CHAPTER 7

UNILATERAL, UNCONDITIONAL REFUSALS TO DEAL WITH RIVALS

I. Introduction

Companies are generally under no antitrust obligation to sell or license their products to, or provide their assets for use by, another company. As the Supreme Court explained almost a century ago, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal.'"[1] Notwithstanding this general principle, courts, including the Supreme Court, have held that, under certain circumstances, the antitrust laws require a monopolist to deal with a rival.

There is a continuing debate over the application of section 2 to situations involving a refusal to deal with a rival. If a monopolist has something that a rival wants to use to make more, different, or better products, it can appear that consumers would be better off if the monopolist were forced to deal with its rival. But if the monopolist is forced to deal with the rival, the monopolist's incentives to spend the necessary time and resources to innovate may be diminished. Moreover, the incentives of other firms to invest and innovate, considering the potential future returns on their investments, may be diminished if they believe they will be forced to share a successful innovation. If the incentives to innovate are diminished, consumers are likely harmed in the long run. Additionally, if forced sharing is required, difficult decisions must be made on precisely what needs to be shared, at what price, and under what other terms. These issues have led a number of commentators and panelists to call into question whether the antitrust laws should ever require a firm to deal with a rival.[2]

This chapter reviews the law regarding unilateral, unconditional refusals to deal with a rival, analyzes the legal and economic arguments, and then addresses the appropriate role of antitrust where there is an allegation that a unilateral, unconditional refusal to deal violates section 2. It does not address conditional refusals to deal with rivals. In those situations, "[t]he proper focus of antitrust is . . . not on the . . . refusal . . . to deal, but on the competitive consequence of whatever conduct this leads other parties to engage in."[3] That is, antitrust should focus on the conditions, such as tying or exclusivity, not on the refusal. Consequently, those situations raise "very different competitive concerns."[4] Nor does the chapter cover refusals to deal that are a part of an agreement with one or more competitors to allocate customers or markets or fix prices, situations covered by section 1 of the Sherman Act. This chapter concerns only what are referred to as unilateral, unconditional refusals to deal with rivals—essentially cases limited to allegations that a company will never sell or license to a rival or will do so only for a price that is alleged

[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[2] *See, e.g.*, Sherman Act Section 2 Joint Hearing: Refusals to Deal Panel Hr'g Tr. 32, July 18, 2006 [hereinafter July 18 Hr'g Tr.] (Pate); *id.* at 104 (Whitener); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 244–48, 270 (2005); RICHARD A. POSNER, ANTITRUST LAW 242 (2d ed. 2001).

[3] Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct* 13 (Econ. Analysis Group, Working Paper No. EAG 08–2, 2008), *available at* http://www.usdoj.gov/atr/public/eag/231610.pdf.

[4] July 18 Hr'g Tr., *supra* note 2, at 8 (Kolasky); *see also id.* at 72 (Whitener).

to be too high. In addition, the essential-facilities doctrine is briefly discussed.

II. Background

The general right of a firm freely to determine with whom it will and will not deal was first established by the Supreme Court nearly nine decades ago. In its 1919 *Colgate* decision, the Supreme Court observed 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 [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[5] The Court reaffirmed that principle eighty-five years later in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, where, citing *Colgate*, the Court affirmed dismissal of an action alleging that non-compliance with state and federal regulations mandating the sale of services to rivals violated section 2.[6] In *Trinko*, the Court noted that, "as a general matter," the antitrust laws impose no duty upon a firm to deal with rivals.[7]

Despite the Court's recognition of a firm's general right to deal or not to deal with whom it chooses, the Court has in a few decisions found that the antitrust laws required a dominant firm to deal with a rival. For example, eight years after *Colgate*, the Court determined there was sufficient circumstantial evidence to allow a jury to decide if Kodak illegally maintained its monopoly through its refusal to sell photography equipment to independent retailers at traditional "dealers' discounts" after Kodak opened its own retail outlets.[8]

In 1973, in *Otter Tail Power Co. v. United States*, the Supreme Court held that the antitrust laws required a firm to sell electric service at "wholesale" to towns seeking to replace Otter Tail as the franchised suppliers of retail electric service with their own municipal power systems.[9] Rejecting Otter Tail's business justification defense that it needed to keep its lines free to serve its own existing and potential retail customers and noting that "[t]here were no engineering factors" preventing Otter Tail from providing the electricity to the towns, the Court concluded that the "refusals to sell at wholesale . . . were solely to prevent municipal power systems from eroding its monopolistic position."[10]

