International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Federal Trade Commission; U.S. Department of Justice, Antitrust Division
Date: November 30, 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.

Under U.S. antitrust law, a firm's unilateral refusal to deal with its rival can give rise to antitrust liability.

What constitutes a potentially unlawful unilateral refusal to deal under U.S. antitrust law has been defined through judicial decisions, as described in the responses below, and is generally consistent with the definition in the introductory paragraphs above.

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)?

U.S. law with respect to unilateral refusals to deal has developed through a common law process in the U.S. courts. No statutory provisions explicitly address refusals to deal. The following statutes provide the legal basis for the U.S. Federal Trade Commission (the "FTC") and U.S. Department of Justice ("DOJ") to address a unilateral refusal to deal:

1. **Section 2 of the Sherman Act, which makes it illegal to "monopolize, or attempt to monopolize." 15 U.S.C. § 2.**

2. **Section 5 of the Federal Trade Commission Act declares unlawful "unfair methods of competition." 15 U.S.C. § 45(a)(1). Although the FTC does not directly enforce the Sherman Act, conduct that violates the Sherman Act is deemed to be a violation of Section 5 of the FTC Act as well. *E.g., Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941).**

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

One element of the monopolization and attempted monopolization offenses is that the defendant firm possesses monopoly power or has a dangerous probability of obtaining monopoly power. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). Thus, the relevant provisions can be violated only by firms that have, or threaten to acquire, monopoly power in the market in which competition is harmed by the refusal to deal.

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?

The DOJ's enforcement of the Sherman Act limits criminal prosecution to hard-core cartel activity and relies on civil enforcement with respect to other conduct. The FTC Act provides for only civil enforcement.

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 past 10 years, the FTC has conducted an in-depth investigation in fewer than a half dozen matters that focused on a refusal to deal as the potentially anticompetitive conduct. DOJ is unable to disclose this information at this time.

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.

DOJ has not brought a refusal to deal case during the relevant time period. In 1999, the FTC reached a consent decree to resolve charges that Intel illegally maintained its monopoly power when it denied three of its customers continuing access to technical information necessary to develop computer systems based on Intel microprocessors. *In re Intel Corp*., FTC Dkt. No. 9288 (1999), *available at* http://www.ftc.gov/os/caselist/d9288.shtm.

For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

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

The United States does not pursue refusal to deal cases criminally. See the response to Question 4.

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.

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Supreme Court upheld liability against an electric utility for refusing to sell power to municipalities trying to establish their own distribution systems and for refusing to transmit power to the municipalities from another supplier. The Court noted that "[t]here were no engineering factors" preventing Otter Tail from providing either power or transmission to the towns, concluding that the "refusals to sell at wholesale or to [transmit] were solely to prevent municipal power systems from eroding its monopolistic position." *Id.* at 378.

In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co*., 472 U.S. 585 (1985), Aspen Skiing Co. ("Ski Co.") controlled three of the four skiing mountains in the Aspen area, and Aspen Highlands Skiing Corp. ("Highlands") owned the other mountain. After several years of cooperating with Highlands to issue ski passes that could be used at all four facilities, Ski Co. discontinued the arrangement. Ski Co. refused to sell Highlands any lift tickets, even at retail prices, and refused to accept retail-price coupons issued by Highlands for its lift tickets. Ski Co. offered to reinstate the four-area pass only if Highlands would accept a fixed percentage of the revenue, which was considerably below Highland's historical average revenue. The Supreme Court upheld a jury verdict that found Ski Co. in violation of Section 2 of the Sherman Act, noting that the "high value that we have placed on the

right to refuse to deal with other firms does not mean that the right is unqualified." ***Id*****. at 601. The court reasoned that the jury may reasonably have concluded that the defendant was forgoing short-term benefits from a joint ticket in order to reduce competition in the long run.** ***Id.*** **at 608. The Court also explained that this conclusion was strongly supported by Ski Co.'s failure to offer any efficiency justification for its conduct.** ***Id.***

