International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: European Commission
Date: 4 November 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.

A refusal to supply can constitute an infringement of Article 82 of the EC Treaty, which prohibits abuses of a dominant position. The European Commission does not use the term "refusal to supply" in a manner different from the general definition given in the introductory paragraph in that it considers that an anticompetitive refusal to supply may arise when the dominant undertaking competes on the "downstream" market with the

buyer whom it refuses to supply. The term “downstream market” refers to the market for which the refused input is needed in order to manufacture a product or provide a service.[1]

However, it follows that the concept of refusal to supply is not limited to the dominant undertaking refusing to license intellectual property (IP) rights[2], or to grant access to an essential facility[3], but covers a broader set of practices such as the two above-mentioned ones, but also refusals to supply products or services to existing or new customers[4], refusals to provide various types of information, such as interface information[5], technical information[6], etc.

The Commission does not regard it as necessary for there to be outright refusal on the part of a dominant undertaking. Unduly delaying or otherwise degrading the supply of the product or the imposition of unreasonable conditions in return for the supply may also amount in reality to a refusal to supply ("constructive refusal to supply").

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 above; a refusal to supply may infringe Article 82 of the Treaty. There is indeed consistent case law on refusals to supply (see reply to question 6 below). However, there are no statutory provisions dealing expressly with refusal to supply under EC competition law.

In December 2008, the Commission issued Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. The Guidance sets out the Commission's enforcement priorities and guides the Commission's actions in applying Article 82. It contains a section on refusal to supply and margin squeeze.

In the Guidance, based on its decisional practice and EC case law on refusal to supply, the Commission clarifies the principles guiding its enforcement in this area, which come together in a unified set of three conditions for any refusal to supply (whether of access to an essential facility, interface information, etc) to be considered as a enforcement priority (for details, see replies to question 8 below).

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

Article 82 of the EC Treaty only concerns the conduct of dominant undertakings.

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?

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[1] Other types of possibly unlawful refusal to supply in which the supply is made conditional upon the purchaser accepting limitations on its conduct, such as halting supplies in order to punish customers for dealing with competitors or refusing to supply customers that do not agree to tying arrangements, are examined by the Commission in line with the principles applicable to exclusive dealing and tying and bundling.

[2] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (IPT) v. Commission* [1995] ECR 743; Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039.

[3] Case COMP IV/34.689 *Sea Containers v. Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994, pg. 8); Case COMP IV/33.544 *British Midland v. Aer Lingus* – (OJ L 96, 10.4.1992, pg. 34).

[4] Joined Cases 6/73 and 7/73 *Instituto Chemioterapico Italiano and Commercial Solvents v. Commission* [1974] ECR 223.

[5] Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601.

[6] *Decca Navigation Systems* [1988], OJ L 43/27.

Abuses of a dominant position, including a refusal to deal, are liable to administrative sanction.

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)?

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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.

Commission's formal decisions since 1999, in chronological order: 8

- Commission Decision of 3 July 2001, Case COMP D3/38.044 — *NDC Health/IMS Health*: Interim measures – Official Journal L 59, 28.2.2002, p. 18 (refusal to licence IP rights concerning the structure used to divide Germany into geographic areas ("brick structure") in order to present pharmaceuticals sales data to customers).

- Commission Decision of 25 July 2001, Case COMP/C-1/36.915 — *Deutsche Post AG* — Official Journal L 331, 15/12/2001, p. 40 (intercepting, surcharging and delaying incoming international mail, amounting to a constructive refusal to supply)

- Commission Decision 2003/707/EC relating to a proceeding under Article 82 EC, 21 May 2003, (Case COMP/C-1/37.451, 37.578, 37.579 – *Deutsche Telekom AG*) - OJ 2003 L 263, p. 9 (margin squeeze)
- Commission Decision of 27 August 2003, Case COMP/37.685 *GVG/FS* - OJ L 6, 10.1.2003, p. 1 (refusal to provide access to the Italian railway infrastructure)

- Commission Decision of 24 May 2004, Case COMP/37.792 *Microsoft* - OJ L 32, 6.2.2007, p. 23 (refusal to disclose information needed for interoperability with the Microsoft PC operating system and servers).