Twelve years later in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Court found an unlawful refusal to deal with a rival in a decision subsequently described by the Court as being "at or near the outer boundary of § 2 liability."[11] The Court found that a firm operating three of four mountain ski areas in Aspen, Colorado, violated section 2 by refusing to continue cooperating with the firm that owned the fourth ski area in offering a combined four-area ski pass.[12] In reaching this conclusion, the Court focused on defendant's refusal to sell its rival any lift tickets, even at retail prices,[13] and its refusal to accept retail-price coupons for its mountains issued by its rival, even though the coupons would have provided defendant "with immediate benefits and would have satisfied its potential customers."[14] Characterizing the refusal to continue offering a joint ticket as "a decision by

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[5] 250 U.S. at 307.

[6] 540 U.S. at 408, 416.

[7] *Id.* at 408.

[8] Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 375 (1927). Although not in the context of a unilateral refusal to deal, the Court also found a duty to deal when addressing the refusal of a joint venture to include one of its member's competitors. *See* Associated Press v. United States, 326 U.S. 1, 18–19 (1945). This chapter does not address those issues. *See e.g.*, Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 ANTITRUST L.J. 659, 660–61 (2001) (noting that "the duty to deal that a joint venture of rivals has" implicates "different issues than those raised by the duty to deal that a single firm should have").

[9] 410 U.S. 366, 368 (1973); *see id.* at 381–82.

[10] *Id.* at 378.

[11] *Trinko*, 540 U.S. at 409.

[12] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 606, 611 (1985).

[13] *Id.* at 593.

[14] *Id.* at 610.

a monopolist to make an important change in the character of the market,"[15] the Court found that the evidence (including, in particular, the cessation of a prior course of voluntary dealing, which the Court presumed to have been profitable) permitted the jury to conclude "that there were no valid business reasons for the refusal."[16]

In 1992, the Supreme Court addressed another refusal to continue dealing with a rival in *Eastman Kodak Co. v. Image Technical Services, Inc.*[17] Both Kodak and independent service operators (ISOs) traditionally serviced Kodak copying equipment. ISOs sued after Kodak began limiting their ability to obtain replacement parts.[18] The Court found that a jury should determine whether Kodak violated the antitrust laws. While discussing Kodak's policies under the rubric of tying and in the context of allegations that went well beyond a unilateral, unconditional refusal to deal, the Court observed that although "[i]t is true that as a general matter a firm can refuse to deal with its competitors," that right "is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[19]

A split among circuits followed. After remand in *Kodak* itself, a jury found that Kodak violated section 2 when it stopped selling replacement parts to ISOs.[20] The Ninth Circuit affirmed, approving a jury instruction that the antitrust laws prohibit a refusal to deal "that unnecessarily excludes or handicaps competitors in order to maintain a monopoly."[21] Some, but not all, of Kodak's parts were patented, and the court held that "a monopolist's 'desire to exclude others'" from using its patented work "'is a presumptively valid business justification'" for any refusal to license.[22] The court found that the ISOs had rebutted the presumption, concluding that the jury "would have found Kodak's presumptively valid business justification rebutted on the grounds of pretext."[23]

The Federal Circuit "decline[d] to follow" the Ninth Circuit's approach in a similar action concerning Xerox's refusal to continue selling patented materials to ISOs.[24] Distinguishing the Supreme Court's *Kodak* decision on the ground that "no patents had been asserted in defense of the antitrust claims" in that case, the court agreed with Xerox's assertion that the patent laws granted Xerox the right to refuse to sell to ISOs. It held that "[i]n the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws."[25]

Many prominent commentators criticize this refusal-to-deal jurisprudence. For example, one asserts that *Aspen Skiing* and *Kodak* "suffer from confused economic reasoning."[26] Others similarly observe that "[a]ntitrust has twisted itself in knots in *Kodak* and other complementary market/aftermarket cases."[27] Another laments that "*Kodak* was a failed experiment in a type of economic engineering where antitrust has no place."[28] And another concludes that the Court's decision in *Aspen Skiing* "is bound to create systematic error."[29] Even commentators

[15] *Id.* at 604.

[16] *Id.* at 605.

[17] 504 U.S. 451 (1992).

[18] *Id.* at 458–59.

[19] *Id.* at 483 n.32.

[20] Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1201 (9th Cir. 1997).

[21] *Id.* at 1209 (emphasis omitted).

[22] *Id.* at 1218 (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994)).

[23] *Id.* at 1219–20.

[24] *In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1327 (Fed. Cir. 2000).