In ***Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*****, 540 U.S. 398 (2004), the plaintiff, Trinko, alleged that an incumbent local exchange carrier (ILEC), breached its duty under a telecommunications statute to provide its competitors access to its telephone network. The Court treated the allegation as a refusal to deal and ruled that the refusal did not breach any antitrust duty to deal. In holding that the case did not fit within the limited exception to a monopolist's right to refuse to deal recognized in** ***Aspen Skiing*****, the Court observed that, unlike in** ***Aspen Skiing*****, there was no prior course of voluntary dealing between the parties. Moreover, the** ***Aspen Skiing*** **defendant had turned down its competitor's proposal to sell at its own (presumably profitable) retail price, whereas the ILEC's reluctance to provide access at the cost-based rate of compensation available under the regulatory scheme did not provide a window onto its predatory intent. More fundamentally, the court noted that the** ***Aspen*** **defendant refused to sell a product that it already sold at retail; what the ILEC was alleged to have withheld was not even available to the public. Finally, the Court recognized the limited ability of courts to effectively remedy the conduct at issue, stating that that "effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree," and that an "antitrust court is unlikely to be an effective day-to-day enforcer of the detailed sharing obligations at issue."** ***Id.*** **at 415.**

In ***MCI Communications Corp. v. AT&T*****, 708 F.2d 1081 (7th Cir. 1983), MCI argued that AT&T had improperly refused to let it connect its telephone lines with AT&T's nationwide telephone network and that interconnection was necessary for competing against AT&T in the long-distance business. The Seventh Circuit concluded that AT&T's network was an essential facility; that it was feasible for AT&T to provide interconnection; and that AT&T's refusal to provide access to MCI constituted monopolization in violation of Section 2 of the Sherman Act. The court identified four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.** ***Id.*** **at 1132-33.**

In ***Data General Corp. v. Grumman Systems Support Corp*****., 36 F.3d 1147 (1st Cir. 1994), the defendant refused to license newly developed software to an independent service organization competitor, even though it had previously licensed other software to other independent service providers. In holding for the defendant, the court stated that a unilateral refusal to license a copyright may constitute exclusionary conduct, but "an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers."** ***Id*****. at 1187.**

See the response to question 9 for a description of essential facilities cases. See the response to question 14 for a description of margin squeeze cases.

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. Private parties can challenge a refusal to deal under the Sherman Act provisions set out above, and, if successful, may obtain injunctive relief and may recover treble damages. ***See*** **15 U.S.C. § 15. There is no private right of action under the FTC Act.**

A recent survey conducted by FTC staff found that between January 2000 and July 2007, 65 refusal to deal with rival claims brought by private parties resulted in published decisions. ***See*** **William F. Adkinson, Jr., Karen L. Grimm, and Christopher N. Bryan, FTC Staff Working Paper,** ***Enforcement of Section 2 of the Sherman Act: Theory and Practice*** **(November 3, 2008), available at http://www.ftc.gov/os/sectiontwohearings/docs/section2overview.pdf. The data collected did not permit calculation of plaintiffs' rate of success specifically for refusals to deal, but overall there were few jury verdicts or judicial decisions awarding plaintiffs relief. Significant limitations in the survey should be noted when drawing inferences from the results, however, including the fact that these numbers did not include decisions that were not published, and there was no information regarding resolutions via settlement.**

Evaluation of an actual refusal to deal

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

    a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude rivals from the market? 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?

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

    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?

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

A refusal to deal has the potential to be anticompetitive if it is used to create or maintain a monopoly by preventing actual or potential competitors from purchasing inputs necessary to compete with the monopolist. As explained below, several policy considerations are involved in determining whether a refusal to deal has an anticompetitive, as opposed to procompetitive, effect. As explained above, U.S. law with respect to refusals to deal has developed through a common law process in the U.S. courts, the decisions of which provide the primary sources of the criteria for analyzing a refusal to deal.