- Commission Decision of 2 June 2004, Case COMP/38.096 — *Clearstream* (Clearing and Settlement) - OJ C 165, 17.7.2009, p. 7 (refusal to supply primary clearing and settlement services, and delays in service provision amounting to an abusive refusal to supply)

- Commission Decision of 4 July 2007, Case COMP/38.784 *Wanadoo España/Telefónica* - OJ C 83, 2.4.2008 (margin squeeze)

- Commission Decision of 18 March 2009, Case COMP/B-1/39.402 *RWE Gas Foreclosure* - OJ C 133, 12.6.2009, p. 10. (refusal to supply gas transmission services to third parties, and margin squeeze).

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.

Number of Decisions Upheld on Appeal(s): 2 (*Microsoft* - T-201/04; *Clearstream* T-301/04).

Number of appeals pending: 2 (*Deutsche Telekom* - up-held by the Court of First Instance (see Case T-271/03 [2008] ECR II-477), currently on appeal before the European Court of Justice in Case C-280 P; and *Telefónica* (see case T-336/07).

Additionally, in *NDC Health/IMS Health*, the Commission subsequently withdrew its interim measures decision following a judgment from the Frankfurter Higher Regional Court which, while recognising that IMS' brick structure was protected by national copyright, held that third parties could not be barred from developing another brick structure […] "*even if the resulting structure may have a similar number of brick segments to the 1860 structure [of IMS Health] and might be deemed to derive from that structure*". (Commission Decision of 13 August 2003 - Official Journal L 268, 18/10/2003 p. 69)

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

Abuses of a dominant position, including a refusal to deal, are liable to administrative sanction.

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.

Leading refusal to supply cases comprise the European Commission's decisions or European Courts' judgments in *Commercial Solvents*[7], *Sea Containers*[8], *Magill*[9], *Bronner*[10], *IMS Health*[11] and *Microsoft*[12]. See the following links to these judgments or decisions, which include a part called "summary":

Commercial Solvents: Joined Cases 6/73 and 7/73, *Institutio Chemioterapico Italiano SPA and Commercial Solvents Corporation v. Commission* [1974] ECR 223n.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973J0006:EN:HTML

Sea Containers: Case COMP IV/34.689 *Sea Containers v. Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994).

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0019:EN:HTML

[7] Joined Cases 6/73 and 7/73, *Institutio Chemioterapico Italiano SPA and Commercial Solvents Corporation v. Commission* [1974] ECR 223n.

[8] Case COMP IV/34.689 *Sea Containers v. Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994).

[9] Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Éireann and Independent Television Publications Ltd (RTE & ITP) v. Commission* [1995] ECR I-743.

[10] Case C-7/97, *Oscar Bronner GmbH & KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbG & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-7791.

[11] Case T-184/01 R, *IMS Health Inc v. Commission* [2001] ECR II-3193.

[12] Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601.

Magill: Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* ('*Magill*') [1995] ECR I-743

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991J0241:EN:HTML

Bronner: Case C-7/97, *Oscar Bronner GmbH & KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbG & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-7791.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0007:EN:HTML

IMS Health: Case C-481/01 P(R), *NDC Health GmbH & Co KG and NDC Health Corporation v. Commission and IMS Health Inc* [2002] ECR I-3401.

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-481/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

Microsoft (24/03/2004), see press release describing the main facts in this Decision in:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=en

and the relevant CFI judgment (17/09/2007) at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0201:EN:HTML

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.

Any citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage. This right of victims to compensation is guaranteed by Community law, as the European Court of Justice recalled in 2001 and 2006.[13] Despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date, in practice, victims of EC antitrust infringements only rarely obtain reparation of the harm suffered. The amount of compensation that these victims are forgoing is in the range of several billion euros a year.[14] Consequently in 2008, the Commission recommended, in a White Paper, a number of minimum rules that would guarantee an effective system of antitrust damages actions for breach of EC antitrust rules across the European Union.

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal?