[25] *Id.*

[26] Carlton, *supra* note 8, at 659.

[27] Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749, 797 (1995).

[28] HOVENKAMP, *supra* note 2, at 310.

[29] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 973 (1986); *see also, e.g.,* Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and* Microsoft, 8 GEO. MASON L. REV. 1, 27 (1999) (stating that *Aspen Skiing* "has been roundly criticized");

who agree with the result in *Aspen Skiing* concede that the decision lacks a "coherent analytical framework."[30]

In its most recent decision dealing with an alleged refusal to deal, the Supreme Court declined to find a duty to deal.[31] *Trinko* involved an alleged failure by Verizon to share its local telephone network with competitors as required by the 1996 Telecommunications Act (1996 Act).[32] The Court first held that the 1996 Act did not create new claims extending beyond existing antitrust standards and then held that Verizon's conduct did not consitute an illegal refusal to deal under the antitrust laws. According to the Court:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[33]

The Supreme Court in *Trinko* cautioned that forcing a monopolist to deal with a rival may "lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities."

While recognizing that "'[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified,'"[34] the Court also said it is important to be "very cautious in recognizing . . . exceptions" to that right "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[35] The Court further said that an allegedly anticompetitive refusal to deal "'should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'"[36]

Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1044–45 (2000) (noting that the implications of *Aspen* and *Kodak* "are problematic to say the least"); Michael Jacobs, *Introduction: Hail or Farewell? The* Aspen *Case 20 Years Later*, 73 ANTITRUST L.J. 59, 68 (2005) (asserting that the "problematic aspects of *Aspen* lead to a conclusion that the case is an anomaly" and that "*Aspen* was a poor tool for crafting important doctrine under Section 2; the Court's opinion did little to clarify the meaning of Section 2, and much to obscure it"); William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1456 (1990) (noting that "many commentators have criticized [*Aspen Skiing*'s] result and reasoning"); James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 ANTITRUST L.J. 99, 135 (2003) (describing the *Aspen Skiing* decision as "much criticized"). *But see* Jonathan B. Baker, *Promoting Innovation Competition Through the* Aspen/Kodak *Rule*, 7 GEO. MASON L. REV. 495, 496–97 (1999) (arguing that the "*Aspen/Kodak* rule . . . is likely to promote innovation").

[30] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 213 (1986) (stating that the *Aspen Skiing* Court "felt its way through murky precedent to what the Justices' instincts told them" was the "correct result[]" (internal quotation marks omitted)).

[31] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416 (2004).

[32] Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[33] *Trinko*, 540 U.S. at 407–08 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

[34] *Id.* at 408 (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985)).

[35] *Id.* at 408.

[36] *Id.* at 415 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1990) (alteration in original)); *see also* Areeda, *supra*, at 855 ("No court should impose

III. Analysis

A. Using the Antitrust Laws to Require a Monopolist to Deal with a Rival

Recent jurisprudence and academic and policy thinking on unilateral, unconditional refusals to deal with rivals focus on several key principles.

- Antitrust law generally does not restrict a firm's right to choose those with which it will deal.[37]
- Antitrust laws protect the competitive process for the benefit of consumers, not the fortunes of any particular competitor.[38]
- Although compelling a firm to deal with a rival can increase short-term static competition, it can also diminish or eliminate incentives for firms (both the monopolist and other firms) to innovate in the future.[39]
- Judges and juries (and antitrust enforcers) are ill-equipped to act as industry regulators deciding the terms on which a firm should be required to sell its products or services.[40]

Using the antitrust laws to require a monopolist to deal with a rival creates a tension between static and dynamic welfare considerations. If a monopolist is forced to deal with a rival, consumers may immediately benefit from short-term price reductions or additional product options. These static benefits, however, are likely to come at a high cost—the loss or diminution of dynamic, long-term efficiencies.

It is nearly universally accepted that innovation—creating new ways of satisfying consumer demand or lowering costs—is key to increasing welfare.[41] Because innovation drives economic growth,[42] diminishing incentives to innovate can harm consumers. Thus, two commentators explain, "an essential element of appropriate antitrust policy is to allow a firm to capture as much of the surplus that, by its own investment, innovation, industry or foresight, the firm has itself brought into existence."[43]

Forcing a firm—even a monopolist—to deal with a rival on terms it would not choose "may lessen the incentive for the monopolist, the rival, or both" to innovate in the future.[44] That is, any firm would have to consider that its investment in a superior or desirable product or service might have to be shared with rivals on terms set by a court at the behest of the rival. In addition, before investing in developing their own improved products to compete in the market, rivals would consider whether they could instead convince a court to give them access to a competitor's product. In light of these potentially skewed investment and innovation decisions and their detrimental impact on economic growth and welfare, the Supreme Court in *Trinko* underscored "the uncertain virtue of forced sharing."[45] Panelists generally agreed that there likely are few circumstances where forced sharing would help consumers in the long run.[46]

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a duty to deal that it cannot explain or adequately and reasonably supervise.").