a. **As a general matter, U.S. antitrust law allows a company to choose those with whom it will do business and for a company unilaterally to refuse to deal with another. *United States v. Colgate & Co*., 250 U.S. 300 (1919). But this right is not unqualified, and a unilateral refusal to deal might be unlawful if it has an exclusionary effect upon a rival *and* harms competition in the relevant market. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985). Merely disadvantaging a rival is not sufficient to establish a violation of Section 2; however, conduct need not eliminate all rivals to be a violation of Section 2.**

b. **The conduct must harm or be likely to harm competition. *Aspen Skiing*, 472 U.S. at 605; *United States v. Microsoft Corp*., 253 F.3d 34 (D.C. Cir. 2001).**

c. **Intent merely to beat competitors and to increase market share is not relevant. Evidence of the business rationale for conduct is relevant, however, in assessing the competitive effects of the conduct. *See, e.g.*, *United States v. Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct").**

d. **A prior course of dealing between the parties is not generally a requirement for finding liability. The *Trinko* and *Aspen Skiing* cases discussed more fully in response to Question 6 suggest, however, that it is a relevant factor. In *Trinko,* 540 U.S. 398 (2004), the Supreme Court contrasted the situation in the *Trinko* case, in which the defendant had never dealt with the rival, with that in *Aspen Skiing*, in which the defendant had ceased participating in a presumably profitable cooperative venture. *Trinko*, 540 U.S. at 409. The Supreme Court explained that the prior course of dealing in *Aspen Skiing* suggested that the defendant was forgoing short-term profits to accomplish an anticompetitive purpose. *Id.* A prior course of dealing also can be informative, for example, on the feasibility of providing access to a facility or on the appropriate terms for dealing.**

e. **A prior course of dealing with non-rivals could be a factor in evaluating the legality of a unilateral refusal to deal. In *Aspen Skiing*, for example, the defendant refused to sell its lift tickets to the rival firm even at the retail prices it charged others for the tickets.**

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.

Some U.S. courts have decided refusal to deal cases under the rubric of the "essential facilities doctrine." The Supreme Court, however, has never recognized such a doctrine. *Trinko*, 540 U.S. at 411.

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.

U.S. courts that have invoked the essential facilities doctrine have identified four elements to establish the defendant's obligation to provide access: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *MCI Commc'ns Corp v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

A facility that is controlled by a single firm "will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market." *Alaska Airlines, Inc. v. United Airlines, Inc*., 948 F.2d 536 (9th Cir. 1991).

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

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

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

The basic principles applied in cases involving unilateral refusals to deal are the same for all forms of property, including intellectual property. Because the application of U.S. antitrust law is sensitive to the particular facts of each case, the outcome of a refusal to deal case could be affected by the nature of the property involved. An important decision rejected the proposition that a company has "an absolute and unfettered right to use its intellectual property as it wishes," *Microsoft*, 252 F.3d at 63, but did not address mere refusal to license.

   a. **Because the nature of the property right could be relevant, it follows that applying the same analysis to refusals to deal involving different forms of intellectual property might lead to different outcomes regarding liability.**

   b. **U.S. case law provides no definitive answer to this question, but several courts have rejected refusal to deal claims in which one rival sought technical information from another. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357-59 (Fed. Cir. 1999); *Daisy Mountain Fire Dist. v. Microsoft Corp.*, 547 F. Supp. 2d 475, 489-90 (D. Md. 2008).**

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

Duties to deal imposed by regulatory statutes or regulatory agencies do not expand the scope of antitrust liability. *See Trinko*, 540 U.S. at 411-12. The impact of regulation might affect the competitive landscape in a variety of ways that potentially could affect the application of antitrust principles. For instance, the existence of regulation may provide courts with available means and oversight for implementing the antitrust remedy.

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

Not Applicable.