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[13] Case C-453/99, *Courage v. Crehan*, [2001] ECR I-6297, and Joined Cases C-295-298/04, *Manfredi*, [2006] ECR I-6619.

[14] Impact Assessment Report – White Paper on Damages Actions for Breach of EC Antitrust Rules, COM(2008) 165, 2.4.2008.

The European Commission's enforcement policy with respect to refusals to supply is set out in the above-mentioned Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty. In the Guidance, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property.

The Commission therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on the dominant undertaking[15]. The existence of such an obligation - even for a fair remuneration - may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings – or undertakings who anticipate that they may become dominant - not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.

Therefore, the Commission will normally only take action when all the following circumstances are present:

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
- the refusal is likely to lead to the elimination of effective competition on the downstream market; and
- the refusal is likely to lead to consumer harm.

This requirement that the input should be objectively necessary does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market[16]. It rather means that there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter – at least in the long term - the negative consequences of the refusal[17]. In this regard, the Commission will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future[18]. The notion of duplication means the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market[19].

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[15] Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v. Commission (Magill)* [1995] ECR I-743, paragraph 50; Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039, paragraph 35; Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, paragraphs 319, 330, 331, 332 and 336.

[16] Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, paragraphs 428 and 560 to 563.

[17] Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications LTD (ITP) v. Commission (Magill)* [1995] ECR 743, paragraphs 52 and 53; Case 7/97 *Oscar Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791, paragraphs 44 and 45; Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, paragraph 421.

[18] In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so-called “single source” information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate.

[19] Case 7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791, paragraph 46, Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 29.

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 refusal to supply may be classified as an exclusionary abuse. As explained above, the second condition for the Commission to pursue such a case and find an abuse is that the refusal is likely to lead to the elimination of effective competition on the downstream market. This means, as a general rule, that the dominant company's refusal to supply should result in the refused competitors being either driven out of the market, marginalised or prevented from entering the market.

Eliminating effective competition in the downstream market may not only have negative effects in the downstream market, but may also harm competition in the upstream market by eliminating possible competition from a product in the downstream market which is or may become a threat to the input in the upstream market and thus make it less attractive for potential rivals to challenge the dominant firm's position in the upstream market.

The likelihood that effective competition will be eliminated in the downstream market by the refusal to supply is determined in the first place by the fulfilment of the first condition mentioned above: whether or not the refused input is objectively necessary for operators to be able to compete effectively on the market. In addition, the likelihood of effective competition being eliminated in the downstream market is generally greater the higher the market share of the dominant undertaking in the downstream market. The less capacity-constrained the dominant undertaking is relative to competitors in the downstream market, the closer the substitutability between the dominant undertaking's output and that of its competitors in the downstream market, the greater the proportion of competitors in the downstream market that are affected, and the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking

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

The Commission's Guidance on Article 82 provides that the Commission will intervene where the conduct of the dominant undertaking is likely to result in consumer harm.

In examining the likely impact of a refusal to supply on consumer welfare, the Commission examines whether the harm is long-lasting, i.e. whether for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply.

The Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled[20]. This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development[21].

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[20] Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, paragraphs 643, 647, 648, 649, 652, 653 and 656.

[21] Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039, paragraph 49; Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, paragraph 658.

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

Under EC competition law, the concept of abuse is an objective one: there cannot be a finding of abuse based on intent only. However, internal documents or business plans of the dominant undertaking may be informative of the existence of a strategy whereby refusal to deal is used to foreclose competitors and ultimately harm consumers. This may be relevant for the assessment of the likely effects of the refusal to deal.

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?

For the purposes of establishing an anticompetitive refusal to supply the Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified.

The three conditions set out above apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (*de novo* refusals to supply). However, the termination of an existing supply arrangement is more likely to be found to be abusive than a *de novo* refusal to supply. For example, if the dominant undertaking had previously been supplying the requesting undertaking, and the latter had made relationship-specific investments in order to use the subsequently refused input, the Commission may be more likely to regard the input in question as indispensable.

