nal Competition Network
Conduct Working Group
Questionnaire

Agency Name: Italian Competition Authority

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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. In Italy a refusal to deal, unless objectively justified, can constitute an infringement of the norms on abuse of a dominant position. The term refusal to deal is used to describe the conduct of a dominant firm which denies access to an input or an infrastructure in an upstream market and therefore may eliminate competitors in a downstream market to the detriment of consumers.

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)?

In Italy a refusal to deal falls under article 3 of the Competition Act 287/1990. Pursuant to this article:

> **"the abuse by one or more undertakings of a dominant position within the domestic market or in a substantial part of it is prohibited. It is also prohibited:**
>
> **a) directly or indirectly to impose unfair purchase or selling prices or other unfair contractual conditions;**
>
> **b) to limit or restrict production, market outlets or market access, investment, technical development or technological progress;**
>
> **c) to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage;**
>
> **d) to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."**
>
> **In particular, refusal to deal falls within the provision of article 3 b).**
>
> **Moreover, Article 82 of the EC Treaty is directly applicable in Italy.**

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

The relevant provisions on refusal to deal (article 3 the Competition Act 287/1990 and Article 82 of the EC Treaty) only apply 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?

A refusal to deal, as all other competition infringements (with the exception of bid rigging), is a civil law violation in our jurisdiction.

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)?

Over the last ten years (1999-2009) there have been 6 cases leading to an in-depth investigation of a refusal to deal.

The cases are: *A285 Infostrada/Telecom Italia*[1]*, A303 Aviapartner/Aeroporto di Bologna*[2]*, A351 Telecom Italia*[3]*, A358 ENI/TTPC*[4]*, A364 Merck*[5]*, A363 Glaxo*[6].**

In some of these cases the refusal to deal was one among several conducts all part of exclusionary strategies by the incumbent firm towards new entrants.

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

In all the 6 cases examined with an in-depth investigation in the last ten years the Italian Competition Authority found an unlawful anticompetitive conduct. Two cases concerned IP rights (*A363 Glaxo, A364 Merck*), two access to essential facilities (*A303 Aviapartner and A358 ENI/TTPC*), one a refusal by the upstream dominant firm to sell an input to a rival (A285Infostrada/TI) and one margin squeeze (A351 Telecom). In all cases the anticompetitive effect of the refusal was the exclusion of a competitor (actual or potential) to the detriment of consumer welfare.

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.

5 cases were challenged in Court. They were all upheld. In one case (A285Infostrada/Telecom Italia), however, the Court reduced the amount of the fine.

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.

Glaxo - Active ingredients*[7]*(IP rights)

[1] Italian Competition Authority's case A285 - INFOSTRADA/TELECOM ITALIA-TECNOLOGIA ADSL, decision n. 9472 of 27 April 2001, published in Bulletin n. 16-17/2001.
[2] Italian Competition Authority's case A303 AVIAPARTNER/SOCIETA' AEROPORTO GUGLIELMO MARCONI DI BOLOGNA, decision n. 12047 of 29 May 2003, published in Bulletin n. 22/2003
[3] Italian Competition Authority, case A351 Comportamenti abusivi di Telecom Italia, decision n. 13752 published in Bulletin n. 47/2004.
[4] Italian Competition Authority, case A358 - ENI-TRANS TUNISIAN PIPELINE, decision n. 15174, published in Bulletin n. 5/2006.
[5] Italian Competition Authority's case A364 - MERCK-PRINCIPI ATTIVI, decision n. 16597 of 21 March 2007, published in Bulletin n. 11/2007.
[6] Italian Competition Authority's case A363 Glaxo-Principi attivi, decision n. 15175 of 8 February 2006, published in Bulletin n. 6/2006.
[7] Italian Competition Authority's case A363 Glaxo-Principi attivi, decision n. 15175 of 8 February 2006, published in Bulletin n. 6/2006.