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 courts in the United States have not provided guidance on when a company offering to deal can be deemed to have constructively refused to deal for the purposes of the antitrust laws. In several cases, courts have rejected the constructive refusal to deal arguments made by private plaintiffs in circumstances where the defendant actually was dealing with the plaintiff. *Ideal Dairy Farms, Inc. v. John Labatt Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Anserphone, Inc. v. BellAtlantic*, 955 F. Supp. 418, 429 (W.D. Pa. 1996). On the other hand, the plaintiff in *Trinko* alleged only that the defendant provided poor quality service, and the courts did not reject the claim on that basis.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

The U.S. Supreme Court held in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009) ("*linkLine*") that, when an integrated firm can legally refuse to deal in the upstream product, a margin squeeze complaint may not be brought under Section 2 of the Sherman Act, although some lower courts had, prior to this decision, more broadly recognized margin squeeze as a theory of harm. In reaching that conclusion, the Court built on its 2004 decision in *Trinko* and held that absence of a duty to deal at all precluded an inquiry into the prices at which a firm chose to deal. Specifically, the Court found that in order to prove cognizable harm from a margin squeeze where the defendant has no duty to deal with rivals under Section 2 of the Sherman Act, the plaintiff must show that the retail price at which the defendant sold in competition with the plaintiff was predatory as defined by the Supreme Court's precedent set out in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). *See linkLine* 129 S. Ct. at 1120. The *linkLine* Court's holding relied partly on the Court's statement in *Trinko* that "if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous."

***linkLine* 129 S. Ct. at 1119. Applying this reasoning to the margin squeeze context, the Court ruled that in the absence of an antitrust duty to deal, there is no violation of the Sherman Act if an upstream monopolist uses its power in the wholesale market to prevent rival firms from competing effectively in the retail market, unless a plaintiff can show that prices in the retail market are predatory under the standards of *Brooke Group.* Although it did not specifically rule on the question, the Supreme Court was also skeptical of a standalone margin squeeze doctrine in the context of an antitrust duty to deal. *See linkLine*, 129 S. Ct. at 1122 ("The problem, however, is that amici have not identified any independent competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level . . . [T]o the extent a monopolist violates one of these doctrines, the plaintiffs have a remedy under existing law.").**

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.

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.

Refusals to deal are not illegal under the U.S. antitrust laws absent monopoly power or a dangerous probability thereof.

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.

Valid business justifications provide a defense to a refusal to deal claim. *See Aspen Skiing*, 472 U.S. at 604-5; *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 483 n.32 (1992); *see also United States v. Microsoft Corp.*, 253 F.3d at 59.

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 most cases discussed in question 6, no violation was found, so no remedy was applied. In *MCI* and *Otter Tail*, the remedy was to require the defendant to provide certain services, the terms for which were supervised by an existing regulatory agency with jurisdiction over the service.

In *Intel*, pursuant to a consent decree, the defendant (Intel) was prohibited from withholding or threatening to withhold certain advance technical information from a customer or taking other specified actions with respect to such information for reasons relating to an intellectual property dispute with that customer. The defendant was also prohibited from refusing or threatening to refuse to sell microprocessors to a customer for reasons related to an intellectual property dispute with that customer.

As the Supreme Court explained in *Trinko*, an effective remedy could force a court to be the day-to-day enforcer of the sharing obligations imposed by the court, a heavy administrative burden. *Trinko*, 540 U.S. at 415; *see also linkLine*, 129 S. Ct. at 121 (noting problem of implementing remedies in margin squeeze cases would be even more difficult).

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?

As noted in response to question 18, in *MCI* and *Otter Tail*, an existing sectoral regulatory agency set the terms and conditions for dealing rather than the court. In an industry not similarly regulated, the court could not have merely ordered the defendant to file an appropriate tariff for service with a regulatory agency.

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.

No.

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

The U.S. Supreme Court has recognized that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Forced sharing, if mandated too broadly, can chill procompetitive activity and valuable experimentation. *See Olympia Equipment*, 797 F.2d at 379-80. Recently, in *Trinko*, the Supreme Court outlined policy considerations applicable in refusal to deal cases. Compelling a firm to share a source of advantage could lessen the incentive of firms to innovate and invest in economically beneficial resources. *See Trinko*, 540 U.S. at 408. Finally, remedial considerations are relevant insofar as a remedy might be difficult for

judicial administration and thereby, in some cases, influence the outcome of a unilateral conduct case. *Id.*

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.

No response.