Similarly, the fact that the owner of the essential input in the past has found it in its interest to supply is an indication that supplying the input does not imply any risk that the owner receives inadequate compensation for the original investment. It would therefore be up to the dominant company to demonstrate why circumstances have actually changed in such a way that the continuation of its existing supply relationship would put in danger its adequate compensation. In other words, if a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds.

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?

The definition of refusal to supply given above presupposes that the dominant undertaking is not supplying a competitor or several competitors in the "downstream" market.

In all refusal to supply cases the Commission will apply the three conditions described at the start of the reply to question 8. As mentioned above, a refusal to supply does not entail that any competition must be excluded from the market altogether, but rather that effective competition is eliminated.

This may happen if the dominant undertaking is not, or stops supplying its main downstream competitor while the other downstream market players are so few or small that they cannot exercise any significant competitive constraint on the dominant undertaking. In addition, if the dominant firm is willing to supply some (smaller) rivals but not its main rival or is willing to supply customers in another downstream market where the dominant firm is not present itself, then apparently the dominant undertaking

finds it in its interest to supply and this may indicate that supplying the input does not imply a serious risk that the owner receives inadequate compensation for the original investment (see also the answer to the previous sub-question). In such a situation it may be more difficult for the dominant firm to argue that its refusal to supply its main competitor, or the only relevant competitor, affects its incentives to invest and innovate.

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.

There are no statutory provisions dealing expressly with essential facilities under EC competition law. The term has however been frequently used by both the Commission and the European courts (see below).

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 Commission considers refusing to provide access to essential facilities to be a form of refusal to supply, the assessment of which is governed by the unified test of three conditions described above.

Both the Commission's decisional practice and the case law of the European courts have used the term, for example in relation to ports[22], airports[23] and airline infrastructure[24]. However, there is no exhaustive list of facilities/inputs that could be considered essential. What matters is what is meant with the term, and in the context of the application of the competition rules to access agreements in the telecommunications sector, the Commission has defined an essential facility as a "facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means."[25] This condition is captured in the first condition of the above-mentioned "three condition test" set out in the Commission's Article 82 Guidance.

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

IP rights grant a temporary monopoly in the technology developed by a firm as a reward for innovation, and hence provide a critical incentive for firms to innovate. Therefore, the Commission's starting point is that there is no general obligation for the IPR holder to license the IPR, not even where the holder acquires a dominant position in the technology

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[22] Commission Decisions *B&I Line plc v. Sealink Harbours Ltd and Stena Sealink Ltd* [1992] CMLR 255; IV/34.689 *Sea Containers v. Stena Sealink – Interim Measures*, (Commission Decision 94/19/EC of 21 December 1993, OJ 1994 L 15, 18.01.1994, pp. 8–19); *Port of Rødby* (Commission Decision of 21 December 1993, OJ 1994 L 26.02.1994, p. 52.

[23] *London European/Sabena* Decision of 4 November 1988 [1988] OJ L 317/47; IV/33.544 *British Midland v. Aer Lingus*, (Commission Decision 92/213/EEC of 26 February 1992, OJ 1992 L 9610/04/1992, pp. 34–45; *FAG-Flughafen Frankfurt/Main AG* Decision of 14 January 1998 OJ [1998] L 72/30; *Alpha Flight Services/Aéroports de Paris* Decision of 11 June 1998 OJ [1998] L 230/10 (upheld on appeal by the CFI in Case T-128/98 *Aéroports de Paris v. Commission* [2000] ECR II-3929 and by the ECJ in Case C-82/01 P *Aéroports de Paris v. Commission* [2002] ECR I-9297).

[24] *Night Services* Decision of 21 September 1994 [1994] OJ L 259/20; *Eurotunnel* Decision of 13 December 1994 OJ [1994].

[25] Notice on the application of the Competition Rules to access agreements in the telecommunications sector [1998] OJ C265/02, paragraph 68.

or product market. The very aim of the exclusive right, like any other property right, is to prevent third parties from applying the IPR to produce and distribute products without the consent of the holder of the rights. This protection would be eroded if the holder of a successful IPR would be required to grant a licence to competitors from the moment the IPR or the product incorporating the IPR becomes dominant in the market.