In February 2006 an investigation into the pharmaceutical group Glaxo concluded with the finding of abusive practices in violation of Article 82 of the EC Treaty. Glaxo refused to grant Fabbrica Sintetici Italiana (FIS), a chemical-pharmaceutical undertaking, a licence to produce an active drug ingredient known as Sumatriptan Succinato, covered in Italy by a supplementary protection certificate, for use in other Member States (in which Glaxo no longer held any patent-rights) in the production of generic drugs known as triptans for the treatment of migraines. The Authority found that Glaxo, in addition to holding a quasi-monopoly on the production of Sumatriptan Succinato worldwide, occupied a dominant position in the Spanish and Italian markets for the production and marketing of triptans sold through hospitals. In these markets Glaxo held a particularly high market-share, equal to about 96% in Italy and 58% in Spain. As for the possibility of access for potential competitors, all the products sold in the markets concerned were found to be covered by industrial patent-rights, which were due to lapse between 2008 and 2012, with the exception of Sumatriptan Succinato which was not covered by any patent in the Spanish market. Based on the investigation's findings, the Authority deemed that Glaxo's refusal to grant the requested licence constituted an abuse of dominant position in violation of Article 82 of the EC Treaty, since its refusal hindered the production of an active ingredient needed by producers of generic drugs, potential competitors of Glaxo, to access national markets where Glaxo did not have any exclusive rights. The Authority considered this conduct had no objective justification.

A351 Telecom Italia[8] (margin squeeze)

In November 2004 the Italian Competition Authority concluded an investigation into abusive practices by Telecom Italia. The Authority found that in the period 2001-2003, Telecom Italia had adopted an exclusionary strategy against its competitors offering financial and technical conditions to customers which the competitors could replicate only at a loss. In particular, one of the allegations concerned the provision of telecom services to the Public Administration through a procurement organized by Consip, an institution that organizes all the procurements for the purchases of the Italian Public Administration's bodies. At the time of the procurement wholesale telecom services where regulated and part of the inputs that Telecom Italia's rivals required to offer the bundle of services had to be made available by Telecom Italia at charges set by the national telecommunications regulator. The Authority concluded that Telecom Italia abused its dominant position by making a bid that could not be replicated by its competitors. This was not due to Telecom Italia's superior technology or efficiency, but because it had charged its internal divisions less than it did to its competitors for the relevant inputs. While the price paid by rivals to Telecom Italia was regulated, Telecom Italia's internal transfer price was not. The Authority used regulated charges as the benchmark to assess whether competitors could place equivalent bids. To the extent that regulated charges exceeded Telecom Italia's actual costs for the input in question, Telecom Italia's offer was not replicable by competitors. The incumbent operator should have applied the same cost base (in this case the long run incremental costs, rather than historical costs on which the regulatory accounting was based) not only to services provided to its own final customers, but also to wholesale services provided to competitors in order to avoid the price squeeze effect. The application of the test showed that Telecom Italia's offer was not replicable, both at the disaggregate and at the aggregate level. This implied, in the view of the Authority, that Telecom Italia had performed a price squeeze abuse with the effect of excluding as efficient competitors from an important provision and that this would have seriously limited the ability of new entrants to compete with the incumbent, with un ultimate

[8] Italian Competition Authority, case A351 Comportamenti abusivi di Telecom Italia, decision n. 13752 published in Bulletin n. 47/2004.

detrimental effect to consumers. The Competition Authority imposed on Telecom Italia a sanction of 152 million Euros, taking into account, among other things, the long duration of the infringement (3 years). The decision of the Authority was appealed and confirmed by the upper level Appeal.

A358 ENI/TTPC[9] (essential facility)

In Eni – Trans Tunisian Pipeline the Authority conducted an investigation into an alleged abuse of dominant position by ENI concerning access to the pipeline transporting Algerian natural gas into Italy. ENI is the most important national producer and the main importer of natural gas in the Italian market, with a market share of 68%. It has a dominant position and/or control of all the international gas pipelines into Italy. ENI is vertically integrated in transmission, where, through its controlled company SNAM, it owns almost all existing nationwide high pressure transmission capacity and also operates, through Italgas, at the distribution level. The Algerian gas is carried to Italy through a pipeline crossing Algeria (TTPC) and then through a submarine pipeline from Algeria to Sicily (TMPC). ENI owns 100% of TTPC and holds exclusive rights of transportation on the pipeline. In 2002 TTPC announced its intention to expand the capacity of the TTPC pipeline. Following this announcement TTPC received several requests and allocated the "new" capacity. In March 2003, following the allocation of new capacity, TTPC concluded take or pay agreements with seven shippers. The agreements were subject to the fulfilment, by June 2003, of several conditions (administrative authorizations, bank guarantees, etc.). In June 2003, TTPC wrote to the shippers that it wished to postpone the effect of the agreements. Finally, in November 2003, TTPC announced its intention to rescind the agreements since the conditions provided in the take or pay contracts had not been fulfilled, even though the shippers had all signed binding agreements with the Algerian supplying company Sonatrach. The problem was that the fulfilment of the conditions was partially in the power of ENI and TTPC themselves. The legal disputes on the responsibilities in the fulfilment of the conditions contained in the agreements went on throughout the whole year 2004, when, in November TTPC offered a new allocation of the additional capacity. The new allocation, contained the provision that the expansion of the pipeline would have been postponed from 2007 to 2012. The case is, in a way, peculiar considering that access has not been denied to existing capacity, but on the capacity resulting from an investment that ENI had no obligation to undertake. However, the Authority considered the fact that, once the decision to expand the pipeline had been taken and the shippers had defined their commercial strategies, the behaviour of TTPC, first wasting time in legal disputes and finally rescinding the contracts, resulted in delaying the entry of competitors into the Italian natural gas market where ENI has a dominant position. The lack of objective justification for the refusal was also stressed. In fact, the investments required for the expansion of the pipeline would be entirely recouped with the contracts subscribed by the shippers that would account for all the additional capacity planned from 2007 to 2019.