[37] *E.g.*, *Colgate*, 250 U.S. at 307 (explaining that the Sherman Act generally "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal").

[38] *E.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))).

[39] *See Trinko*, 540 U.S. at 407–08.

[40] *See id.* at 408.

[41] *See, e.g.*, WILLIAM J. BAUMOL, THE FREE-MARKET INNOVATION MACHINE 20 (2002).

[42] *See, e.g.*, Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312, 316 (1957).

[43] Carlton & Heyer, *supra* note 3, at 1.

[44] *Trinko*, 540 U.S. at 408. *But cf.* July 18 Hr'g Tr., *supra* note 2, at 44 (Salop) (stating that "monopolists have weaker innovation incentives").

[45] 540 U.S. at 408.

[46] *See, e.g.*, Sherman Act Section 2 Joint Hearing: Conduct as Related to Competition Hr'g Tr. 123, May 8, 2007 [hereinafter May 8 Hr'g Tr.] (Rule); July 18 Hr'g Tr., *supra* note 2, at 26 (Pitofsky) ("Let me start with the proposition that the general rule is and must be no general duty to deal."); *id.* at 107 (Salop) (stating that "very few refusals to deal would be actionable under

Panelists generally agreed that there likely are few circumstances where forced sharing would help consumers in the long run.

As one panelist observed:

> [I]ndependent competition among competitors who are not relying upon one another for assistance or even for pulled punches in the competitive process is what best produces innovative products at low prices. . . . The uncertainty that is caused by indeterminate liability rules and duties to assist competitors [is] likely to retard desirable investment.[47]

Refusal-to-deal claims often involve a refusal to license intellectual-property rights, a setting raising particular concerns about the dampening of innovation incentives.[48] Recently, the Department and the FTC issued a Report dealing with antitrust enforcement and intellectual property, an entire chapter of which was devoted to whether there should be antitrust liability for a refusal to license patents.[49] In that Report, the agencies concluded that "liability for mere unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections."[50]

In addition to the concern about long-run harm to consumers from forced sharing, there is also a concern, noted by the Court in *Trinko*, that courts would have to engage in price regulation, defining "the terms on which cooperation or related transactions will take place."[51] As the Supreme Court explained in *Trinko*, and panelists and commentators alike have emphasized, this is a task for which judges, juries, and antitrust enforcers are very poorly suited.[52] Because commercial relationships are typically complex and fluid, "[a]n antitrust court is unlikely to be an effective day-to-day enforcer of . . . detailed sharing obligations."[53] As one commentator explains, "[O]nce we get into the issue of fair compensation for the manufacturer's past R&D expenditures or simply fair compensation for his creative success, we are in a hopeless situation. . . . How would a court ever assess how much a firm should be fairly rewarded for its creative efforts?"[54]

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my view").

[47] July 18 Hr'g Tr., *supra* note 2, at 30 (Pate).

[48] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND PROTECTING COMPETITION 23–24 (2007), *available at* http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

[49] *See id.* at 15–32.

[50] *Id.* at 30.

[51] George A. Hay, Trinko: *Going All the Way*, 50 ANTITRUST BULL. 527, 539 (2005); *see also, e.g.*, July 18 Hr'g Tr., *supra* note 2, at 24 (Pitofsky) ("[I]f you mandate disclosure, you have not just the decision about mandating, you have a decision about at what royalty, what terms, what timing, and so forth."); *id.* at 76 (Whitener) (stating that "we have to call it what it is, which is price regulation of every firm that is being forced to share"); *id.* at 110 (Walton) (asking "how do we get this pricing").

[52] 540 U.S. 398, 408 (2004) ("Enforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited."); *see also, e.g.*, ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATION 102 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("[F]orced sharing requires courts to determine the price at which such sharing must take place, thereby transforming antitrust courts into price regulators, a role for which they are ill suited."); July 18 Hr'g Tr., *supra* note 2, at 30 (Pate) (stating that courts "are not very well equipped" to set prices); *id.* at 92 (Walton) (reporting that General Motors and the FTC "argued for 19 years" about what were "reasonable" terms of dealing); Hovenkamp, *supra* note 29, at 1044 (observing that "antitrust courts are not public utility agencies").