Particular caution is therefore required before intervention should be contemplated in relation to firms whose dominant position results from the possession of intellectual property rights. The case law provides that a refusal to license an IPR be considered an abuse only under exceptional circumstances.[26] The above-mentioned three conditions allow making sure that such circumstances are present. Particular reference can be made here to the third condition of the test: as mentioned above, the undertaking which requests the licence should not intend to limit itself essentially to duplicating the good or services already offered on this market by the owner of the IPR, but produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.[27]

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

No. The refusal of licensing an IPR protected technology should not impair consumers' ability to benefit from innovation brought about by the dominant undertaking's competitors.

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

Yes. The above mentioned three conditions are also applied to situations where a dominant undertaking refuses to supply information in a way that allows it to extend its dominance from one market to another. This may be the case for information necessary for interoperability between one market and another. Although there is no general obligation even for dominant companies to ensure interoperability, leveraging market power from one market to another by refusing interoperability information may constitute an abuse of a dominant position.

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

In competition analysis, the Commission takes the markets as it finds them. Consequently, in cases involving regulated markets, the Commission will take into account the specific regulatory environment in conducting its assessment.

The Commission considers that in certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. According to the Article 82 Guidance, in such specific cases, the Commission is not required to apply the above-

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[26] Case C-418/01 *IMS Health*, paragraph 34.
[27] Case C-418/01 *IMS Health*, paragraph 49.

mentioned three conditions to find an abuse; it is sufficient that it establishes that the refusal leads to likely anticompetitive foreclosure[28].

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

It is not the historical character (or intrinsic nature) of the former monopolist that matters, but its conduct on the market.[29] However, the input owner's and/or other operators' incentives to invest and innovate upstream will likely not be affected by an obligation to supply when the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources (see also the previous answer).

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

The Commission does not regard it as necessary for there to be outright refusal on the part of a dominant undertaking. Unduly delaying[30] or otherwise degrading the supply of the product or the imposition of unreasonable conditions in return for the supply may also amount in reality to a refusal to supply ("constructive refusal to supply").

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?

Yes. The Commission has investigated margin squeeze allegations in a series of cases, five[31] of which have led to a formal decision, and three[32] have resulted in court proceedings.

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[28] The Article 82 Guidance defines "anticompetitive foreclosure" as a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.

[29] *FAG-Flughafen Frankfurt/Milan AG* (OJ 1998 L 72/30 paragraphs 97-98).

[30] See for example *Clearstream* above.

[31] Commission Decision of 29 October 1975 adopting interim measures concerning the National Coal Board, national Smokeless Fuels Limited and the national Carbonising Company Limited, OJ L 35, 10.2.76 ("*National Carbonising*"), Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the Treaty of the EEC Treaty (Case No IV/30.178 Napier Brown – British Sugar), OJ L 284, 19.10.1988 ("*Napier Brown-British Sugar*"); Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the Treaty (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ L 263, 14.10.2003 ("*Deutsche Telekom*"), Commission Decision of 4 July 2007 relating to a proceeding under Article 82 of the Treaty (Case COMP/38.784 – *Wanadoo España v. Telefónica*), OJ C 83, 2.4.2008 ("*Telefónica*"); Commission Decision of 18 March 2009, Case COMP/B-1/39.402 *RWE Gas Foreclosure*, OJ C 133, 12.6.2009, p. 10.

[32] Case T-5/97 *Industrie des Poudres Sphériques SA v. Commission* [2000] ECR II-3755; T-271/03 *Deutsche Telekom AG v. Commission* [2008] ECR II-477 (currently on appeal in case C-280 P *Deutsche Telekom AG v. Commission*).

As to the concept of margin squeeze, the Commission takes the view that there can be an abusive margin squeeze under Article 82 of the EC Treaty, which prohibits the abuse of a dominant position, if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs of the dominant operator for providing its own retail services on the downstream market.

In accordance with the Commission's Guidance on its enforcement priorities, the Commission will normally pursue conduct in the form of a margin squeeze in case the three conditions set out in the reply to question 8 are met.