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.

Yes, but we are not able to provide details about representative cases.

Evaluation of an actual refusal to deal

[9] Italian Competition Authority, case A358 - ENI-TRANS TUNISIAN PIPELINE, decision n. 15174, published in Bulletin n. 5/2006.

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.

In our jurisdiction a firm, even if dominant, has no legal obligation to deal with competitors. Therefore, the assessment of a refusal to deal case involves, first of all, an evaluation of whether the product or service is objectively necessary to compete in the downstream market. This evaluation implies an assessment of the possible substitutes for the refused input. In all the cases where the Italian Competition Authority deemed that the refusal by the dominant firm was unlawful, it found that there were no alternative sources allowing the competitors to compete in the downstream market (in many cases the dominant firm was a monopolist in the upstream market). The analysis should also include an assessment of objective justifications (financial, economical, technical) for the refusal.
In its analysis of refusal to deal cases the Italian Competition Authority will consider the circumstances indicated in the European Commission guidance on enforcement priorities in applying Article 82 with reference to refusal to supply and margin squeeze[10]. In particular the guidance states that it will consider refusal to supply to be an enforcement priority if all the following circumstances are present:
a. the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
b. the refusal is likely to lead to the elimination of effective competition on the downstream markets; and
c. the refusal is likely to lead to consumer harm.

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?

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

In all cases where the Authority examined a refusal to deal and found it to be anticompetitive the concern was the exclusion of an actual or potential rival that had effects on consumer welfare. The exclusion has at least to be likely. The exclusion of competitors must result in consumer harm. In the cases where no proof of immediate consumer harm was possible (for example because the excluded rival had not entered the market yet) at least its likelihood had to be demonstrated.

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

No. The Authority adopts an effect-based approach, whereby the conduct of the dominant firm is assessed with a view to establishing its exclusionary impact and its adverse consequences on consumer welfare. The intention to exclude can only be relevant for the quantification of applicable fines.

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?

[10] Communication from the Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive and exclusionary conduct by dominant undertakings [2009] OJ C45/7.

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

In the assessment of refusal to deal cases all the actual circumstances of the case (included a prior course of dealing between the parties) can be evaluated, although prior dealing is not a requirement for finding liability.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

   If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

The Italian Competition Authority has dealt with a number of competition issues which have arisen in the context of access to key facilities. There have been cases where explicit reference to the concept of essential facility was made, especially in situations where a monopolist, legally controlling the facility in the upstream market, refused to give access to potential competitors on the downstream market. These cases mostly concerned recently liberalised sectors like telecommunications, energy and transport. Sometimes the cases concerning access to key facilities were addressed under the more general rubric of abuse of a dominant position without mentioning explicitly the essential facility doctrine. However, when examining a problem of access, the tests outlined in the essential facility doctrine are usually applied. These steps in general are: (i) control of the essential facility by a monopolist; (ii) a competitor's inability practically or reasonably to duplicate the facility in an acceptable period of time; (iii) the denial of the use of the facility to a competitor; and (iv) the absence of an objective justification for access denial. The test developed in Italy's case law introduced a time dimension to the inability to duplicate the facility and restricted the possible justifications of access refusal to being objective.

In all cases the position in the downstream market of the firm controlling the facility was assessed and the firm controlling the facility was also operating, directly or through controlled firms, in the downstream market, often holding a dominant position.

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

Both competition policy and intellectual property rights are complementary means aimed at promoting innovation, technical progress and economic growth to the benefit of consumers and of the whole economy. In some circumstances, however, the exercise of an intellectual property right could be used as an instrument to pursue anticompetitive strategies. This could happen, for example, when the exercise of market power is used to restrict competition between technologies that are economic substitutes or to exclude new technologies from the market. In these cases, the key question is to establish when the exercise of an intellectual property right ceases to be legitimate and becomes anticompetitive. To this regard, the assessment of a refusal stemming from the detention of an intellectual property right is not different from that applied in other contexts.