[53] *Trinko*, 540 U.S. at 415; *see also* POSNER, *supra* note 2, at 242 ("Where the refusal to deal is unilateral, the only effective remedy is an order that the defendant do business with the victim of the refusal to deal. The antitrust court becomes charged with the supervision of an ongoing commercial relationship, a function that courts are not equipped to perform effectively.").

[54] George A. Hay, *A Monopolist's "Duty to Deal": The Briar Patch Revisited*, 3 SEDONA CONF. J. 1, 5 (2002); *see also* May 8 Hr'g Tr., *supra* note 46, at 114 (Sidak) (stating that "regulating price . . . is fundamentally not something that a court can do").

Due to the difficulties of devising judicially manageable remedies and the risk that a remedy mandating forced sharing might diminish welfare, some commentators conclude that the antitrust laws should never compel rivals to deal.

In view of these remedial difficulties and the risk that a remedy mandating forced sharing might diminish welfare, some commentators conclude that the antitrust laws should never compel rivals to deal. Judge Posner, for example, concludes that "it cannot be sound antitrust law that, when Congress refuses or omits to regulate some aspect of a natural monopolist's behavior, the antitrust court will step in and, by decree, supply the missing regulatory regime."[55] Professor Hovenkamp raises the same concern, contending that forcing a firm to cooperate with rivals is appropriately dealt with through regulation, not the antitrust laws.[56] Several panelists agreed.[57]

Despite identifying these concerns with forced sharing, the Supreme Court in *Trinko* stated that the right to refuse to deal with rivals is not "unqualified" and reserved the possibility that a refusal to cooperate with rivals "[u]nder certain circumstances . . . can constitute anticompetitive conduct and violate §2."[58] Some commentators agree.[59] Some panelists also agreed, asserting that a per se rule of legality could either unacceptably risk failing to prevent or stop anticompetitive conduct[60] or lead to more sectoral regulation in the place of antitrust.[61]

The Supreme Court in *Trinko* stated that the right to refuse to deal with rivals is not "unqualified."

One panelist opined that a monopolist's decision to stop cooperating with a rival

[55] POSNER, *supra* note 2, at 243–44.

[56] *See* HOVENKAMP, *supra* note 2, at 270 (concluding that "[w]hile price-regulated monopoly may sometimes be appropriate, that decision must be made by a legislature, and never via the antitrust laws," because "a compulsory sales rule turns the defendant into a public utility and places the court in the indefensible position of price regulator"); Sherman Act Section 2 Joint Hearing: Welcome and Overview of Hearings Hr'g Tr. 51, June 20, 2006 (Hovenkamp) (stating that courts should "get out of the business" of forcing firms to deal with competitors under the antitrust laws).

[57] *See, e.g.*, May 8 Hr'g Tr., *supra* note 46, at 112 (Rule) (explaining that "in the area of refusals to deal, particularly if you are talking about unconditional unilateral refusals to deal, the circumstances under which you would ever be concerned . . . are so limited and so rare that that's precisely the kind of place you would want to have a rule of per se legality"); July 18 Hr'g Tr., *supra* note 2, at 59–71 (Walton) (describing the history of the FTC's investigation of GM's failure to deal with independent crash-part dealers and its own dealers on the same terms and stressing that the FTC ultimately found no violation in part because it did not want to commit extensive resources to reviewing GM's interpretations of to whom and at what price it could sell); *id.* at 72 (Whitener) (arguing that "unconditional refusals to deal with competitors simply do not constitute exclusionary conduct").

[58] 540 U.S. at 408.

[59] *See, e.g.*, Areeda, *supra* note 36, at 845 n.21 (stating that distinctions between unilateral conduct and concerted refusals to deal "do not mean that a monopolist should never be required to deal"); Carlton, *supra* note 8, at 660 ("Although it is understandable why some could take the position that the evidence to date on refusals to deal is so ambiguous that there should be no antitrust restrictions, I do not take such an extreme view. I start from the premise that there can be a legitimate role for antitrust restrictions on refusals to deal."); A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1266 (2005) (advocating application of the profit-sacrifice test as a means of prohibiting inefficient refusals to deal while avoiding antitrust intervention when forced sharing would be inefficient).

