International Competition Network
Conduct Working Group
Questionnaire

Agency Name: Antimonopoly Office of the Slovak Republic (AMO)
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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.

YES.

Cases mentioned in initial paragraphs could be subsumed into the article 8, par. 2, letter b) of the Act. Exemption is constituted by margin squeeze, which the Office subsumes into the

article 8, par. 2, letter a), as for example European Commission did in Deutsche Telekom case.

Act No. 136/2001 Coll. on Protection of Competition as amended

Article 8
Abuse of a Dominant Position

(1) A dominant position in the relevant market is held by an undertaking or several undertakings that are not subject to substantial competition or can act independently as a result of their economic power.

(2) Abuse of a dominant position in the relevant market shall be defined as:

a) direct or indirect enforcement of excessive prices or other unfair trade conditions;
b) a threat of restriction or an actual restriction of the production, sale or technological development of goods to the detriment of users;
c) application of different conditions for identical or comparable performance with respect to the individual undertakings, through which the respective undertakings are or may be disadvantaged in the competition;
d) tying the conclusion of a contract to the condition that the other party accepts further commitments, unrelated to the subject of the contract in terms of substance or according to customary commercial practice; or
e) temporary abuse of economic power with a view to excluding competition.

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)?

See above.

The Act on Protection of Competition adjusts the essential facilities specifically in the following manner.

Article 8
Abuse of a Dominant Position
(3) Essential facility is a facility, infrastructure or part thereof, location or right, the building or acquisition of which is objectively impossible by another undertaking and without the use of which competition would or might be restricted in the relevant market.

(4) Pursuant to this Act, an owner or administrator of an essential facility is also a holder of the right if a right is the respective essential facility pursuant to paragraph 3.

(5) An undertaking that is an owner or administrator of an essential facility abuses its dominant position in the relevant market if such an undertaking refuses to provide access to it and, at the same time:
a) the essential facility permits satisfying the undertaking's requirements regarding the utilization of the essential facility, while allowing for simultaneous satisfaction of the requirements of the essential facility’s owner or administrator at the time of peak demand for its services, also taking into account the fulfilment of its long-term commitments;
b) an undertaking requesting access to the essential facility with the aim of its utilization is

able to ensure adherence to the respective qualitative and quantitative parameters of the essential facility resulting from its operational requirements, or if the undertaking requesting the utilization of an essential facility represented by a right is able to ensure adherence to all requirements concerning the aforementioned right as stipulated in special legislation; 5)
c) an undertaking requesting access to the essential facility is capable of providing the essential facility's owner or administrator with adequate payment.

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

Relevant provisions are applied 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 an administrative violation (see above).

Under certain circumstances refusal to deal may be also considered as violation of „civil law" (civil/commercial law). It may be a case when one of the contractual parties, it means possible dominant breaks the contract. In this case it is a legally prosecuted claim.

Criminal Act contains the state of facts of Abuse of participation in competition. It comes out from the state of facts that it is applied also to any conduct being contrary to Act on Protection of Competition, hence also to all forms of refusal to deal.

§ 250 of the new criminal code:

(1) A person who abuses a participation in the competition by the following way:

a) by means of unfair competition in the economic relations person's conduct results in a harm to the good reputation of competitor's entrepreneurial subject or
b) person's conduct which is contrary to the mentioned Act results in a considerable harm to the other competitor, threatens an operation or development of his entrepreneurial subject,
shall be sentenced up to three years imprisonment.

(2) A perpetrator shall be sentenced from two up to six years imprisonment if his/her conduct under the paragraph 1:

a) results in a harm of a large extent to the other person or
b) results in decline of the undertaking of other competitor,
c) has been committed from the particular motive, or
d) has been committed by the more serious way of conduct.

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)?

Since 2005 the Office made 11 investigations in this area.

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.

   The Office is not informed if any of the cases would have elicited proceedings in criminal law.

   Here are all cases since 2003.

   A) Vychodoslovenská vodarenska spolocnost, a.s. [Eastern Slovak Water Management Company]

   In August 2000, Vychodoslovenska vodarenska spolocnost a.s. Kosice (hereinafter referred to as "VVS a.s. Kosice") stopped supplying unprocessed water to the company DAMIJO KOMPLET, s.r.o. Svidnik (hereinafter referred to as "DK s. r. o."), which used the unprocessed water to produce table water. Despite the demonstrable effort on the part of DK, s.r.o to settle business relations, VVS a.s. Kosice refused to resume unprocessed water supplies.

   The Office conducted an investigation and arrived at the conclusion that VVS a. s. Kosice was an entity having the character of a natural monopoly, which was the administrator of the water distribution sewerage systems in the territory of eastern Slovakia and a dominant supplier of water. This company was the only possible unprocessed water supplier for DK, s.r.o.