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?

Anti-competitive effects of a margin squeeze

The anticompetitive effects associated with margin squeeze under the case law are the risks of foreclosure of equally efficient competitors whose access to the market is eliminated or hampered: in the presence of a margin squeeze the competitors of the dominant undertaking cannot trade profitably in the downstream market on a sustainable basis[33]. By containing competitive pressure, the dominant firm could levy both high wholesale prices and supra-competitive retail prices to the detriment of consumers.

Margin squeeze and dominance

To prove an abusive margin squeeze, it is necessary to demonstrate that the undertaking is dominant in the upstream market. It results from case law[34] that it is not necessary to prove that the company concerned is dominant in the downstream market.

As held by the European Court of Justice[35], the fact that a dominant company's abusive conduct has its adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 82. Margin squeeze is an example of leveraging of market power from one market (in which there is dominance) into another (in which the abusive undertaking is active – but not necessarily dominant – and in which an extension of market power from the market in which there is dominance is sought).

Margin squeeze and predatory pricing compared

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[33] In *National Carbonising* the Commission referred to a "margin sufficient to enable [a reasonably efficient competitor] to survive in the longer term". In *Napier Brown/British Sugar* the Commission considered that because of an insufficient margin, "if maintained in the longer run", any company equally efficient competitor would have been "obliged to leave" the retail market.

[34] See *Industrie des Poudres Sphériques* above.

[35] Judgment of the European Court of Justice of 14 November 1996, Tetra Pak International SA v Commission of the European Communities [1996] ECR I-05951.

In accordance with the case law[36], the abusive nature of a margin squeeze is connected with spread between the upstream prices and the downstream prices. In other words, there is no need to demonstrate that the wholesale prices are excessive or that the retail prices are predatory.

There are substantive differences between conduct in the form of a margin squeeze, on the one hand, and predatory pricing, on the other hand. In a predatory pricing case, the dominant company first incurs losses because it charges prices below cost. After this has led to foreclosure, the dominant company may recoup such losses in the longer term as it exploits its strengthened market power.

On the contrary, margin squeeze does not require such a trade-off or *ex ante* sacrifice as the dominant company may not incur losses on an end-to-end basis, and a margin squeeze may involve a high retail price (relative to end-to end costs) in the short-run as well as the long run. Indeed, by restricting entry and/or growth of competitors on the market and ultimately reducing competitive pressure, the margin squeeze allows the dominant firm to sustain a high level of retail prices. A margin squeeze can be a profitable strategy for the dominant firm already during the period in which it engages in the margin squeeze: the profits extracted from a high level of retail prices may surpass by far the forsaken profits related to the forsaken wholesale sales as a result of the high wholesale prices relative to the retail prices[37].

Equally efficient competitor test and cost benchmarks used

In establishing whether the dominant undertaking is engaging in a margin squeeze, the Commission normally carries out an equally efficient competitor test. This entails that the dominant undertaking's pricing practices are determined on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors[38].

In so doing, the Commission uses the long run average incremental cost (LRAIC) of the dominant company, when the latter is available or can be constructed. This is in accordance with economic theory and the Commission's decisional practice where the ability of competitors to operate profitably in the long term was assessed. In order to assess whether the prices that the dominant firm applies over time are such that they can foreclose equally efficient competitors the costs considered must include the total costs which are incremental to the provision of the product/service. These are also the prices which form the basis of the firm's decision to invest.

Margin squeeze and refusal to supply

The margin squeeze cases investigated by the Commission have involved both situations in which there was no pre-existing obligation to supply (whether under Article 82 or sector specific regulation), and in which such an obligation had been established. In the latter two cases, the dominant firm was obliged to provide access to the relevant upstream input under sector-specific regulation.

The Court of First Instance has held that competition rules apply where sector-specific legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings[39]. In the relevant case, the

[36] Judgment of the Court of First Instance of 10 April 2008 in Case T-271/03 ("Deutsche Telekom"), paragraph 167.

[37] *Telefónica,* paragraph 611.