[60] Steven C. Salop, Refusals to Deal 4 (July 18, 2006) (hearing submission); *see also* May 8 Hr'g Tr., *supra* note 46, at 110 (Melamed) (stating that "we ought not to have a per se lawful rule because when an AT&T refuses to deal with a rival even though it deals with others interconnecting into the market or when an Aspen refuses to accept tickets sold at retail prices to a competitor, there ought to be some room to say now we know he has gone too far"); July 18 Hr'g Tr., *supra* note 2, at 25 (Pitofsky) (questioning giving "free rei[]n for the monopolist").

[61] Sherman Act Section 2 Joint Hearing: Policy Issues Hr'g Tr. 116, May 1, 2007 [hereinafter May 1 Hr'g Tr.] (McDavid).

without legitimate justification is "a perfectly legitimate basis for inferring harm to competition."[62] Another panelist noted, however, that there is no reason to believe that "a course of conduct that was once entered into remains efficient forever."[63] Hearing testimony further cautioned that a duty of continued dealing could discourage any dealing in the first place.[64] In light of these latter concerns, the Department believes that a firm's termination of a prior course of dealing generally should not be a significant factor in assessing whether the antitrust laws impose a duty to deal with a rival.

In addition, some panelists disagreed that the difficulty of crafting administrable, effective remedies supports a rule of per se legality.[65] Some suggested that a court may set terms of dealing without excessive difficulty in certain circumstances, for example by using the terms at which sales are made to other companies as a benchmark.[66]

Panelists who supported potential liability for refusals to deal proposed a number of different tests for assessing when a firm should be required to accept a rival's offer to deal. Two panelists endorsed tests ultimately balancing procompetitive and anticompetitive effects of a refusal to deal.[67] A third panelist favored a test under which a monopolist would be compelled to accept offers to deal with a rival above a "protected profits benchmark," that is, a price that would compensate the defendant for its loss of monopoly profits from customers that shift from dealing with the defendant to dealing with the plaintiff.[68] Two other panelists endorsed focusing the inquiry on whether the practice "would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."[69]

After reviewing and considering the case law and commentary, as well as the panelists' views, the Department believes that there is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effect of economy-wide disincentives and remedial difficulties. Then-Judge Breyer's assessment of the difficulties inherent in establishing whether a price is illegally high under the antitrust laws applies with equal force to evaluating the sufficiency of an offer in refusal-to-deal cases:

> [H]ow is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the [monopoly] product? None exist. Is it the price that competition "would have set" were the [market] not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? . . . Must it be [sufficient]

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[62] *Id.* at 115 (Baker).

[63] July 18 Hr'g Tr., *supra* note 2, at 37 (Pate); *see also* May 1 Hr'g Tr., *supra* note 61, at 113 (Elhauge) (terming reliance on termination of a course of dealing a "misbegotten notion").

[64] July 18 Hr'g Tr., *supra* note 2, at 37–38 (Pate); *see also* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.) ("If [defendant] had known that by taking steps to promote competition it would be laying itself open to an antitrust suit . . . it probably would not have taken them.").

[65] May 8 Hr'g Tr., *supra* note 46, at 109 (Melamed) ("Answering the liability question with the remedy question is a mistake."); *id.* at 117 (Pitofsky) ("I am upset with the following process of thinking. This is a very, very difficult issue and the remedy is extremely difficult to work out and, therefore, let's call it per se legal. I don't think that's the way antitrust law should proceed.").

[66] *Id.* at 110 (Melamed) (suggesting that "a contemporary discriminating benchmark" is likely to be necessary for demonstrating a refusal to deal); May 1 Hr'g Tr., *supra* note 61, at 116 (Kolasky) (noting that sales to others provide basis for an administrable remedy); July 18 Hr'g Tr., *supra* note 2, at 25 (Pitofsky) ("Sometimes the remedy is easy. Perhaps the monopolist has already been licensing other people, but refuses to license potential competitors. It's not common, but it happens."); *id.* at 57 (Salop) ("Market prices often provide a good benchmark.").

[67] July 18 Hr'g Tr., *supra* note 2, at 16 (Kolasky); *id.* at 21–22, 25–26 (Pitofsky).

[68] *Id.* at 48 (Salop).