   The Office also found out during the investigation that it was, and still is, fully viable for DK s. r. o. Svidnik to connect to the unprocessed water distribution channels of the company VVS a. s. Kosice. No restrictions in terms of technology, safety, capacity, or other restrictions were found due to which it would be necessary to stop unprocessed water supplies. DK, s.r.o. also met all technical, administrative, and business conditions related to unprocessed water supplies.

   Therefore, the Office assessed the refusal of the company VVS a. s. Kosice to supply unprocessed water to DK s. r. o. Svidnik and its failure to resume these supplies after the attempts of DK s. r. o. Svidnik to conclude a new agreement in 2003 as abuse of a dominant position of the company VVS a. s. Kosice on the relevant market; a fine was

imposed on the company, and it was ordered to remedy the illegal state of affairs within 30 days.

The Court upheld the Office's decisions.

B) Cintoriny Komarno, spol. s r.o.

In this case, the Office assessed the conduct of the company Cintoriny [Cemeteries] Komarno, spol. s r.o. toward the competing funeral services and stonemasons. The undertakings - providers of funeral services complained about being prevented access to the Roman Catholic cemetery in Komarno, in addition to complaints about the exacting of the provision of services consisting of preparation of transported mortal remains for funeral and the undertakings - stonemasons complaining about the application of different fees for permission of access to the cemetery and exacting of payments for supervision over the construction process. Following an investigation of the aforementioned case, the Office issued a decision on the violation of the law.

In 2006, the Office decided that the undertaking Cintoriny Komarno, spol. s r. o. (hereafter referred to as Cintoriny Komarno) had violated the law because it failed to provide funeral homes with access to the Roman Catholic cemetery in Komarno for the purpose of providing funeral services. Access to the cemetery where a client wishes the burial service to take place and the deceased to be buried represents the main input for funeral homes, without which this service cannot be provided. The company Cintoriny Komarno thus excluded all its competitors from the provision of funeral services at this cemetery. In the final analysis, such a violation of the law also has a negative impact on customers – clients who need a burial service, because they do not have the opportunity to choose from the individual providers of funeral services.

Case is still pending.

Margin squeeze

C) Virtual private network

In 2005, the Antimonopoly Office of the Slovak Republic decided on the violation of the Act on Protection of Competition by the company Slovak Telecom, a.s. in the process of a tender for a solution to the "Integrated Communication Platform Ludová Banka, a.s. [Volksbank]."

The case concerned a virtual private data network (VPS) for Ludová Banka, a.s. VPS is a closed computer network built in the open environment of public networks, particularly the internet, using various encryption devices.

Restriction of competition consisted of the application of a price bid of August 2004 by the company Slovak Telecom, a.s. (ST) in the tender in connection with prices charged by ST for the lease of networks to competitors according to the General Conditions and Tariffs effective at the time of the tender, because the amount of the wholesale price for the lease of networks and the retail price offered to Ludová Banka, a.s. by ST, as a vertically integrated company, did not create room for competitors to offer a competitive price in this tender. It was not possible to compete with the retail price offered by ST, unless a competitor incurred a loss even if it were equally effective as ST. This procedure may be described as the so-called "margin squeeze."

A "margin squeeze" is a form of abuse where the difference between the retail price charged by the dominant and the wholesale price charged to its competitors for comparable services is negative or insufficient to cover the costs specific to the product of the dominant, which also provides its own retail service in the related market.

Case is still pending

D) Fixed voice.

Slovak Telecom, a.s. (ST) is a former state monopoly with the most extensive telecommunication network for fixed lines, which covers the entire territory of Slovakia, and has been a member of Deutsche Telekom Group since 2000. ST is a vertically integrated company providing a wide range of telecommunication services through a network of fixed lines both at the wholesale and retail level.

If an undertaking with a dominant position, operating in the entire territory of member state abuses its dominant position in the form of exclusion, this conduct usually also influences trade between member states, because it makes it difficult for competitors from other member states to penetrate the market. Trade between member states is generally influenced by the conditions of access to telecommunication infrastructure and wholesale services of an operator that was a state monopoly in the past. These conditions determine what the other undertakings can offer in the market and their competitive ability.

The conduct assessed within these administrative proceedings created a barrier to entry into the Slovak market and made it difficult for the existing and potential competitors to enter or remain in the market. This negatively influenced the structure of the relevant market, where a potential negative effect (a "reputation" of an immediate reaction to competitors' activities was established) on future endeavours of other competitors who would be interested in providing telecommunication services should also be taken into consideration.

Voice services were liberalized de jure on 1 January 2003. Entry into the market and the commencement of activities of an operator were conditional upon signing connection agreements between ST and alternative operators (hereafter referred to as "AOs“). How ever, these agreements were signed only at the beginning of 2005 and the first AOs entered the market on 1 August 2005.