[38] For case law, see the CFI Judgment in *Deutsche Telekom*, paragraph 188.

[39] See paragraphs 88 and 89 of the CFI Judgment *in Deutsche Telekom.*

dominant firm was found to infringe Article 82, because the sector-specific legislation left it with sufficient scope for autonomous conduct as to eliminate the margin squeeze, but it did not do so.

In the other case[40], only the prices of one of the two upstream products in relation to which the Commission established a margin squeeze (which accounted for approximately 30% of the wholesale prices covered in the Decision in 2006) were regulated: they were subject to maximum prices, which means that the dominant firm was free to set prices below the maximum. The prices of the other upstream product (accounting for the remaining 70%) were not regulated. In other words, the dominant firm had all the necessary room of manoeuvre to put an end to the margin squeeze(s). However, it did not take this initiative on its own free will, and this in spite of the fact that its internal documents showed that the company was aware that it was engaging in a margin squeeze contrary to Article 82.

In that case (which is currently under appeal) the question was raised whether there needs to be an obligation to supply under Article 82 (rather than any sector-specific regulation) before a margin squeeze is found to be abusive[41]. This issue has not been expressly addressed by the Community judicature yet. The ECJ will nonetheless be called to pronounce on it, also because of a reference for a preliminary ruling from the Tingsrätt Stockholm (Sweden) lodged on 6 February 2009 - *Konkurrensverket v TeliaSonera Sverige AB* (Case C-52/09).

Margin squeeze in regulated industries

In their appeals against the two above-mentioned Commission decisions, both dominant firms have argued that the existence of price regulation at the national level should, as it were, have shielded them from an intervention by the Commission under Article 82 of the EC Treaty.

However, the Court of First Instance has held that competition rules apply where sector-specific legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings. In other words, competition rules apply where sector specific legislation leaves scope for competition in the regulated sector but the dominant firm prevents, restricts or distorts that competition.

In the Commission's view[42], *ex ante* regulation and *ex post* antitrust intervention go hand in hand, and complement each other. Regulators set access regimes and prices on the basis of market and cost projections (in other words, estimates) to reduce the risk of market failures, but cannot entirely eliminate them. Therefore, antitrust authorities that work with historical data and actually incurred costs must be able to sanction infringements of Article 82. What matters is that there is scope for autonomous conduct and that the dominant firm could not have ignored that it was engaging in a margin squeeze contrary to Article 82.

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40 *Telefónica*, see above.

41 In that particular case, however, the obligation to provide access to that input (and also the express obligation not to engage in a margin squeeze) had been imposed by the national telecommunications regulator after a market and dominance analysis based on competition law principles, as required by the relevant EC Directives, including in particular a careful balancing of the respective incentives to invest and innovate of the dominant firm and its competitors, which was in all material aspects the same as one that the Commission would do in application of Article 82

42 See press release from the Commission - IP/O7/1011 and MEMO/07/274 of 4 July 2007.

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.**

No. The legality or illegality of a refusal to deal is not presumed and has to be carefully assessed on a case by case basis. In general, the Commission does not consider a refusal to supply by dominant firms to be pro- or anti-competitive *per se.*

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.**

No (note that Article 82 only applies to dominant undertakings).

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.**

There are numerous possible instances in which a refusal to deal does not give rise to objections because it can be justified on acceptable commercial grounds. The customer may, for example, not be considered a reliable trading partner, perhaps because of a history of not honouring its debts. The dominant firm may have difficulties in meeting all the demands it faces: it may, for example, be experiencing a shortage of raw materials, production capacity constraints, or its production or distribution capabilities may be disrupted.

The Commission will also consider claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realise an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account. The Commission will also consider claims by the dominant undertaking that its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about, including the development of follow-on innovation by competitors.

In this context, the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled:

(a) the efficiencies have been or are likely to be realised and are a result of the refusal to supply;

(b) the refusal is indispensable to the realisation of these efficiencies: there must be no realistic and less anti-competitive alternatives to the refusal that are capable of generating the same efficiencies;

(c) the likely efficiencies brought about by the refusal outweigh any likely negative effects

on competition and consumer welfare, and

(d) the refusal does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between firms is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant firm will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible pro-competitive efficiency gains. Exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

It is incumbent upon the dominant firm to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. In particular, it falls on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation. If a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal is justified on efficiency grounds.