[69] May 8 Hr'g Tr., *supra* note 46, at 115 (Melamed); R. Hewitt Pate, Refusals to Deal and Essential Facilities 23 (July 18, 2006) (hearing submission).

for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?[70]

The Department thus concludes that antitrust liability for unilateral, unconditional refusals to deal with competitors should not play a meaningful part in section 2 enforcement.[71]

B. The Essential-Facilities Doctrine

The essential-facilities doctrine derives from the 1912 *United States v. Terminal Railroad Ass'n of St. Louis* decision in which the Supreme Court condemned a consortium's combination of railroad facilities necessary to carry freight traffic or passengers across the Mississippi River at St. Louis. Rather than order dissolution, the Court held that the consortium could continue so long as it either admitted other railroads into the consortium or agreed to charge railroads that were not in the consortium fees that would "place every such [railroad] upon as nearly an equal plane . . . as that occupied by the [consortium members]."[72]

Although the case involved a joint venture among competitors, lower courts have drawn from *Terminal Railroad* the essential-facilities doctrine—the proposition that the antitrust laws require a single firm in control of a facility essential to its competitors to provide reasonable access to the facility if possible.[73] In *MCI*, the Seventh Circuit set forth a leading formulation of the doctrine, under which a plaintiff must prove four elements to establish liability and 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."[74]

Aspen Skiing contains the Supreme Court's first explicit mention of the essential-facilities doctrine. The Tenth Circuit had affirmed liability on multiple grounds, including the theory that the joint lift ticket constituted an essential facility to which plaintiff had a right of access.[75] The Supreme Court declined "to consider the possible relevance of the 'essential facilities' doctrine" and affirmed on other grounds.[76] In *Trinko*, the Supreme Court similarly declined "either to recognize . . . or to repudiate" the doctrine, noting that, even if it were to exist, it would be inapplicable where government regulations included "extensive provision for access" to the allegedly essential facility.[77]

Many commentators criticize the essential-facilities doctrine, noting that the doctrine fails to provide clear guidance as to what constitutes a facility, what makes a facility essential, and what constitutes a denial of access.[78] Similarly,

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[70] Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.).

[71] This is consistent with the conclusion of the 2007 report of the Department and the FTC regarding antitrust enforcement and intellectual property. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 48, at 32.

[72] United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411 (1912).

[73] *See, e.g.*, MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1128–29 (9th Cir. 2004); MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132–33 (7th Cir. 1983); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992–93 (D.C. Cir. 1977); United States v. AT&T, 524 F. Supp. 1336, 1360–61 (D.D.C. 1981).

[74] *MCI*, 708 F.2d at 1132–33; *see also Hecht*, 570 F.2d at 992 ("The essential facility doctrine . . . states that 'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.'"(citations omitted)); July 18 Hr'g Tr., *supra* note 2, at 96 (Pitofsky) (stating that "virtually every lower court adheres to" the Seventh Circuit's definition of essential facilities set forth in the 1983 *MCI* decision).

[75] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520–21 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

[76] 472 U.S. at 611 n.44.

[77] 540 U.S. 398, 411 (2004).

[78] *See, e.g.*, 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 771c, at 173 (2d ed. 2002) (noting that "the essential facility doctrine is both harmful and unnecessary and should be abandoned"); Areeda, *supra* note 36, at 852 ("Compulsory access, if it exists at all, is and should be very exceptional."); Donald I. Baker, *Compulsory Access to Network Joint*

many panelists recommended that it be expressly repudiated,[79] although some others supported a limited application of the doctrine in "extraordinary cases."[80]

As critics of the doctrine have observed, each *MCI* factor raises difficult issues for courts. For example, a court must determine what constitutes a facility and how critical access to the facility is to effective competition.[81] The second *MCI* element, asking whether a competitor can reasonably duplicate the facility, may require the court to determine whether the costs of duplicating the facility are reasonable.[82] The third element, denial of access, may appear uncomplicated when an absolute denial is involved, but can become complex when a more limited denial is alleged or when parties merely disagree on the price or other terms at which access to some asset can be bought.[83] Some cases suggest that essential facilities must be made available on terms that are "just and reasonable"[84] or "nondiscriminatory,"[85] but they do not provide any useful guidance on when terms of access will be regarded to be "unreasonable."[86] Analysis of this issue may involve evaluation of the outcome of price negotiations between the monopolist and its competitor, making judicial administrability difficult.[87] Finally, evaluating the feasibility of providing the facility may require the court to make difficult judgments about the impact of forced sharing on the efficient and safe functioning of the facility.[88]

More basically, commentators point out that the concerns about innovation incentives and judicial capacity arising in refusal-to-deal cases apply equally in essential-facility cases. For

Ventures Under the Sherman Act: Rules or Roulette?, 1993 UTAH L. REV. 999, 1006 (stating that "competition among networks, rather than judicial compulsion, should be the preferred option"); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 402 (1986) (noting "embarrassing weakness" of essential facilities doctrine); Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1195 (1999) (stating that "mandatory access remedies, such as the essential facilities doctrine, do not fit comfortably within antitrust law"); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433, 480 (1987) (asserting that "courts should reject the doctrine").