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

No. The analysis does not change based on the type of intellectual property.

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

The Italian Competition Authority has not assessed cases concerning interoperability, but such a case might, under the circumstances described above, constitute a refusal to deal.

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

The Italian Competition Authority considers competition and regulation as complementary and competition rules apply to regulated industries as well as non-regulated industries. The specific regulatory environment of a refusal to deal case is taken into account when assessing a firm's behavior in a regulated industry and its effects on competition. Some of the cases concerning refusal to deal occurred in regulated industries, especially recently liberalized ones (*A303 Aviapartner/Aeroporto di Bologna, A285 Infostrada/Telecom Italia* and *A351 Telecom Italia*) where there was an obligation to deal established by the regulatory framework. The assessment of the case involved, in any case, an evaluation of the effects of the refusal on the relevant market.

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

No.

Evaluation of constructive refusals to deal

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 assessment of refusal to deal cases is conducted with an effect based approach. Exclusionary effects can stem not only by an outright refusal but also by the terms of dealing, for example the timeliness of the supply. In *A303 Aviapartner/Aeroporto di Bologna*[11], for example, the Authority found that the dominant firm (the airport's infrastructure manager) had delayed the supply of the facilities that the competitor needed in order to start its activity in providing handling services.

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?

[11] Italian Competition Authority's case A303 AVIAPARTNER/SOCIETA' AEROPORTO GUGLIELMO MARCONI DI BOLOGNA, decision n. 12047 of 29 May 2003, published in Bulletin n. 22/2003

Yes. The Italian jurisdiction, however, does not provide for specific criteria for analyzing margin squeeze and, since the practice is assessed on a case by case basis, the general criteria of analysis of abuses of dominant position apply. Some conditions, specific to margin squeeze cases can be identified: there must be a dominant vertically integrated firm; the input the vertically integrated firm supplies to rivals must in some sense be "essential" for competition on the downstream market; if the dominant firm's upstream prices were charged to its downstream activities, they could not be profitable. The Italian Competition Authority has investigated margin squeeze allegations in very few cases. A reason might be that margin squeeze cases might also be treated, in some instances, as other forms of abuse, such as predatory pricing or price discrimination. In A351 Telecom Italia the Authority found that Telecom Italia had performed a price squeeze abuse with the effect of excluding as efficient competitors by charging its internal divisions less than it did to its competitors for the relevant inputs.

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. A case by case analysis has to be conducted.

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. A case by case analysis has to be conducted.

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.

It is always possible for a dominant firm to allege objective justifications for a refusal to deal. The justifications might be based on commercial grounds (for example the firm requiring the input is not financially reliable) or include technical reasons that make it impossible for the dominant firm to satisfy the request(s) of the competitor(s) (for example because of capacity constraints).

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?

In the cases concerning refusal to deal discussed in questions 6 and 7 the Authority ordered the dominant firms to bring an end to the infringements, without establishing a mandated access/right or price conditions for the sale/license of the good or service.

In *A364 Merck* the Authority, with a view to ensuring that, pending the outcome of the investigation, Merck's behaviour would not continue to cause serious and irreparable harm in the markets concerned, adopted interim measures obliging the company to issue without delay – and at least for stockpiling purposes – licences authorising the production in Italy of *Imipenem Cilastatina*. In accordance with this ruling, in August 2005 Merck issued a license to the chemical firm Dobfar to manufacture this active ingredient, whose Supplementary Protection Certificate expired in January 2006. In November 2006 Merck presented a commitment under Article 14-*ter* of Law no. 287/1990, offering free licenses to manufacture and sell the active ingredient *Finasteride* and related generic drugs, even though the Supplementary Protection Certificate does not expire until 2009. The Authority deemed that this commitment was likely to result in the permanent removal of any anticompetitive effects flowing from Merck's former refusal to grant licences.

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?

N/A

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.

N/A

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?

The Italian Competition Authority recognizes that in addressing cases concerning a refusal to deal by a dominant firm, its interventions should not undermine the incentives for innovation and investment. A careful assessment of the specific circumstances of each case is therefore required and no obligation to supply should be assumed without an evaluation of the fact that the product or service is objectively necessary, that the refusal is likely to eliminate effective competition in the downstream market and lead to consumer harm.

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 case

N/A