrant constituted an undue obstruction to competitor's entrance, maintained its monopolistic position in the aviation fuel provision market, and thus violated the FTA.

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.

A: Yes. Whether a refusal to deal is in violation of the FTA is determined by the competition authority, the Fair Trade Commission (FTC). However, a private party is able to make a claim for damage through courts pursuant to the Article 31 of the FTA.

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?

    A: The competitive concern for a refusal to deal, as in other cases, is "whether the practice is likely to impede market 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?

    A: No. The FTC may consider a conduct violates the FTA if it is proved to be likely to harm market competition.

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

    A: Yes, intent is an important element. If the intent of a refusal to deal is to aim to exclude competitors, the conduct may constitute a violation of the law.

    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?

    A: Whether there is a history of dealing between the parties is not a significant issue to be considered when the FTC investigates misuse of monopolistic position and restrictive trade practices cases.

    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?

    A: We have little experience in this area.

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.

A: In the "Fair Trade Commission Policy Statements on the Business Practices Cross-Ownership and Joint Provision among 4C (Telecommunication, Cable TV, Computer network, and E-Commerce) Enterprises", an "essential facility," is defined as the following:

(1) an essential facility is controlled by a monopolist;
(2) competitors (including potential competitors) are unable to duplicate an essential facility in an economically reasonable way within a short period of time;
(3) an essential facility is inaccessible to competitors with the result that competitors are unable to compete with the controller of such a facility; and
(4) it is feasible for a monopolist to provide a competitor with a facility.

Since competitors do not have access to an essential facility, they lack the ability to compete with the controllers of such a facility. Enterprises controlling an essential facility, therefore, could possess sufficient power to impede or exclude competitors from competition. This is especially so when 4C enterprises undertake the integration of services. They might use the essential facility they already possess to hinder other enterprises from competing. Hence, if those 4C enterprises with monopoly power deny the use of the essential facility to their competitors, cease providing the essential facility without justification, or provide the facility in a discriminative way that restrains and impedes fair competition, they might violate Article 10 of the FTA.

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

A: No.

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

A: No.

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

A: Up to mow, the FTC hasn't had any case in relation to such circumstances as the above question.

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

A: No. However, the FTC issued some guidelines for regulated industries, such as telecommunication industry in order to complement the general analysis.

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

A: No.

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?

A: Yes. In the "Fair Trade Commission Policy Statements on Regulations of Telecommunication Industry" (Chinese version only) Section 5, point 2: "vertical margin squeeze", the concept of "constructive" refusal to deal is defined as the following:

In order to impede competition or exclude competitor in the downstream market, a vertical integrated telecommunication enterprise, which operates upstream and downstream businesses at the same time, weaken competitors' competition ability by raising input costs for competitors.

To determine whether the term constitute a vertical margin squeeze, the FTC will consider the following 3 conditions:
1. whether the undertaking is a vertical integrated business and a monopoly in the upstream market;
2. whether the product or service it supplies in the upstream market is an essential input in the downstream market;
3. whether the price is high enough to force the same efficient downstream competitors out of the market.

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?

A: Yes. See Q13.

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?

A:
1. The firm is dominant in the upstream market only.
2. The "Fair Trade Commission Policy Statements on Regulations of Telecommunication Industry" (Chinese version only) lists an example to show how the FTC would adopt imputation test to determine an anticompetitive vertical margin squeeze:

Assume Company A is a vertical integrated telecommunication enterprise. A is the sole service provider in the upstream wholesale market and also competes with several competitors in the downstream retail service market. The wholesale price offered by A for all downstream service providers is w, and the retail price and cost of the service by A is p and c respectively. If the wholesale price w is greater than the difference between A's retail price p and cost c ($w>p-c$), this price setting may cause the retailers with same efficiency exit the market because of no profit and constitute a vertical margin squeeze.

3. This criterion only applies in the telecommunication industry.

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.

A: No.

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.

A: No.

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.

A: No statutory justifications are permitted.

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?

A:

1. Pursuant Article 41, the FTC can order the infringing party to cease or rectify its conduct or take any necessary corrective action within the time prescribed in the order. Both parties (infringing and infringed) can appeal to the Appealing Committee of the Cabinet and the Administrative Court should they don't agree with the decision by the FTC.

2. N/A.

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?

A: The remedy mentioned in Q18 is applied to all unlawful refusal to deal cases.

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.

A: No.

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?

A: N/A.

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.

A: In response to changes in market and trade patterns, positive elements, such as increase in efficiency and decrease in cost, should be considered for rule of reason in the investigation of refusal to deal cases.