79 July 18 Hr'g Tr., *supra* note 2, at 116 (Kolasky) ("I think the essential facilities doctrine should be abandoned all together."); *id.* (Whitener) (stating that he "would eliminate the doctrine").

80 *Id.* at 99 (Salop); *see also id.* at 26 (Pitofsky) (stating that essential facilities doctrine is needed to deal with "bottleneck monopol[ies]"); *id.* at 98–99 (Salop) (asserting that there is no reason a court should not step in when, by "an accident of history," an industry that should be regulated is not, and urging that, although regulation by courts is "rare," that is "not to say that it should never be done").

81 *See, e.g.*, Lipsky & Sidak, *supra* note 78, at 1212 ("'[E]ssentiality' and the 'practicability of duplication' are issues that can depend on matters of degree. . . . It may be difficult indeed to determine whether exclusion from the use of a particular facility will mean inconvenience, extinction, or some intermediate degree of harm to the excluded competitor."); Werden, *supra* note 78, at 452–53 (discussing lack of clarity in case law regarding what constitutes a facility).

82 *See* Lipsky & Sidak, *supra* note 78, at 1211–13; *see also* Fishman v. Estate of Wirtz, 807 F.2d 520, 540 (7th Cir. 1986) (finding a basketball arena to be an essential facility because it "was not duplicable without an expenditure that would have been unreasonable in light of the size of the transaction such duplication would have facilitated").

83 *See* Werden, *supra* note 78, at 456 (discussing the difficulties of evaluating "less overt methods of disadvantaging a competitor" than complete denial of access to a facility).

84 United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411 (1912).

85 MCI Commc'ns v. AT&T, 708 F.2d 1081, 1148 (7th Cir. 1983).

86 *See, e.g.*, Werden, *supra* note 78, at 456 ("The cases provide no guidance as to when terms of access are unreasonable.").

87 *See, e.g.*, *id.*

88 *See, e.g.*, State of Ill. *ex rel.* Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1483 (7th Cir. 1991) (stating that the feasibility requirement "excuses refusals to provide access [to an essential facility] justified by the owner's legitimate business concerns"); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992–93 (D.C. Cir. 1977) ("The antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."); *see also* Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1626 n.21 (2005) ("Recent cases indicate that sharing even an essential facility is not required where there is an efficiency reason for not doing so.").

example, a firm may be unwilling to assume the risk and costs of creating a facility if it could later be compelled to share that facility on terms it would not otherwise have chosen.[89] Moreover, commentators note that courts granting relief under the doctrine would face the nettlesome task of setting prices and other terms of dealing.[90] In short, the consequences of forcing a firm to deal with its rivals do not disappear with the substitution of the rubric essential facilities for refusals to deal.

The Department agrees that the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition. The doctrine is essentially a "label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing [its] implications."[91] In addition to the ambiguities and difficulties of application discussed above, the doctrine does not explicitly require harm to competition, rather than to competitors; does not require that conferring access substantially improve competition; and does not expressly allow for a full consideration of legitimate business justifications. As Professor Areeda put it, essential facilities "is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are."[92]

The Department agrees that the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition.

IV. Conclusion

The Department believes that there is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effects of economy-wide disincentives and remedial difficulties. The Department thus concludes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.

The Department believes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.

[89] *See e.g.*, Areeda, *supra* note 36, at 851 ("Required sharing discourages building facilities . . . even though they benefit consumers."); Paul D. Marquardt & Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson, and Hooks*, 70 ANTITRUST L. J. 847, 856 (2003) ("If innovation did not carry the promise of potential economic return, there would of course be much less of it."). *Cf.* AREEDA & HOVENKAMP, *supra* note 78, ¶ 771b, at 172 (stating that forced sharing of an essential facility "discourages firms from developing their own alternative inputs").

[90] *See e.g.*, Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 352 ("A duty to [share an essential facility] leaves the price term open, so it fails to handle monopoly unless the court becomes a rate regulator—and few think that the isolated examples of judicial rate regulation, such as the blanket license decree for copyrights, have been successful."(footnote omitted)); Lipsky & Sidak, *supra* note 78, at 1248 (stating that courts "feel ill-equipped[] to prescribe and monitor price, terms, and condition of access").

[91] AREEDA & HOVENKAMP, *supra* note 78, ¶ 772a, at 175.

[92] Areeda, *supra* note 36, at 841.