The Office defined a total of 12 relevant markets at the wholesale and retail level. The effects of the conduct subject to assessment primarily concerned the provision of the telephony service via the public fixed line network to household and non-household customers.

In its decision, the Office defined several instances of abuse and one of them was margin squeeze.

In 2004 and 2005, ST introduced in the retail market, as part of individual calling programs, tariffs enabling customers to make 30-minute telephone calls for SKK 1 (EUR 0,03) at certain times and tariffs enabling customers to telephone free of charge at certain times. These tariffs were introduced in the market shortly before AOs' entry. From 1 August 2005, when AOs entered the market, they had to pay a wholesale price - connection fees to ST for each telephone call made by their customers through an

operator. The Office stated that the setting of wholesale and retail prices by ST represented a margin squeeze, closed the market, and prevented AOs from competing effectively.

In the area of voice services, all of the aforementioned practices were concurrently applied during a certain period, due to which there was a high risk of the market closure and creating barriers to entry into the market. This did not result in a complete exclusion of competition in the market, but such conditions were created in the market that competition did not develop after AOs entered the market. Competition in the market, particularly in the segment of households, remained at a "symbolic" level. By setting these conditions, ST made it difficult for its competitors to enter the market and operate there.

AMO decided in 2007 and case is still pending.

Essential facility

E) Denial of access to local loop

Slovak Telecom, a.s. (ST) is the sole owner and administrator of the fixed public telecommunication network in the entire territory of the Slovak Republic, which includes local lines, also called the "last mile," connecting the end point of the network on the premises of a customer with the main switchboard or an equal device in the fixed public telephone network.

The fixed public telephone network with local lines represents an essential facility, which is essential for doing business in related markets and whose duplicate construction is not objectively possible in view of large investments, a long period of return, and the risk of incurring "sunk costs." ST as the owner and administrator of this essential facility is an unavoidable business partner for undertakings for which access to infrastructure is essential for their own business activities in view of the nonexistence of an equal alternative. Therefore, in order to create competitive pressure, it is necessary to make sure that access to these facilities is provided.

By failing to provide access to local lines, ST, as a vertically integrated company owning local lines, imposed restrictions on its competitors operating in related markets. The failure to provide access to local lines caused the liberalization of the telecommunications sector to be considerably postponed, despite the establishment of a legal framework for the full liberalization of the sector. Access to local lines enables undertakings to compete in offering high-speed data transmission services for permanent access to the internet, as well as in the area of DSL-based multimedia applications and the voice service - provision of the public telephony service (local calls, long distance calls, and international calls). As ST failed to voluntarily create and publish an offer regarding the establishment of contractual relationships with entities interested in access to local lines, it excluded potential competition and restricted the expansion of the existing competition, by which it artificially prolonged the possibility of obtaining the so-called monopoly rent.

The behaviour of ST deformed the competitive environment in the market of electronic communication services for a long time, which also had negative impacts on consumers, who could not benefit from competitive pressure in the form of lower prices, better-quality products and services, implementation of new technology, and so forth.

The seriousness of this behaviour is increased by the fact that the conduct of the company ST concerns services provided within the sector of electronic communications in the territory of the Slovak Republic. Electronic communications are the key factor on the path toward an information society and, at the same time, they create basic conditions for undertakings, public institutions, and individuals to access modern communication networks and services within information infrastructure worldwide.

AMO decided in 2005 and 2008 and case is still pending.

F) M. R. Stefanik Airport – Airport Bratislava, a.s. - denial of access to an essential facility

In 2005, the Office assessed and decided on the conduct of the company M. R. Stefanik Airport – Airport Bratislava, a. s. (hereafter referred to as "LMRS, a.s."), which denied the company Two Wings, s.r.o. access to the check-in area of the Bratislava airport intended for transporting, loading, and unloading of refreshments onto/from aircraft by air carriers. Two Wings, s.r.o. asked the undertaking LMRS, a.s. to allow it access to the check-in area of the airport, but LMRS, a.s. did not permit it to access this area before the Office issued a first-instance decision on the matter.

The Office arrived at the conclusion that the check-in area of the Bratislava airport, where services of transporting, loading, and unloading refreshments onto/from aircraft were provided, was an essential facility. The company LMRS, a.s., which operates the Bratislava airport, is its sole owner, a fact that gives it a dominant position on the market of the provision of access to the check-in area of the Bratislava airport. For the company Two Wings, s.r.o., the undertaking LMRS, a.s. represents an exclusive business partner and the only entity that can allow it access to the check-in area of the airport. The company LMRS, a.s. is exclusively operating on the market of transporting, loading, and unloading of meals and drinks onto/from aircraft in the check-in area of the Bratislava airport (in addition to the company Slovak Air Services s.r.o., a subsidiary of the Czech Airlines air carrier, which provides these services to its aircrafts), where the company Two Wings, s.r.o. also tried to establish itself.
The company Two Wings, s.r.o. fulfilled all the conditions for being permitted access to the check-in area of the Bratislava airport. Moreover, no capacity, technical, security, administrative, or other reasons existed in the reported period for which it could, or should, be denied access.