It then falls to the Commission to make the ultimate assessment of whether the conduct being examined is likely to result in anti-competitive foreclosure, based on a weighing of any apparent anti-competitive effects against any advanced and substantiated efficiencies.

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 factors which go to demonstrate that an undertaking's conduct in refusing to supply is abusive are highly dependent on the specific economic and regulatory context in which the case arises. The Commission considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on a dominant undertaking. Such a finding can only be based on a rigorous case by case investigation and a careful balancing of conflicting considerations.

Below is a non-exhaustive list of examples of remedies applied in refusal to supply cases.

In certain cases, the Commission "simply" ordered the dominant undertaking to bring an end to the infringement. For example in *Deutsche Post*, the Commission concluded that the dominant firm infringed Article 82 of the EC Treaty by intercepting, surcharging and delaying incoming cross-border letter mailings from the UK sent by senders outside Germany but containing a reference in its contents to an entity residing in Germany. The Commission ordered Deutsche Post AG to immediately bring to an end the infringement in so far as it has not already done so and to refrain repeating it.

In *Commercial Solvents*, having established a refusal to supply, the Commission ordered certain quantities of raw material to be supplied to make good the refusal of supplies as well as to order that proposals to prevent a repetition of the conduct complained of be put

forward. In order to ensure that its decision was effective, the Commission determined the minimum requirements to ensure that the infringement was made good.[43]

In *Magill*, the Commission required ITP, BBC and RTE, broadcaster in the UK and Ireland, to supply each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and to permit reproduction of those listings by such parties. If the parties chose to supply and permit reproduction of the listings by means of licenses, any royalties requested by ITP, BBC and RTE should be reasonable. The parties were allowed to include in any licenses granted to third parties such terms as are considered necessary to ensure comprehensive, high-quality coverage of all their programmes.[44]

In *Microsoft*, the Commission implemented, and the CFI affirmed, a three-stage remedy procedure, for the abusive refusal by Microsoft, according to which Microsoft was to make the interoperability information available to any undertaking having an interest in developing and distributing work group server operating system products and, on reasonable and non-discriminatory terms, allow the use of the interoperability information by such undertakings for the purpose of developing and distributing work group server operating system products..

In *RWE Gas Foreclosure*, RWE proposed commitments to address the Commission's concerns on the German gas markets. Essentially, RWE committed to divest its entire German high-pressure gas transmission network to a suitable purchaser. The divestiture of RWE's gas transmission network was considered as a structural remedy, as it did not only oblige RWE to behave in a certain manner, but consists in the divestment of its gas transmission activities, which effectively removed the possibility for RWE to engage in infringements of the same type. The sale of RWE's transmission business ensured that RWE has no control over the gas transmission network and that RWE could not engage in anti-competitive practices relating to the access to its network anymore.[45]

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?

In *Deutsche Telekom* the Commission concluded that since 1998, the dominant firm had infringed Article 82 of the EC Treaty by engaging in a market squeeze and ordered it to immediately bring to an end the infringement and refrain from repeating it. Such a remedy could also have been imposed in *Telefónica*, but in that case the infringement had come to an end prior to the adoption of the Commission's decision by means of an intervention by the national regulator which lowered the relevant wholesale charges (maximum charges).

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 explain your response.

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[43] *See* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973J0006:EN:HTML, paragraph 46.

[44] *Magill TV Guide/ITP, BBC and RTE*, OJ 1989 L 78/43, paragraph 27.

[45] *See* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:133:0010:0011:EN:PDF, paragraphs 5—8.

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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?

As mentioned above, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property.

The incentives for innovation and investment are at the heart of the Commission's approach to refusals to supply. The existence of an obligation to supply - even for a fair remuneration - may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings – or undertakings who anticipate that they may become dominant - not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.

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.

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