By its conduct, the company LMRS, a.s. abused the ownership of an essential facility, which resulted in LMRS, a.s. maintaining and/or strengthening its position on the vertically connected market of transporting, loading, and unloading meals and drinks onto/from aircraft at the Bratislava airport, where it is impossible to enter and remain without having access to the check-in area of the airport. By the aforementioned conduct, the company LMRS, a.s. restricted competition in the vertically connected market, which resulted in the elimination of competitive pressure on the part of the company Two Wings, s.r.o. and prevented effective competition in this market.

On September 18, 2009 the Regional Court in Bratislava dismissed a suit of company Letisko M. R. Stefanika – Airport Bratislava, a.s. and upheld the decisions of the Office and of the Council of the Office.

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.

Pursuant to the article 6 of Regulation No. 1/2003 the courts may directly apply the Article 81 and 82 of EC Treaty.

The Office has information on the only case (Vychodoslovenska vodarenska spolocnost a.s. Kosice – see above), when the injured party brought a suit against the company having been committed abuse of a dominant position. Suit has been brought pursuant to the general rules on damages assigned by the Slovak civil law (hence not in the matter of the Articles 81 and 82 application).

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?

To observe refusal to deal it is not necessary to exclude all rivals, but the exclusion of the substantial part of the market/competition is sufficient. It is not possible to state the actual figures, mentioned facts are assessed case by case. However, it is possible to presume that the Office would deal if refusal to deal would affect for example 50% of the market (regardless the number of rivals).

It is sufficient if exclusion is threatened or probable. An impact of dominant's conduct on rivals´ ability to make a competitive pressure upon dominant would be assessed. Mentioned facts depend on particular market realities (in the time before and after implementation of possible anticompetitive conduct).

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

It is sufficient to prove the probability of consumer harm.

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

Slovak law order does not require proof of intent in administrative delicts of legal persons.

    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?

Dominant's position is worse if he refuses to supply input, which he/she had been already supplying in past. He/she must demonstrate which facts have been changed in such a significant manner that he/she interrupted existed supplies. However, it is not a presumption of observing refusal to deal which may occur also if there is no history of dealing (for example if it is a new undertaking having entered the market).

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?

Cases should be evaluated identically since the consequence of the conduct on competition in the market is more substantial fact than proving dominant's motivation.

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.

Act on Protection of Competition specifically adjusts the area of essential facility, as well as conditions of enforcement of this provision (see answer to question No. 2). It needs to be said that this provision adjusts only those cases of denial to access the essential facility when the undertaking denies the access based on the individual request. Other cases of denial to access the essential facility fall under the general clause of the article 8, par. 2 of the Act.

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 Office does not have practical experiences with this kind of refusal to deal.

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

In the case of regulated industry the analysis itself is not influenced, but the setting of degree of given matter priority is influenced (if it is an issue solved or might be solved by relevant regulation body). However, the mentioned applies to all types of abuse of a dominant position.

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

No, assessing existing cases the analysis was not influenced.

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?

Act on Protection of Competition does not distinguish "constructive" refusal to deal from other forms of refusal to deal.

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 cases having been assessed as margin squeeze the Office came out from European Commission's cases (for example IPS, Napier Brown, DT, Telefonica) and from principles being developed by this case law.

To observe margin squeeze the following presumptions need to be met:

- Dominant is vertically integrated,
- Dominance existed in upstream market,
- Wholesale input must be essential for rivals to entry the market and it must create substantial part of costs,
- Setting upstream and downstream prices does not enable rivals to compete effectively,
- Consequence: probable negative effect on competition in downstream market,
- Objective reasons for such a conduct do not exist.

Criteria are the same both for regulated and other sectors.

The Office has not decided on abuse of a dominant position in the form of predatory prices so far.

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.

There are no such circumstances.

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.

There are no safe harbours from the general prohibition of refusal to deal.

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 Office does not have formally defined justifications or defenses permitted for a refusal to deal. However, it could be reasonably presumed that the reasons justifying refusal to deal might be standard, objective reasons, for example lack of capacity, bad historical experience with payment discipline of refused undertaking etc.

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 Act only enables the Office to observe the breach of the Act and to impose a general obligation on undertaking to remedy the unlawful state of affairs. The Office can not impose specific measures the undertaking should do.

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?

See above.

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.

See above.

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?

All cases are assessed identically; even there are any particular considerations for specific types of a refusal to deal. The issue of incentives for innovation and investment has not been relevant so far in any decision; the policy of the Office is not set in this area.

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.